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BY  
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purchaser at an execution-sale in a suit against the mortgagor. The mortgage-deed was in the English form, with a power of sale. Inasmuch as it [132] was sought to be enforced in the *mofussil*, the procedure prescribed by the Regulation has been applied to it as if it were a mere *bye-bul-wafa*, or deed of conditional sale. The suit is the ordinary suit, which, in such cases, the mortgagee, who has foreclosed, is obliged to bring in order to recover possession of the mortgaged premises, with this difference only, *viz.*, that it is brought against the purchaser under the execution-sale as well as against the mortgagor, and that the former is the substantial defendant.

In such a suit the plaintiff has to make out his title to dispossess the other party, and any objection which can be taken either to the original mortgage title, or to the proceedings in foreclosure, may be taken.

The respondent was one of a firm of builders who, in December 1872, sued one Surfunnissa Begum, as the daughter of Munshi Bazlur Rahim, and the representative of his estate by virtue of a certificate under Act XXVII of 1860, for the amount claimed as due to them, for work done partly in the lifetime of Bazlur Rahim and partly after his death. On the 10th of December 1872 they applied for and obtained, under ss. 84 and 85 of the Civil Procedure Code, an attachment before judgment, in order to secure the property. Mr. Doyne took objection to the regularity of the issue of that attachment, complaining that there was no proof of the proceedings which are enjoined by s. 81 and the subsequent sections having been adopted. But in their Lordships' opinion, it must be taken that, as between Surfunnissa Begum and the plaintiffs in this former suit, there was a valid and subsisting attachment at the date of the execution of the mortgage, and that this is virtually admitted by the consent order of the 23rd January 1872, which was made when part of the property which had been attached was released from the attachment on the payment of part of the plaintiffs' demand, and it was arranged that the attachment should continue as to the particular property, which is the subject of this litigation.

In these circumstances Surfunnissa Begum, on the 20th of May 1873, executed the mortgage under which the plaintiff claims; and the principal question raised by this appeal [133] whether that alienation of the property was not, by reason of the attachment, null and void as against the attaching creditors and those deriving title under them. The decree in that suit was made on the 13th of September 1873, and the proceedings in execution began on the 18th of the same month; and it has been suggested on the part of the appellant that, inasmuch as one of these proceedings consisted in an attachment after judgment, it must be presumed that the actual sale in execution proceeded under this subsequent attachment, and that the respondent cannot claim the benefit of the former attachment. Upon this point, the learned Judges of the High Court say:—"The attachment never was removed, and the property remained unaffected by this mortgage (so far as the person at whose suit the attachment issued) at the time it was attached and sold in execution of the decree." Their Lordships must, therefore, assume that, although, where property has been attached before judgment, it is usual to reattach it after judgment, that proceeding implies no abandonment of the first attachment, which gives the priority of lien. There is no trace here of any express abandonment. If this be so, and there was, as their Lordships think there was, a valid and subsisting attachment at the date of the mortgage, that alienation, unless it can be shown not to fall within the provisions of the 240th section, was null and void as against the attaching creditor and those who claim under him. Hence, the determination of this appeal depends very much upon the point which has been ingeniously raised

and argued by the learned counsel for the appellant, and particularly by Mr. Cowell. It is said that s. 240 does not govern the case, for the following reasons :—That section runs thus : “After any attachment shall have been made by actual seizure or by written order as aforesaid, and in the case of an attachment by written order, after it shall have been duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, or otherwise,” and so on, “shall be null and void.” It is contended that the words “after it shall have been duly intimated and made known in manner aforesaid” incorporate into the 240th, the provisions of the 239th section, which says, “in the case of [134] lands, houses, or other immoveable property, the written order shall be read aloud at some place on or adjacent to such lands, houses, or other property, and shall be fixed up in some conspicuous part of the Court-house; and when the property is land or any interest in land, the written order shall also be fixed up in the offices of the Collector of the Zilla in which the land may be situated.” Their Lordships entertain some doubt whether, under the circumstances of this case, it was not rather for the plaintiff, who was seeking to oust the defendant from possession, to prove the non-observance of the formalities in question, rather than for the defendant, who was in possession, to prove affirmatively that they had been observed. However that may be, they are clearly of opinion that the point raised is one which cannot be taken here upon appeal for the first time. It is one which ought to have been taken in the Court below and their Lordships can find no trace of its having been so taken. No such trace is to be found in the judgments, or in the evidence, or in the reasons which are stated in the petition presented to the High Court for leave to appeal to Her Majesty in Council. On the contrary, the first of those reasons seems rather to assume the regularity of the attachment, and to suggest that it had ceased to be a valid and subsisting attachment at the time the mortgage was made. It is in these words : “That their Lordships ought to have held that, even if the said property was legally attached before judgment, such attachment had ceased to be a valid and subsisting attachment under s. 85 of the Act.” In the case which has been cited—*Indrochunder Baboo v. Dunlop* (10 W. R., 265; S.C., 1 B. L. R., S N., 20).—It is clear from the judgment of Mr. Justice MACPHERSON, who is one of the Judges who decided the present case, that there it had been positively proved that those proceedings which were enjoined by the Act had not taken place. Their Lordships think this is clearly an objection which ought to have been taken in the Court below, and not raised for the first time here, because it involves a question of fact, and if it had been taken before the High Court and argued, the Judges of that Court might have directed a further inquiry into the matter under the powers which its [135] procedure gives them. Upon this record they think the judgment of the High Court was right, and will, therefore, humbly advise Her Majesty to affirm that judgment and to dismiss this appeal. The cost of this appeal will follow this result.

*Appeal dismissed.*

Solicitors for the Appellant : Messrs. *Barrow and Rogers.*

Solicitors for the Respondent : Messrs. *Wrentmore and Swinhoe.*



APPELLATE CIVIL.

The 21st July 1880.

PRESENT :

MR. JUSTICE PONTIFEX AND MR. JUSTICE McDONELL.

Laljee Sahoy.....Plaintiff

versus

Fakeer Chand and others.....Defendants.

*Hindu Law—Mitakshara—Liability of son to pay father's debts.*

Under Mitakshara law, according to the rulings of the Judicial Committee, the payment, even in the father's lifetime, of an antecedent debt due by him is a pious duty on the part of the son, and its discharge is, therefore, such a necessary purpose as to give validity to a sale or mortgage by the father as against his minor sons. Such antecedent debt means a debt antecedent to the transaction,—viz., the sale or mortgage purporting to deal with the property

In a suit upon a mortgage by the father alone, where the sons are made parties, the decree would be good as against the sons, even though they may have been adult when the debt (assuming it was not for immoral purposes) was incurred, and the whole property would be bound, notwithstanding verse 29, Chap. I, sec. 1, and verse 10, Chap. I, sec. vi of the Mitakshara.

In respect of ancestral property the son is equally liable for his father's debts, if not incurred for immoral purposes, as for his own debts. The interest of an adult son, however, could not, ordinarily, be affected by a decree against the father alone.

Where, however, an adult son, although neither an executant of the bond on which the suit was brought, nor a party to such suit, yet was shewn to be [136] himself liable for a large proportion of the antecedent debt due on the bond and by his conduct had made it apparent that he approved of and fully acquiesced in the sale of the whole ancestral property, and moreover that he allowed the mortgagee to take and remain in possession for upwards of eleven years and to go to the expense in paying off encumbrances on the estate,—it was, in a suit by the son to recover his share of such ancestral property, *Held*, that he was not entitled to succeed. Under the circumstances the son ought to have been made a party to the suit brought by the mortgagee.

The principles laid down by the Privy Council, and in the Full Bench case of *Luchmun Dass v. Giridhar Chowdhry* (1. L. R., 5 Cal., 855), by the High Court discussed.

THIS was a suit for restoration to possession of a specified share of certain ancestral property claimed by the plaintiff in virtue of his right as son and concurrent heir under Mitakshara law.

The plaint, *inter alia*, stated, that one Lala Hurmundul Singh the grandfather of the plaintiff, and father of the second defendant, died, leaving four sons; that the second defendant, as one of such sons, succeeded to a four-anna share of the ancestral property; and that the plaintiff, as the son of the second defendant, became, on his birth, entitled to a two-anna share of his father's property under Mitakshara law, that, on the 4th July 1866, the first defendant obtained a decree on a mortgage-bond, dated the 2nd January of the same year, against the second defendant directing a sale of his share of Mouza Kumeryawan; that the first defendant, at such sale, held on the 22nd Decem-

\* Appeal from Original Decree, No. 179 of 1879, against the decree of Moulvie Mahomed Syed Nurul Hossain, Khan Bahadoor, Subordinate Judge of Shahabad, dated the 31st March 1879.

ber 1866, himself purchased, and took possession of the whole four-anna share of the said mouza. In the present suit (the plaint being filed on 15th November 1875), the plaintiff sought to regain possession of a two-anna share of the said mouza.

In his written statement the first defendant asserted, that the mortgage-bond, mentioned in the plaint, had been given by the second defendant as a security for the payment of antecedent debts; that a portion of this consideration was in respect of moneys due on previous decrees obtained in suits in which the plaintiff, as well as his father, the second defendant, had been made parties, that a further portion of the money so secured was borrowed by the second defendant to defray the expenses attendant upon the performance of the *shrad* ceremony of the plaintiff's [137] grandfather; and that no part of the debt incurred under the bond had been so incurred for an immoral purpose. The first defendant also contended that, under the Mitakshara law, the debt not being contracted for an immoral purpose, the whole of the share of the ancestral property which descended to the second defendant and the plaintiff was liable for the debt of the father, and further, that the plaintiff, by his conduct at the time when the bond was executed and the decree of the 4th of July 1866 was obtained, must be taken to have acquiesced in the sale of the whole four-anna share of the Mouza Kumeryawan, which followed upon the decree.

The Court of first instance found on the facts that the debt due on the mortgage-bond, dated the 2nd January 1866, was incurred to pay valid and legal debts due to the first defendant by the second defendant, and, to some extent, by the plaintiff himself, that there was nothing in the bond which exempted the share of the plaintiff from sale under the decree, and that the plaintiff was aware of and acquiesced in the sale of the whole of the four-anna share of Mouza Kumeryawan. For these reasons the Court dismissed the plaintiff's suit.

The plaintiff, thereupon, appealed to the High Court.

Baboo Hem Chunder Banerjee and Baboo Durga Pershad for the Appellant.

Baboo Mohesh Chundur Chowdhry, Baboo Chundur Madhub Ghose, and Baboo Abinash Chunder Banerjee for the Respondents.

The **Judgment** of the Court (PONTIFEX and McDONELL, JJ.) was delivered by

**Pontifex, J.**—This appears to us to be one of those fraudulent cases on the part of a Mitakshara father and son, which have led to the late fluctuating developments of Mitakshara law. The case stood over in consequence of a similar point, at the time it came on, being before a Full Bench,—*Luchman Dass v. Gurdhar Chowdhry* (I. L. R., 5 Cal. 855), and the argument was delayed till the decision of the Full Bench had been given. Now, I was a member of the Full Bench on that occasion, and as I understand it, the [138] decision given by the Full Bench in that case does not interfere with the opinions expressed in the judgment of myself and Mr. Justice McDONELL in the case of *Pursid Narain Singh v. Honooman Sahay* (I. L. R., 5 Cal., 845) (which was one of the cases mentioned in the Reference to the Full Bench), except that would seem, in consequence of the rulings of the Privy Council, we are bound to hold that the payment, even in the father's lifetime, of an antecedent debt due by him is a pious duty on the part of the son; and its discharge is, therefore, such a necessary purpose as to give validity to a sale or mortgage

by the father as against his minor sons (but not against his adult sons), whether such antecedent debt does or does not come within the words—"If a calamity affecting the whole family requires it, or the support of the family renders it necessary, or indispensable duties, such as the obsequies of a father or the like make it unavoidable;" always provided that the antecedent debt is not incurred for immoral purposes. It was however, the opinion of the Full Bench, that the antecedent debt spoken of by the Privy Council means a debt antecedent to the transaction, *viz.*, the sale or mortgage purporting to deal with the property.

But if the property is dealt with by a decree in a suit upon a mortgage by the father alone, to which suit the father and sons are parties, it follows, from the Privy Council decisions, that, as against the sons, even though they may have been adult when the debt (assuming it was not for immoral purposes) was incurred, and notwithstanding verse 29, Chap I, sec. i, and verse 10, Chap I, sec. vi, of the Mitakshara, the property would be bound, not indeed by virtue of the mortgage, but by virtue of the father's debt antecedent to the suit being enforceable against the joint ancestral estate, and therefore against the mortgaged property as part of it. Strictly speaking, perhaps the suit should be in the form of a suit upon the mortgage as against the father, and upon the debt as an antecedent debt as against the interests of the sons in the joint ancestral estate. But this would be merely matter of form, and the neglect to frame the suit accurately would, probably, not prevent the Court making a decree which would give the sons an opportunity of [139] redemption. The result in fact seems to be, that *quæ* ancestral property, the son is as equally liable for the father's debts, if not incurred for immoral purposes, as for his own debts. But if the interests of an adult son were affected by a decree against the father alone, which, in our opinion, is not the law, the unreasonable consequence might be, that the son's interest would be more liable for the payment of the father's debt than for the debt, and perhaps the prior debts, of the son, for no creditors of the son could touch his interest without suing him.

No doubt, previously to the Privy Council judgment, it was considered that the pious duty of paying the father's debts did not arise until after his decease. This resulted from what appears to have been considered by the Privy Council a too literal interpretation of the texts which applied to the subject, and which, for convenience' sake, may be referred to as to a great extent collected in Chap. V, sec. iv, of the Mayukha. But by the decisions of the Privy Council it has now been established, that it is a pious duty of the son to pay his father's debts out of the ancestral estate even in the father's lifetime.

Now, in the present case, a Mitakshara father mortgaged certain ancestral mehals for the purpose of securing the sum of Rs. 9,000. That sum of Rs. 9,000 was made up of three sums due to the mortgagee on antecedent decrees,—*viz.*, a sum of Rs. 2,598-3-8, due on a decree of 19th December 1864, a sum of Rs. 822-6-6, due on another decree of the same date; and the sum of Rs. 5,183-9-4, due on a decree of 29th November 1864. These three decrees made up the sum of Rs. 8,604-3-6. The mortgagee agreed to give up Rs. 204-3-6, but at the same time advanced an additional sum of Rs. 600, thereby making up the whole sum of Rs. 9,000. Now, the first two antecedent decrees which I have mentioned were against the father alone, but they were decrees which have not been impeached, and which show that there were antecedent debts due from the father at the time of the execution of the mortgage bond. The 3rd decree, of the 29th November 1864, was a decree on a bond given by the father and his son, the present plaintiff, which decree had been obtained against the

father and the present plaintiff. It is not attempted in this case to show [140] that that decree was a fraudulent or improper decree, no steps were even taken to set it aside, and we must assume, therefore, that the debt was a valid debt against the father and the son; and that being the case, the whole sum of Rs. 9,000, alleged to be secured to the defendant by the father's bond, was at the date of such bond, an antecedent debt due by the father, with the exception of Rs. 600 advanced at the time. Now, that is so insignificant a proportion to the whole sum that, probably, it might be left out of account altogether. But as a matter of fact there is a recital in the bond that it was taken for the *karuj* ceremony of the grandfather of the present plaintiff, and we find by a statement in the plaint that the grandfather died just one month before the execution of the bond in question. We think, therefore, that we may safely assume that the Rs. 600 was advanced to the father for a purpose which would be binding on the ancestral estate. Now, upon this mortgage bond the defendant, mortgagee, sued the father alone. He obtained a decree, the property was put up for sale, and the mortgagee purchased it. It is true that the decree was in the form in which decrees were then drawn, declaring that the right, title, and interest of the defendant should be sold. But there can be no doubt whatever upon the evidence in this case, that it was the belief of the mortgagee, at the time when he executed the decree, that he was selling and purchasing the whole 16 annas of the property hypothecated. Still, if there were no other circumstances in the case, we should have been bound, on the principles to which I have referred at the commencement of this judgment to hold, that the son's interest would not be affected by that decree, he not having been a party to the suit. But in reality we find that in this case there are very special circumstances. Not only was the bond given, as to the larger proportion of the amount secured, for a debt actually due by the son, but we find, upon the evidence, that the son was present at the time of the execution of the bond; and that he was a consenting party to his father mortgaging this mehal. We also find, upon the evidence that after the suit had been commenced by the mortgagee, and a decree obtained, the son went to the mortgagee and asked him to postpone the execution of the decree. [141] Moreover we find, that the son allowed the mortgagee to purchase, and to enter into possession, and to hold possession of the 16 annas for nearly twelve years, because the purchase was made in December 1866, and this suit was not commenced until November 1878: and it is a noticeable circumstance that the plaintiff has carefully abstained from presenting himself as a witness.

But the case does not rest there alone, for there is evidence to show, and we have been assured, that, after his purchase, the mortgagee paid off money-incumbrances upon this estate. In consequence of the son standing by and allowing the mortgage to be made, allowing the mortgagee to believe that the mortgage would affect that whole 16 annas of the property, and afterwards allowing him to take possession under his purchase, to continue such possession for a period of eleven years and upwards, and to discharge incumbrances on the estate, we think it would be manifestly unfair and improper, under the circumstances, to allow the son in this suit to treat the purchase by the mortgagee under his decree as if it did not affect the son's interest at all. If these circumstances did not exist, we should have said, as we have stated before, that the son being adult, and being no party to the mortgage or to the suit upon it, would not be bound by the decree, and even under existing circumstances, we think that, properly, he ought to have been made a party to the suit. But the question now is, ought he to succeed in this suit? He has allowed nearly twelve years to expire before bringing the

present suit ; and when he brings the suit, he makes no offer whatever to pay off the sum that was secured by the mortgage-bond, or the sums paid by the defendant in discharge of incumbrances on the estate. Now, we have shown that the son is liable, at all events, so far as ancestral estate goes, which would include this mortgaged property, to pay the antecedent debt of the father ; and the mortgagee would be entitled to enforce, in execution against this property, any decree he might get against the son for that antecedent debt. We think it would be wholly unfair in this suit to give the plaintiff a decree when he has not offered in any way to pay off that debt, and inasmuch as he stood by when the mortgage, [142] purporting to affect the whole 16 annas, was made, and allowed the defendant to take and hold unquestioned possession of the estate for more than eleven years, to deal as owner with the other incumbrances on this property by paying them off, and to be put to a very considerable expense in that way, we think that he ought not now to have even an opportunity of redeeming the property. What we shall do, therefore, will be to affirm the decree of the Court below and dismiss the plaintiff's suit. The appeal must, therefore, be dismissed with costs.

*Appeal dismissed.*

[6 Cal. 142]

*The 10th June, 1880.*

PRESENT :

MR. JUSTICE MORRIS AND MR. JUSTICE PRINSEP,

Kristodass Kundoo and another.....Defendants

*versus*

Ramkant Roy Chowdhry.....Plaintiff.

*Practice—Joinder of Causes of Action—Civil Procedure Code (Act VIII of 1859), s. 7† Limitation Act (IX of 1871), sched. ii, art. 15‡—Mortgage Decree—Sale for Arrears of Revenue—Surplus-sale-proceeds—Marshalling.*

A mortgagee brought a suit against the mortgagor to have a declaration of his lien over the mortgaged properties, and obtained a decree. He afterwards brought another suit against certain attaching creditors of his mortgagor, to have a declaration of his lien over certain

\* Appeal from Original Decree, No. 145 of 1878, against the decree of F. J. G. Campbell, Esq., Officiating Additional Judge of Chittagong, dated the 20th February 1878.

† [Sec. 7.—Every suit shall include the whole of the claim arising out of the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. If a plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted, shall not afterwards be entertained.]

‡ [Art. 15:—

Description of suit.	Period of limitation.	Time when period begins to run.
To alter or set aside a decision or order of a Civil Court in any proceeding other than a suit.	One year ...	The date of the final decision or order in the case by a Court competent to determine it finally.]

surplus moneys in the hands of the Collector, who, previous to the institution of the first suit, had sold certain of the mortgaged properties free of all incumbrances, for arrears of Government revenue. *Held*, that the second suit was not barred under Act VIII of 1859, s. 7.

*Held* also, that the mortgage decree declaring the lien over all the mortgaged properties covered the surplus sale-proceeds then in the hands of the Collector, because these moneys must, as between the mortgagee and attaching creditors of the mortgagor, be taken to represent the mortgaged properties.

*Heera Lal Chowdhry v. Janokeenath Mookerjee* (16 W. R., 222) followed.

The doctrine of marshalling does not apply as between a mortgagee and attaching creditors of the mortgagor who hold mere money-decrees.

The period of limitation prescribed by art. 15, sched. i, Act IX of 1871, for a suit to set aside an order of a Civil Court, does not apply where the order simply amounts to a declaration that the Court considers it has no jurisdiction to act in the proceeding before it.

**[143]** THE facts of this case were as follows: On November 3rd, 1875, Ram Sunder Sen and Ram Chunder Sen mortgaged certain properties to Gonesh Misser on a bond containing a condition for payment of principal and interest within one year. The bond also contained the following stipulations:—

"We shall pay the Government revenue.—If we do not pay the Government revenue, and if, in consequence, all or any of the mehals be sold by auction for realization of the Government revenue, then you shall be competent to take the principal and interest that shall have been due to you from the Collectorate from and out of the surplus sale-proceeds on the strength of this deed of conditional sale. Neither we, nor our heirs, shall be competent to take any objection to it, and no objection, if taken, shall be legally valid. In case the proceeds of the sale of the mehals in mortgage do not cover the amount that shall have been due to you on account of principal and interest, you shall be competent to realise the principal and interest by sale of our other properties, whether moveable or immoveable."

Shortly afterwards the mortgagors neglected to pay the Government revenue on nine of the mortgaged properties which were accordingly sold under Act XI of 1859, free from all incumbrances.

The defendants in the present suit, who held money-decrees against the mortgagors, obtained orders from the Civil Court attaching the surplus sale-proceeds which remained as a deposit in the Collector's office to the credit of the mortgagors, their debtors.

On May 13th, 1876, the mortgagee applied to the Judge for an order releasing the surplus sale-proceeds from these attachments, on the ground that they were liable to satisfy his mortgage, and he asked to have evidence taken of his claim. The Judge held, on the authority of the case of *Brojonath Mitter* (13 W. R., 301), that he had no jurisdiction to determine the priority of claims to money in deposit in the Collector's Court, and he declined to take any proceedings on that petition. The mortgagee then applied to the Collector for payment of this money, **[144]** but this application was also rejected, and an order was passed on the 16th May 1876, that the money could "not be paid to any person other than the mahik," probably meaning the mortgagors.

On January 9th, 1877, Gonesh Misser sued the mortgagors on his mortgage bond to recover the money due thereon, "by declaration of a lien" on the mortgaged properties, or, if that were not sufficient, from the other properties of the mortgagors, and a decree was passed on 5th February following, which declared that "the mortgaged properties stand subject to lien until the realization of the money."

Application for execution of this decree was made on 6th April 1877, by sale of the mortgaged properties, the nine properties which had been sold for arrears of revenue as already stated being excluded from this application, though they, with the other properties, were entered in the schedule attached to the decree.

Gonesh Misser, the original mortgagee, sold this debt, on 21st May 1877, to Ramkant Roy. He, as transferee judgment-creditor, attempted to attach the surplus sale-proceeds of these nine properties. Thereupon opposition was made by the present defendants, who had already obtained orders of attachment, and the Judge, on 11th August 1877, declined to take any action for the reasons recorded by his predecessor on 13th May 1876, which have been already stated. Ramkant Roy, on 29th August 1877, brought the present suit to set aside this order of the 11th of August, and to declare that the surplus sale-proceeds were subject to his mortgage lien.

Against the decree given to the plaintiff by the Additional Judge of Chit-tagong, two of the decree-holders, defendants, appealed.

Mr. Bell (with him Baboo Chunder Madhub Ghose) for the appellants — The limitation applicable to this case is Act IX of 1871, sched. ii, art. 15. The suit is, under that article, barred by limitation. It is also barred under s. 7 of Act VIII of 1859: *Moonshee Buzloor Roheem v. Shumsoonissa Begum* (11 Moore's I. A., 551) and *Ram-[145]hurry Mondul v. Mothoormohun Mondul* (20 W. R., 450). Even if the suit does lie, the Court will compel the mortgagee to go against the other mortgaged estates and leave the surplus proceeds to the general creditors.

Mr. P. O'Kinealy (with him Baboo Akhil Chunder Sen) for the respondent.—Act IX of 1871, sched. ii, art. 15, does not apply here, because the Court refused to pass any order in the case, and because this is not a suit to set aside an order of the Civil Court: *Kaylash Chunder Paul Chowdhry v. Preonath Roy Chowdhry* (I. L. R., 4 Cal., 610). Nor is the suit barred under Act VIII of 1859, s. 7, because the subject-matter and the parties in both suits are different. The decree against the mortgaged properties covers the surplus proceeds in the hands of the Collector, which must be taken to represent the properties themselves for all the purposes of the mortgage: *Heera Lal Chowdhry v. Janakeenath Mookerjee* (16 W. R., 222); Macpherson on Mortgages, pp. 113, 234. The appellants are mere general creditors, and therefore the doctrine of marshalling does not apply.

The Judgment of the Court (MORRIS and PRINSEP, JJ.) was delivered by

**Prinsep, J.** (who, after stating the facts as above, continued).—The first objection is, that the suit is barred by limitation under art. 15 or art. 16, sch. ii, Act IX of 1871, because it has not been instituted within one year from the order of the Judge, dated 13th May 1876, or that of the Collector, dated 16th idem, rejecting the mortgagee's applications. We have, however, no doubt that these articles do not apply, inasmuch as in neither case was there any order passed adverse to the mortgagee's right after any adjudication thereof. The orders passed simply amounted to a declaration, that neither the Judge, nor the Collector, considered that he had jurisdiction to act as desired. The general law of limitation for suits to establish a right would, therefore, apply to the present suit, and under that law the suit is not barred.

[146] The main objection pressed on us by Mr. H. Bell, who appears as counsel for the appellants, is, that this suit is barred by s. 7, Act VIII of 1859, because in his suit against the mortgagors, the mortgagee, knowing that these

nine properties had been sold for arrears of revenue, did not apply to have the surplus sale-proceeds declared subject to his mortgage lien, but merely asked for and obtained a decree against the mortgaged properties. Mr. Bell contends that, as the mortgagee did not ask for all the relief to which he was entitled, he cannot now sue for the balance of his claim; that the surplus sale-proceeds are distinct from the mortgaged properties, which by the decree have been charged with the debt, and that, if he could not bring a second suit against the mortgagors, he cannot bring one against the present defendants, the creditors of the mortgagors who have obtained orders of attachment in execution of decrees held by them. He relies principally on the case of *Moonshee Buzloor Roheem v. Shumsoonissa Begum* (11 Moore's I. A., 551, see 603 and 605), and on *Ramhurry Mondul v. Mothurnohun Mondul* (20 W. R., 450), but the fallacy of his argument appears to us to lie in the fact that the judgment-debtors, mortgagors, have not made, and indeed could not make, any opposition to the execution of the mortgage decree on the surplus sale-proceeds. The cause of action in the present suit is certainly distinct from that in the first suit. In that suit the mortgagee sought to establish his mortgage-debt and his lien on the mortgaged properties, and to obtain an order of the Court enforcing it, and the cause of action was the default of the mortgagors to make payment within the stipulated time. The cause of action in the present suit is the opposition of certain creditors to the satisfaction of the mortgage-decree out of money which represents the balance due to the mortgagors after payment of Government revenue on nine of the mortgaged properties sold under Act XI of 1859, in consequence of their default. If the mortgagee had, in the suit to enforce the terms of the mortgage bond, attempted to obtain a lien on this money, it would have been necessary either to make the present defendants parties to that suit, or to bring the present suit, before he [147] could obtain a decree binding on the present defendants. But in such a case the present defendants might reasonably complain that they were not concerned in the cause of action, the default of the mortgagors, that the claim to the money was one dependent entirely on the manner in which execution of the mortgage-decree was taken out, that, when this matter arose, they would be prepared to defend their rights, and that, therefore, they should be dismissed from the suit. Such an objection would, in our opinion, be irresistible. To use the words of their Lordships of the Privy Council in the case already quoted. "The correct test is, whether the claim in the new suit is in fact founded on a cause of action distinct from that which was the foundation of the former suit" (11 Moore's I. A., at p 605). Applying this test we have no doubt that the cause of action in the two cases are distinct.

But besides these grounds we are of opinion that the objection must fail for another reason. In the case of *Heera Lall Chowdhry v. Janokeenath Mookerjee* (16 W. R., 222), the High Court (NORMAN, Offg. C.J., and L. S JACKSON, J.), declared, that "it has been long settled by decisions from the time of the late Sudder Court, in consonance with reason and justice, that when mortgaged lands are sold for arrears of Government revenue, not accrued through default of the mortgagee, any proceeds which may arise from the sale in excess of the arrears belong to the mortgagee, and he has a right of action for their recovery. It is clear in fact that the money, the proceeds of sale, which had been substituted for the land mortgaged, became subject to the lien to which the land which it represented was subject."

The Court, in that case acting on this principle, required a creditor, who had, in execution of a money-decree against the mortgagor, attached such surplus sale-proceeds, to refund that money to the mortgagee. The cases decided in



the Sudder Court, to which reference has been made in this Judgment, are quoted in Macpherson on Mortgages, 6th edition, p 234.

Taking the surplus sale-proceeds as representing the nine mortgaged estates which had been sold for arrears of revenue, the decree obtained by the mortgagee declaring his lien on them [148] and other estates would be the same as declaring a lien on that money ; and as I have before pointed out, a declaration of a lien on that money expressly would not be binding against the present defendants, who would be entitled to show, if they could do so, that that money was not subject to any such lien, but had been rightly attached in satisfaction of their decrees. This, under the rule laid down in *Brojonath Mitter's case* (13 W. R., 301), could not be determined except in a separate suit such as has now been brought.

Mr. *H. Bell* next contends that, as a Court of Equity, we should compel the mortgagee to execute the decree first on the other mortgaged properties, but we can find no authority for such a course. The defendants are holders of ordinary money-decrees, and have no special claim on our consideration, such as to require us to interfere with and limit the undoubted rights of the mortgagee. He has an easy way of realizing the money due to him, and he is entitled to take advantage of it. The defendants can proceed to execute their decrees against other properties. It is thrown out by Mr *Bell*, that these properties may be subject to other incumbrances. If that be so, there is still more reason for our refusing to require the mortgagee, plaintiff, to proceed against these properties, for the defendants, creditors on no security, cannot ask to have the advantage of the prior mortgage held by the plaintiff, so as to enable them to obtain their money to the detriment of these incumbrancers, and more particularly without giving them an opportunity of resisting such an order.

The appeal is, therefore, dismissed with costs.

*Appeal dismissed.*

#### NOTES.

#### I. LIEN OR SECURITY IS NOT DESTROYED BY THE CONVERSION OF LAND INTO MONEY—

“There can be no question that, when the land was converted into money, the lien or security was not destroyed by the transmutation, in support of this view, it is sufficient to refer to the principle embodied in section 73 of the Transfer of Property Act (1882) and deducible from the decisions in (1851) 5 M. 1 A. 271 ; (1880) 6 Cal 142 , (1892) 20 Cal. 241 , (1893) 20 Cal. 533 ; (1905) 33 Cal 92 (111) Indeed, the principle that the rights of a mortgagee are not destroyed by the mere transmutation of the subject-matter of the security into a different form without his consent, is too firmly established to be seriously challenged, and it has been expressly held applicable to cases of compulsory acquisition under the Land Acquisition Act—(1890) 13 Mad. 321 ; (1909) 6 C L J 745 , see also *Ranken v. East and West India Docks* (1849) 12 Beav. 298, *Sherwood v. LaFayette* (1886) 58 Am Rep. 414. *Per MOOKERJI, J.*, in (1909) 10 C. L J 150 (177, 178). See Dr Rash Behary Ghose on Mortgage, Vol. I (1911), p 273 As to the right of the mortgagee to follow the money in the hands of the unsecured creditor, see also (1893) 21 All. 137.

#### II. MARSHALLING IN FAVOUR OF UNSECURED CREDITOR—

See Dr. Rash Behary Ghose on Mortgage. Vol. I (1911), at 359, 360.

#### III. ORDERS WITHOUT JURISDICTION—LIMITATION—

Need not be set aside . 3 All. 40 ; 1 All. 333 , 8 Mad. 82 ; 11 Bom 160.]

[149] *The 22nd July, 1880.*

PRESENT :

MR. JUSTICE MORRIS AND MR. JUSTICE PRINSEP.

Kasheekishore Roy Chowdhry.....Plaintiff

*versus*

Alip Mundul and another.....Defendants.\*

*Co-sharers—Enhancement—Notice of enhancement.*

*Held*, in a suit for enhancement by one co-sharer, to which the other co-sharer was made a party, that one co-sharer is not competent to issue a proper notice of enhancement without the consent of the other co-sharers previously obtained, though the rent has been paid to each co-sharer separately. Under the ruling of the Full Bench, in the case of *Guni Mahomed v. Moran* (I. L. R., 4 Cal. 96), he must first establish his right to a separate contract to recover his rent separately on his individual share.

THIS was a suit for arrears of rent at an enhanced rate, instituted on the 10th of July 1875. The plaintiff stated that the plaintiff and the second defendant, Bisseswari Chowdhranee, were the owners of a zamindari, in which the first defendant held a jote, the rent of which he paid to each co-sharer separately. Previously to 1280 (1873), the plaintiff had granted his share to his wife, Hurrosoondari Debi, "under a talukdari settlement, to hold and enjoy the same during her lifetime." She died in the month of Pous 1281 (December 1874), but in the year 1280, she had directed a notice of enhancement to be served on the first defendant, and it was upon this notice that the present suit was brought. The Court of first instance held, that the notice was invalid, and that one co-sharer could not sue alone for enhancement of rent. On appeal this judgment was reversed, and the cause remanded for trial on the merits. The lower Court, on retrial, gave the plaintiff a decree. The defendant appealed, and on appeal the judgment of the lower Court was reversed, and the suit dismissed with costs on the authority of *Guni Mahomed v. Moran* (I. L. R., 4 Cal., 96).

The plaintiff then appealed to the High Court.

. [150] Mr. A. M. Bose, Baboo Mohun Mohun Roy, Baboo Rashbehary Ghose, and Baboo Grish Chunder Chowdhry for the Appellant.

Baboo Gya Sunker Mozoomdar for the Respondents.

The following **Judgments** were delivered :—

**Prinsep, J.** (after shortly noticing other objections not material to this report, continued):—

Mr. Bose has endeavoured to show that this suit does not fall within the terms of the case referred to the Full Bench ; and he argues, that an expression of opinion which goes beyond that case is an *obiter dictum*, and is not binding on this Division Bench.

It appears to me, however, that the judgment of the Full Bench is directly in point, and we are bound to apply it to the present case. The case referred to the Full Bench was thus stated : " Whether the ijaradar of a co-sharer of an entire estate, who has for some time realized his rent separately in respect of his share, can sue to enhance the rent of that share separately without joining the other co-sharers of the tenure ? " The judgment of the Full Bench

\* Appeal from Appellate Decree, No 215 of 1879, against the decree of H. Beveridge, Esq., Officiating Judge of Rungpore, dated the 28th October 1878, reversing the decree of Baboo Aubinash Chunder Mitter, First Munsif of Bogoorah, dated the 29th May 1877.

declared, "that that question should be answered in the negative." It also declared, that "the Rent Law does not contemplate the enhancement of a part of the entire rent, and the enhancement of the rent of a separate share is inconsistent with the continuance of the lease of the entire tenure."

The grounds upon which the judgment of the Full Bench proceeded are thus stated :—

"The entire tenure was originally held by the tenant under all the co-sharers at an entire rent ; but by some arrangement amongst themselves, consented to by the co-sharers on the one hand and by the tenant on the other, the latter had been in the habit of paying a portion of the rent to each co-sharer in respect of his separate share ; such arrangements are by no means unusual, and they may be evidenced either by direct proof or by usage from which their existence may be presumed. But in either case they are perfectly consistent with the continu-**[151]**ance of the original lease of the entire tenure ; and the same consent of all the parties, by which the arrangement was originally created, may at any time put an end to it." Although in accordance with the practice of this Court I have always followed this rule, I have done so, with an expression of my own opinion in dissent from it, because it seems to me that the separate payment of rent to each of several co-sharers constitutes a separate tenancy, so far as regards each of the landlords, which would entitle each, if not otherwise debarred, to claim an enhancement of the rent payable to him separately.

Mr. Bose has referred to two cases,—one *Troylochotaran Chowdhry v. Muthoor Mohun Dey* [W. R. (1864), Act X Rul., 41] decided by MORGAN and SHUMBHOO NATH PUNDIT, JJ., and the other decided by PEACOCK, C J., and JACKSON, J. [W. R., (1864), Act X Rul., 41 note] which were not quoted in the argument before the Full Bench, and are in conflict with its judgment. And I have already on a previous occasion referred to these cases.

A point, however, arises in the case now before us, which apparently was not considered by the Judges who formed the Full Bench, and that is under what authority the notice of enhancement required by s. 14 of the Rent Law should be issued, where one of several co-sharers alone desires to enhance the rent of a tenant. Previous service of a notice of enhancement alone confers the right to sue for rent at an enhanced rate, and therefore, unless a proper notice has been served, no suit of the nature contemplated by the Full Bench could properly be brought. The enhancement must extend to the entire holding of the tenant, or this can be effected only in the presence of all the co-sharers. One sharer would not be competent to issue a notice of enhancement of the rent of the entire tenure, nor could he, under the terms of the judgment of the Full Bench, issue notice of enhancement of the rent due on his own particular share except with the consent of his co-sharers previously obtained.

If that consent be withheld, he cannot, as held by the Full Bench, put an end to the original contract or modify the terms **[152]** of the arrangement under which separate payments of particular shares of rent were made.

Mr. Bose could not contend that, in the present suit, in which plaintiff demands an enhanced rate on the particular share of rent due to him alone, the other co-sharer, who is joined as a defendant, would be entitled also to claim the same rate on her share, for the notice of enhancement served by the plaintiff on the defendant-tenant claims only the rate due on his own share, calculated on what would be due on the entire tenure. Plaintiff, as the proprietor of only

a share, could alone not demand more. If he could not do that, he could not bring the present suit on the ground assigned by the Full Bench to substitute a separate contract for rent at an enhanced rate on his share of the property, for the original contract still subsisting, under which rent was paid in one lump sum on the entire tenure. He must first establish his right to a separate contract to recover rent separately on his individual share, he will then be in a position to serve a notice of enhancement of that rent, and after that to sue to enforce his rights at the rates claimed. Until this is done, so long as any of his co-sharers refuse to join with him, the plaintiff cannot assert his rights separately.

**Morris, J.**—I too am of opinion that, on the authority of the decision of the Full Bench in the case referred to, this appeal must be dismissed. Their Lordships, as I understand their judgment, considered that, without the rescission of the original contract in respect to the entire rent, for which purpose all the parties to it must be before the Court, a single sharer in a joint undivided tenure cannot sue to raise the rent of his share, even though hitherto, by an arrangement which has been concurred in by all the contracting parties, he has been paid separately his quota of the stipulated rent.

Here the judgment, as an expression of opinion of the Full Bench on the point referred to it, may be said to end. But it by no means follows, as has been argued by Mr. Bose, that when, in a suit of this kind, a sharer has made his co-sharer a party, and so brought all the parties to the original contract before the Court, a fresh apportionment of the rent can at once be [153] made, and a new contract entered into in the terms desired by the sharer-plaintiff. As justly observed by their Lordships "if the original lease of the entire tenure is cancelled, or put an end to by the consent of all the parties, the co-sharers and the tenant are at liberty to enter into any fresh contracts which the law allows." Here, under the Rent law in force, one of the parties to the original contract,—namely, the tenant,—can hardly be said to be a consenting party to its rescission. Enhancement of rent is a condition incidental to his tenure of the land, but he can fairly claim a strict fulfilment of all the requirements of the law before any enhancement of rent can be imposed upon him. The law, s 14, Beng. Act VIII of 1869, directs that no under-tenant shall be liable to pay any higher rent for the land held by him unless a written notice shall be served on him at a time and in a manner specified by order of the Collector on the application of the person to whom the rent is payable. It seems to me, therefore, to follow as a necessary corollary of the judgment of the Full Bench, that the person to whom the rent is payable is not the single sharer, the plaintiff in the suit, but all the sharers in the tenure. If the original contract as to the entire rent cannot be broken and a new contract entered into without the presence of the co-sharers, this is so because the tenure continues one and the same as a joint property, the only difference between the new contract and the old being a modification in the amount of rent to be paid by the tenant. If, therefore, the rent of one sharer can only be raised by a re-adjustment of the entire rent of the tenure, then clearly the notice of enhancement prescribed by the Act is defective, if it be not served on the application of all the co-sharers in the tenure. It is quite conceivable that a sharer in a joint undivided tenure may be unwilling to raise the share of the rent which has hitherto been paid to him separately, and yet not object to his co-sharer, in a suit brought for the purpose, raising his quota of rent in a certain proportion on his share.

But inasmuch as the re-adjustment of the rent to which he agrees disturbs the terms on which the tenant holds the tenure equally from him and his

co-sharer, it is necessary, before [154] any such re-adjustment of rent can be made, that he, as well as his co-sharer, should sign the notice and apply to have it served upon the tenant. So again, in any fresh adjustment of the rent by which he desires to raise his quota of rent to the level of that of his co-sharers, such co-sharer must, I conceive, join with him in the notice to be served on the tenant. No doubt, a new and separate tenancy is created by the new contract of lease, but from the very nature of the case the contracting parties continue the same, and the tenure remains as before, a joint undivided property. In this view the suit of the plaintiff must fail, because the notice of enhancement required by law has not been served on the tenant on the application of all the persons to whom the rent is payable. The appeal is dismissed with costs

*Appeal dismissed.*

**NOTES.**

[But see 7 Cal. 633=9 C. L. R. 37, 10 Cal. 36=13 C. L. R. 323, 9 Cal. 864, 11 Cal. 615, 11 Cal. 644.]

**[6 Cal. 154]**

**APPELLATE CRIMINAL.**

*The 31st July, 1880.*

PRESENT.

MR. JUSTICE WHITE AND MR. JUSTICE FIELD.

Samshere Khan and others

*versus*

The Empress.

*Riot—Unlawful Assembly—Culpable Homicide—Fight between two contending factions, each armed with deadly weapons—Penal Code (Act XIV of 1860), s. 300, except. 5*

Where death results in a fight between two bodies of men deliberately fighting together, a greater proportion of the men composing both sides being armed with deadly weapons, and it being further apparent from the evidence that the man slain was an adult, and that no unfair advantage was taken by the one side or the other during the fight, the offence committed is culpable homicide, but does not amount to murder.

THE facts of this case sufficiently appear from the Judgments.

Mr. Wood and Mr. Bonnerjee (with them Baboo Nulit Chunder Sein, Baboo Jogesh Chunder Roy, and Munshee Sirajul Islam) for the Appellants.

Baboo Doorga Mohun Das for the Crown.

[155] The following Judgments were delivered :—

**White, J.**—This is an appeal against the conviction of the five appellants, named Samshere Khan, *alias* Sirdar, Abdul Rohoman Moonshee, Sahab Khan,

\* Criminal Appeal, No. 408 of 1880, against the order of T. M. Kirkwood, Esq., Sessions Judge of Mymensingh, dated the 21st April 1880.

Uasimuddi Meah, and Fakiroollah Khan, for murder committed in the course of a riot, for which offence they have been severally transported for life.

The evidence extends to a very great, and in my opinion a very unnecessary, length. It is full of repetitions, and yet the inquiry in some important respects has not been as searching as it might have been. It is clear, however, that a very serious riot took place in a village called Latshailla on the morning of the 17th January of this year, which resulted in the wounding of one man and the death of another. Two of the shareholders of a portion of a share in the village, named Kurreem Sirdar and Dost Mahomed, having quarrelled about their share, sold each of them a fraction of his share to two rival zamindars, Khan Saheb and Dwarkanath Roy, with the object of enlisting two powerful neighbours in the dispute. The purchase by Khan Saheb was taken in the name of his son Hafiz. It would appear that Kurreem Sirdar, when he sold, was not in possession of his share, and that Khan Saheb, shortly before the riot took place, had been taking steps to get possession of the fractional part which he had bought, and for that purpose had erected a cutcherry on the land of the prisoner Fakiroollah, who is described as a small talukdar in the village, and who had become a partisan of Khan Saheb. This step was followed very soon afterwards by the introduction of some lathials into Fakiroollah's bari. On the morning of the 17th of January, Dost Mahomed also collected a number of persons in the homestead. As to the origin of the riot, which took place on that morning between the two partisans, we think that the most reliable evidence is that of Nobi Bux, the constable, who had, some days previously, been deputed by the authorities to keep peace in the village, and who was on the spot whilst the riot was going on. From his evidence it appears, that Dost Mahomed and some of his party came down that morning to Fakiroollah's bari; that the constable, then seeing preparations being made on both sides, which led him to believe that a breach of the peace was imminent, [156] had a report drawn up, which he forwarded to the thannah, with a request that the Inspector of Police would attend, but before the Inspector could arrive the two factions, with armed men on both sides, met in conflict in a field of Dhanoo Sircar, just outside the borders of Fakiroollah's bari. After a short fight, Gariboolla, who was one of Dost Mahomed's party, was wounded in the stomach with a spear. Upon this Dost Mahomed's party fled eastward to a jack tree, about fifty yards off, pursued by Khan Saheb's party, that there Dost Mahomed's party were reinforced by some more partisans armed with spear and lathies, when Khan Saheb's party, in their turn, took to flight, but having fled about eighty yards, were rallied near some mangoe trees. The fight then recommenced, and very soon afterwards a man named Khoaz, who also belonged to Dost Mahomed's party, was killed. A great deal of argument has been addressed to us to show that Khan Saheb's party was a lawful assembly collected together for the defence of the cutcherry, which had been erected on Fakiroollah's land. It may be that there was a motive of defence in collecting the party in the first instance, but judging them from their acts and conduct, and from what subsequently took place we think there can be no reasonable doubt that they were originally assembled for purposes of offence as well as defence; that the purpose was, by means of criminal force, to enable Khan Saheb to assert his right, or supposed right, of collecting the rents of the share which he had bought; and that when, on the morning of the 17th, knowing that Dost Mahomed had collected a band of men to oppose them, and that he and some of his partisans had come down to Fakiroollah's bari with hostile intentions against them, they issued armed from Fakiroollah's bari, they so issued with a common object of fight

ing Dost Mahomed's party. The evidence, no doubt, shows that Dost Mahomed's party were in a manner the aggressors on that morning, and had done acts for the express purpose of provoking Khan Saheb's party to come forth from Fakiroollah's bari, or which at least were calculated to provoke the latter, but, on the other hand, it is clear that Khan Saheb's party were quite willing to accept any challenge from Dost Mahomed or his party. The members of the two assemblies, or a large portion on each side [187] were armed with deadly weapons, such as latties and spears, and on the side of Khan Saheb's party, at least there was a large number of professional fighting men. We look upon what took place, from the time that Khan Saheb's party issued from the bari until the death of Khoaz, as one continued fight, although it consisted of more than one stage, and we think that it was in the prosecution of the common object of fighting that Gariboollah was wounded and Khoaz killed.

We have not now before us the persons who actually inflicted the grievous hurt on the one and the death-wound on the other, but before considering the extent to which the five prisoners are responsible for what occurred, we will state the view that we take of the crimes committed by the wounding and killing.

As regards the wounding of the man Gariboollah, we consider that that has been proved most satisfactorily to be grievous hurt. The wound was a spear-wound, which penetrated the skin of the abdomen. It was a severe wound, and resulted in the man being, as the doctor proves, more than twenty days in hospital. But for the interposition of Providence, the man might have lost his life, for, if the spear had entered the abdomen, it probably would have ended in death.

With regard to the man who was killed, we are of opinion that the offence committed by killing him is culpable homicide, but does not amount to murder, inasmuch as Khoaz was an adult, and his death occurred in the course of a fight between two bodies of men who were deliberately fighting together, both sides being armed, or a greater part of the men on both sides being armed, with latties, or spears, which are deadly weapons, and no unfair advantage appearing upon the evidence to have been taken by the one side over the other in the course of the fight.

On this point, I would refer to the case of *The Queen v. Kukier Mather* (Unreported), decided on the 13th November 1877 by a Bench, of which I was a member. In that case I considered at some length what was the character of the offence where death was caused under circumstances similar to the present. I then held that the offence did not amount to murder, because it [188] came within the 5th exception to s. 300 of the Indian Penal Code. After alluding to the difference between the English and Indian law on the subject as regards voluntary culpable homicide by consent, I said. — "A man who, by concert with his adversary, goes out armed with a deadly weapon to fight that adversary who is also armed with a deadly weapon, must be aware that he runs the risk of losing his life, and as he voluntarily puts himself in that position, he must be taken to consent to incur the risk. If this reasoning is correct as regards a pair of combatants, fighting by premeditation, it equally applies to the members of two riots or assemblies who agree to fight together, and of whom some on each side are, to the knowledge of all the members, armed with deadly weapons."

Some of the Judges of this Court entertain a different view from mine (see *Empress v. Rohimuddin*, I. L. R., 5 Cal., 31) as to the applicability of

the 5th exception to a case of a premeditated fight for two reasons, - *first*, because the party who is killed does not intend to get himself killed if he can help it. But the language of the exception is not confined to the case where a man consents to suffer death, but extends to the case where he consents to take the risk of death. Although it was Khoaz's intention to escape death if he could, yet he not the less ran the risk of death when an armed man he joined in encountering armed men, and he did this voluntarily, and therefore with his own consent.

The *second* reason is, because sudden fight forms the subject of an express exception, namely the 4th exception. Hence it is argued that the Legislature could not have intended that premeditated fight was one of the cases prescribed for by the 5th exception. This argument does not appear to me to be based upon a sound construction of the 5th exception. Consent voluntarily given by an adult, implies in every case premeditation. In *suttee*, which, according to the universal opinion, falls within the 5th exception, the widow deliberately intends to die by burning, and the relative who fires the funeral pyre, on which the widow mounts, deliberately and with the utmost premeditation, does an act with the intention that the widow shall be burned to death. There is nothing, therefore, in the [159] fact that the fight is premeditated, which ought to exclude it from the operation of the 5th exception. If, as I think, according to the common and natural meaning of the words, an armed man, who deliberately fights with another man whom he knows also to be armed, consents thereby to take the risk of death, why is the adversary who kills him to be excluded from the benefit of the 5th exception, because by another exception the case of a man who kills his adversary in the course of sudden fight is specially provided for. The circumstances under which a man slays his opponent in sudden fight are different from those where he slays him in premeditated fight, and if the Legislature intended that the offence of both should be only culpable homicide, the intention would naturally be shown by the enactment of two distinct exceptions. Again, sudden fight is a distinction recognised by the English law of homicide, and the framers of the Code may easily be supposed to have, for that occasion alone, made sudden fight the subject of a distinct exception, without imputing to them the intention thereby implied, by excluding from the 5th exception a case of premeditated fight, if it actually falls within the meaning of the exception. The sound construction to my mind is that the 5th exception extends to all cases of death occasioned by or resulting from, premeditated acts, where the party killed takes the risk of the death with his own consent, and that the 4th exception is an independent exception, applying to all cases of death occurring in the course of sudden and unpremeditated fight and does not in any way bind the natural operation of the 5th exception.

(The learned Judge then went into the evidence as to the share each of the prisoners had taken in the riot, and varied the order of the Sessions Judge).

The convictions and sentences passed by the Sessions Judge will therefore be set aside, and the convictions and sentences which I have mentioned above will take their place.

**Field, J.**—I concur in the Judgment which has just been delivered. I think that it is very clear that, on the morning of the 17th, a considerable number of armed lathials were collected in [160] the village on the part of Khan Sahab, and a considerable number on the part of Dost Mahomed.

What actually occurred was this :—The constable having paid a visit to Dost Mahomed's bari, and having had reason to believe that a number of men



were collected there, went over to Fakiroollah's bari, and there found the same state of things. It appears that a number of Dost Mahomed's people followed the constable, and took up a position on certain land belonging to one Dhunnoo Sircar, south of, and immediately adjoining, the homestead land of Fakiroollah. When the constable, having had a report written, and having sent it to the thannah by Bhugwan Chowkidar, came out of the cutcherry recently erected on Fakiroollah's land, south of his bari or homestead, Dost Mahomed represented to him that a number of armed men were collected within the homestead of Fakiroollah, and urged him (the constable) to arrest them. When the constable hesitated to do so, Dost Mahomed called his own men to assist him in carrying out his expressed intention of doing so himself. It would appear either that a considerable number of Dost Mahomed's men had remained behind at Dost Mahomed's bari, or that Dost Mahomed had miscalculated the strength of Fakiroollah's party. Be this as it may, Fakiroollah's people did not wait for Dost Mahomed's men to come on Fakiroollah's land, but they took the initiative, and crossed the boundary line into the land of Dhunnoo Sircar, and there the riot commenced, and first took place.

Under these circumstances I think it is impossible to say that Khan Saheb's party were acting on the defensive merely, or, in other words, were acting in the exercise of the right of private defence of person or property. It is quite clear that both parties were armed, and both parties were prepared to fight, and that a very trivial incident was sufficient to bring them into conflict. I think it is reasonable to say that, in entering upon that conflict, each party had for its object to fight for victory, and in doing so, knowingly and deliberately took upon itself the risks of the encounter, to this state of facts I agree that the 5th exception to s. 300 of the Penal Code is applicable, and I do not think it very material which party were, in the first instance, the actual aggressors, though this should be considered in awarding the punishment. When a man, being one of an armed band, and being himself armed with a deadly weapon, as there is evidence to show that Khoaz, who was on this occasion killed, was armed, takes part in a fight, and uses that deadly weapon against his opponents, I think it is reasonable to say that he was, within the 4th clause of s. 300, committing an act which he knew to be so imminently dangerous, that it must, in all probability, cause death or such bodily injury as is likely to cause death; and I think further that he committed such act without any excuse for incurring the risk of causing death or such injury as has just been mentioned. When he and his party are opposed by a number of persons similarly armed, and using their arms in a similar way, I think it is reasonable to say that such person, within the meaning of exception 5, takes the risk of death with his own consent.

*Order as to conviction and sentences varied.*

#### NOTES.

[The majority of the Court dissented from this ruling in (1891) 18 Cal. 484 F. B. as regards the inference of consent to take the risk of death.

See, however, the comments of Mr. **Mayne** in his *Criminal Law* (1904), at pp 667-670.]

[6 Cal. 161]  
APPELLATE CIVIL.

The 25th August, 1880.

PRESENT :

MR JUSTICE WHITE AND MR. JUSTICE FIELD

In the Matter of the Petition of Shrish Chunder Mookhopadhyā and another \*

*Order of Civil Court authorising lease of Minor's property—Act XL of 1858, s. 18.*

On an application under s. 18† of Act XL of 1858 for leave to deal with the property of an infant, the Civil Court is bound to determine the question, whether the proposed mode of dealing with it would if sanctioned, be for the benefit of such infant and the petition should contain all the materials reasonably required to enable the Court to decide that question

The decision of GARTH, C J in *Sikher Chund v. Dulputty Singh* (I. L. R., 5 Cal. 363) followed

THIS was an application by Nitumbini Debi, the mother and guardian of her two minor sons, for leave, under s. 18 of Act XL of 1858, to lease out certain lands, the property of the infants. The Civil Court, on such application, made the following [162] order —“I decline to sanction the proposed lease, the guardian must act on her own responsibility.” The applicant, thereupon, appealed to the High Court

Baboo Hem Chunder Banerjee, Baboo Alobinash Chunder Banerjee and Baboo Omakalāy Mookerjee for the Appellant

The Judgment of the Court (WHITE and FIELD, JJ) was delivered by

**White, J.**—This is an appeal against the order of the Judge of the 24-Pargannas, declining to sanction a lease, which sanction was applied for by Nitumbini Debi, as guardian of her two infant sons, under s. 18 of Act XL of 1858.‡

The case was opened to us as one in which the Court had refused to go into the question of whether the proposed lease was for the advantage of the infants or not, but the order, when read, shows that the Judge merely declined to sanction the lease, and having regard to the materials that were put before him in the petition, we cannot say that he was wrong

In applications under s. 18 the Court is bound to go into the question, whether or not the proposed sale is one which it is for the benefit of the infant that the guardian should be empowered to execute. On this point we may adopt the language used by the present Chief Justice in *Sikher Chund v. Dulputty Singh* (I. L. R., 5 Cal. 363, at p. 381) where he says —“The Civil Court has now not only the power, but it is bound, as I consider,

\* Appeal from Order No. 156 of 1880, against the order of J. F. Browne, Esq., Officiating Judge of the 24-Pargannas, dated the 27th April 1880

† [See 18.—Every person to whom a certificate shall have been granted under the provision of this Act may exercise the same powers in the management of the estate as might have been exercised by the proprietor if not a minor, and may collect and pay all just claims, debts and liabilities due to or by the estate of the minor. But no such person shall have power to sell or mortgage any immoveable property or to grant a lease thereof for any period exceeding five years, without an order of the Civil Court previously obtained.]

under that section to enquire\* into the circumstances of each case and to determine whether, as a matter of law and precedence, it is right that any proposed sale or mortgage of the minor's property should take place."

The petition in the present case contains a statement of the proposed lease on behalf of the infants, and that its execution is necessary in order to avert the disposal of the property by the creditors of the infants' father, but it is defective in not stating the amount of premium that is to be taken from the intended lessee, the amount of rent that is reserved by the patni lease, and the annual rent of profits which are at present derived from the property proposed to be leased.

[163] The petitioner, therefore, did not furnish the District Judge with all the materials which he reasonably required in order to enable him to form a correct opinion as to whether the lease was for the benefit of the infants or not.

We must dismiss the appeal, but at the same time we think it right to intimate that this dismissal will not prevent a second application from being made to the District Judge under s. 18, based upon further and better materials, and that if these materials show that the granting of the proposed patni lease is for the benefit of the infants, the Court should give the necessary power to the guardian to make or join in the grant. In dealing with these materials, the Court will consider the allegation of the guardian that the granting of the patni lease is necessary to avert the disposal of the property by the creditors of the infants' father.

#### NOTES

[This authority holds good under the current Guardian and Wards Act, 1890.]

[6 Cal. 163]

#### CRIMINAL REFERENCE.

*The 28th June, 1880.*

PRESENT

MR. JUSTICE TOTTENHAM AND MR. JUSTICE MACLEAN.

The Empress

*versus*

Nistar Raur :

*Contagious Diseases Act (XIV of 1868), ss. 11, 21—Rules 13 and 27 passed under the Act—Magistrate, Competency of Jurisdiction.*

Any woman desirous of ceasing to carry on the business of a common prostitute is, under the provisions of the Indian Contagious Diseases Act, 1868, absolutely entitled to have her name removed from the register, and any rule, or portion of a rule, purporting to have been framed under the provisions of that Act which places any obstacle on the way of her doing so, is *ultra vires*, and therefore void.

Where a woman is prosecuted before a Magistrate under s. 11 of Act XIV of 1868, she is not precluded from pleading that she has ceased to be a common prostitute, and that she has

\* Criminal Reference, No. 106 of 1880 from B. L. Gupta, Esq., C.S., Presidency Magistrate of Calcutta, Northern Division, dated the 29th May 1880.

taken steps, under s. 21 and the rules framed thereunder, for the removal of her name from the register; and the Magistrate is competent to entertain such a defence.

*In the matter of Lakhmani Raur* (8 B. L. R., A. Cr., 70) approved.

[164] THIS was a reference from the Presidency Magistrate for the Northern Division of Calcutta, in which it appeared that the defendant, Nistar Raur, was registered as a common prostitute under Act XIV of 1868, and her name was still borne on the register, which was produced in evidence before the Magistrate. She was several times convicted and fined for failing to appear in due time for periodical medical examination, and her fifth and last conviction was on the 23rd of March 1880

It would seem, however, from the records of the Police Office, produced in evidence, that in February 1880, an application on behalf of Nistar was presented to the Deputy Commissioner of Police, informing him that she had ceased to be a common prostitute, and was living under the protection of a certain individual, and praying that her name might be removed from the register. The application was rejected. Later on, a second application on her behalf, claiming exemption on the same grounds, was presented to the Commissioner of Police by her attorney, Mr. Leslie, in person. A Police enquiry was ordered, and pending the result of such enquiry the woman presented herself for examination on one occasion. No orders on the petition were received for some time after this, and Mr. Leslie deposed that he made more than one attempt, but failed to obtain a hearing for his client. Upon this he intimated to the Commissioner that he would advise his client not to appear at her next examination, so that in case of a prosecution she might have an opportunity of contesting her rights before the Court. The result of these proceedings was the arrest of the woman by the Police without a warrant from any Magistrate, and this prosecution under s. 11 of the Act.

The first question raised related to the legality of the arrest. The Police are expressly authorized, by rule 27 of the Government rules, to arrest all registered women defaulting at the medical examination. But before the Magistrate it was contended that the rule itself, which purports to have been made under s. 11 of the Act XIV of 1868, was unauthorized by that Act, and was therefore *ultra vires*.

The next question raised related to the jurisdiction of the Magistrate in the case, and to the validity of rule 13 passed [165] under s. 21 of the Act. Rule 13 provides that applications by women to have their names removed from the register should be made in writing to the Commissioner of Police, who, if satisfied, on enquiry, that the applicant has really ceased to practise as a prostitute, "may cause her name to be removed from the register." Neither the Act nor the rules indicate any other mode by which a woman once registered may procure her exemption, and the rules provide no appeal from the Commissioner's orders. It was contended, therefore, that the Commissioner's orders were final, and the Magistrate had no jurisdiction to go into the question as to whether the woman had ceased to be a common prostitute. On the other hand, it was contended that s. 21 of the Act confers an absolute right on every registered woman to withdraw her name at her option from the register, and leaves it to the Government only to prescribe the procedure or mode by which she may do so; so that as no woman's name, nor even that of a declared common prostitute, can be placed on the register against her will, or without her consent; so no woman's name can continue on the roll after she has, in the manner prescribed by Government, applied for the removal of her name; and that if a woman, after the removal of her name from the book, still continues to carry on the business of a common prostitute, the only course left to the

Police is to prosecute her for each repetition of the offence under s. 4\* of the Act. It was, therefore, urged that rule 13, investing the Commissioner of Police with a discretionary power to reject applications made under s. 21,† was inconsistent with the real import of that section, and therefore null and void. The ruling of the High Court in *In the matter of Lakhmani Raur* (3 B. L. R., A. Cr., 70) was referred to.

On the evidence before him, the Magistrate found, as a fact, that the accused had ceased to be a common prostitute within the meaning of the Act; and he referred the following questions of law for the opinion of the High Court under s. 240 of Act IV of 1877:—

*1st*—Is rule 27 of the rules passed by the Government of Bengal, under Act XIV of 1868, valid in law, and is a woman registered under that Act legally liable to arrest by a Police [166] officer without a warrant, for omitting to attend at the periodical medical examination?

*2nd*—Is rule 13 of the said rules consistent with the Act, and can the Commissioner of Police, in his discretion, lawfully refuse to remove from the register the name of a woman who declares herself desirous of ceasing to practise as a common prostitute, and applies for such removal?

*3rd*—In either case, is a registered woman, whose application to the Commissioner of Police for the removal of her name from the register has not met with success, precluded from pleading before the Magistrate, on a prosecution under s. 11 of the Act, that she is not, or has ceased to be, a common prostitute, and is the Magistrate competent to enquire into such a plea?

Mr. R. Allen and Mr. R. N. Mitra for Nistar Raur.

The following **Judgments** were delivered.—

**Maclean, J.**—This is a reference made by one of the Presidency Magistrates of Calcutta, under s. 240, Act IV of 1877, submitting for the opinion of the Court three questions of law arising out of a prosecution under Act XIV of 1868, s. 2.

The first question raises a point which does not affect the case before the Magistrate, who has to decide whether the person charged before him has committed the offence imputed. We think it unnecessary to express any opinion on this point.

We think that, as every woman registered under the Act has an absolute right to have her name removed "from the book," if she is desirous of ceasing to carry on the business of a common prostitute, any rule which raises any obstacle to the exercise of that right is not in accordance with s. 21 of the Act.

\* [Sec. 4.—In any place to which this Act applies, no woman shall carry on the business of a common prostitute and no person shall carry on the business of a brothel-keeper, without being registered under this Act at such place, and without having in her or his possession such evidence of registration as hereinafter provided.

Any woman carrying on the business of a common prostitute, and any person carrying on the business of brothel-keeper without having been registered as aforesaid, or without having in her or his possession such evidence as aforesaid, shall, on conviction before a Magistrate, be punished with imprisonment for a term which may extend to one month, or with fine not exceeding one hundred rupees, or with both.]

† [Sec. 21.—The Local Government shall lay down rules prescribing a procedure in accordance with which any woman registered under this Act and desirous of ceasing to carry on the business of a common prostitute in the place at which she is registered and of having her name removed from the said book, may have her name removed accordingly.]

Removal of name from registry.

Part of the 13th rule referred to by the Magistrate, commencing "may postpone" and ending "satisfied he," appears to be *ultra vires*. We answer the second question in the negative.

The third question refers to the Magistrate's competency to entertain a woman's plea that she is no longer lawfully retained on the register, and is therefore not liable to be punished for breach of the rules applicable to registered women. In our opinion, a woman prosecuted for an offence under s. 11 is not [167] precluded from pleading that she has ceased to carry on the business of a common prostitute, that she has taken the steps prescribed by s. 21 and the rules framed in accordance therewith to obtain the removal of her name from the register, and that, if it is still retained there, it is retained contrary to law. This opinion is, we think, supported by the authority of this Court in the case to which the Magistrate refers—*In the matter of Lakhmani Raur* (3 B. L. R., A C , 70). It was there held, that the Magistrate was bound to enquire into the plea that the woman before him had not been lawfully registered, because she has not consented to it, and, on the same principle, we think that, in the present case, it is the Magistrate's duty to determine whether or not the woman has been lawfully retained upon the register, and if not, whether she had, in fact, ceased to carry on the business of a common prostitute or not when the proceedings were taken against her.

**Tottenham, J.**—I have no doubt that rule 27 is legal in authorizing arrest without warrant, but the Magistrate cannot go into this question. I think that rule 13 is beyond the scope of s. 21 of the Act in allowing the Commissioner of Police to retain a woman's name on the register as long as it pleases him to do so. I read the law as leaving it at the option of the woman to be put on the register and to remain on it. She comes off at her own peril, but there is no authority given by law for keeping her name on the register against her will.

I also think that a woman brought before the Magistrate for breach of rules under s. 11 of the Act is entitled to plead that she has conformed to the procedure by Government under s. 23 of the Act, that she is not a common prostitute, that if she is still on the register, she is kept there against the law, and is not liable to be punished for neglecting to attend for examination. The Magistrate, I think, should acquit her if he finds her plea to be true.

## [168] APPELLATE CIVIL.

*The 11th August, 1880.*

PRESENT:

MR. JUSTICE WHITE AND MR. JUSTICE FIELD

Nubbi Buksh.... Judgment-debtor

*versus*

Chasni .. ... Decree-holder.

*Appeal—Insolvency—Refusal to grant application to be declared Insolvent—**Code of Civil Procedure ( Act X of 1877), ss. 351, 588 cl. 17*

An order refusing to grant an application to be made an insolvent, is appealable under cl. 17, s. 588 of the Code of Civil Procedure

Such an order must be considered to be one made under s. 351.

*Juggutjeebun Gooptoon v. Haro Coomari Pal* (I. L. R., 5 Cal., 719) dissented from

THE facts relevant to this report sufficiently appear in the judgments of the Court

Baboo Aushoolosh Dhan and Munshee Serajul Islam for the Appellant

Mr. H. Bell and Mr. Trevelyan (with them Baboo Bama Churn Banerjee, Baboo Ankkil Chunder Sen, and Baboo Juggut Chunder Banerjee) for the Respondent.

The **Judgments** of the Court (WHITE and FIELD, JJ.) were as follows —

**White, J.**— This is an appeal against an order of the Officiating Judge of Dacca, refusing an application, on behalf of Nubbi Buksh Bopari, to be declared an insolvent under s. 351 of the Code of Civil Procedure

A preliminary objection is taken, that the appeal does not lie *first*, on the ground that the order being one of refusal is not made under s. 351. and *secondly*, because, if made under that section, no appeal lies against an order of refusal, but only against an order granting the application.

Section 588, cl. 17, of the Code gives an appeal against an order under s. 351 in these words—“orders in insolvency matters [169] under s. 351.” Now, as regards the first objection, I think that the order under appeal, although one of refusal, was made under s. 351. This is the only section under which the District Court can deal with an application by an insolvent judgment-debtor to be made an insolvent. Neither that section, nor any other section in the chapter, expressly authorises the Court to refuse the application, but from the language of the 351st section, as well as from the nature of the case, it is obvious that the Court has such power, for s. 351 directs that the Court may, if satisfied as to certain particulars, declare the applicant to be an insolvent, which implies that, if not so satisfied, the Court may refuse the application. It appears to me to follow from these data that an order refusing an application is as much made under s. 351 as an order granting an application, unless the former order can be supposed to be made under no section of the Code, which could not, I apprehend, be seriously contended.

\* Appeal from Order No. 98 of 1880, against the order of R. F. Rampini, Esq., Officiating Judge of Dacca, dated the 29th March 1880

Taking the order to be made under s. 351, the second objection cannot, in my opinion, prevail against the natural meaning of the words used in cl. 17 of s. 588. The words "orders in insolvency matters under s. 351" are wide enough to embrace any order made under that section, whatever its nature may be; and an order made by a Court in the course of disposing of an application is not the less the order of the Court because it refuses the application. Where the Legislature intended to confine the right of appeal to one species of order, it has used clear and appropriate words, as for instance, in cl. 27 of s. 588, where an appeal is only given in respect of orders of refusal under s. 558. This question has been the subject of decision by more than one Bench of this Court. In the earlier decision—*Mumtaz Hossein v. Brij Mohun Thakoor* (I. L. R., 4 Cal., 888)—the objection was disallowed. Mr. Justice JACKSON, who pronounced the judgment of the Court, says:—"It appears to us that the term 'insolvency matter' is purposely wide so as to include any question arising out of the exercise of the functions entrusted to the Courts under the section specified." That decision, and the reasons upon which it is founded, commend themselves to our judgment. The second decision was passed about a year and [170] a quarter afterwards—*Juggutjeebun Gooptoo v. Haro Coomar Pal* (I. L. R., 5 Cal., 719). In this decision the objection prevailed, but I am unable to gather from the report the precise ground upon which it was allowed to do so. It is to be observed that the earlier decision of Mr. Justice JACKSON and Mr. Justice McDONELL was not cited. Under these circumstances I think that we are at liberty to act upon that authority, which appears to us to be most in conformity with the true construction of cl. 17, s. 588.

For these reasons, we are of opinion that an appeal lies to this Court against the order refusing to declare Nubbi Buksh an insolvent.

(The learned Judge then went into the evidence in the case, and dismissed the appeal on the merits).

**Field, J.**—In this case a preliminary objection has been made that no appeal will lie. In other words, it is contended that an order refusing to declare a person an insolvent does not come within the meaning of the words "orders in insolvency matters under s. 351" in cl. 17, s. 588 of the Code of Civil Procedure. Section 351 is as follows:—"If the Court is satisfied that, &c. . . the Court may declare him" (*i.e.*, the applicant) "to be an insolvent." This section contains no express provision empowering the Court to refuse an application made by a judgment-debtor asking to be declared an insolvent, and I may add that no such express provision is to be found in any other section of the Code. The question then arises, under what section does the Court make an order refusing to declare a person to be an insolvent. That it has power to make this order there can be no doubt.

It appears to me that, although the provisions of s. 351, in their express language, empower the Court to make an affirmative order only, yet, by necessary implication, they must be understood to give the Court the further power to make a negative order,—*i.e.*, an order refusing to declare the applicant to be an insolvent, and that an order refusing to declare an applicant to be an insolvent is, therefore, made under s. 351. If cl. 8 of s. 588, read with s. 103 of the Code,—cl. 9 of s. 588, with s. 108,—cl. 7 of s. 588, with s. 111,—cl. 19 of s. 588, with s. 370,—[171] cl. 20 of s. 588, with s. 371,—cl. 21 of s. 588, with s. 372,—and cl. 27 of s. 588, with ss. 558 and 560,—it will be abundantly manifest (more especially as regards ss. 371, 558, and 560) that orders refusing to grant applications under certain sections of the Code are understood to be made under those



particular sections which expressly confer the power only of granting applications, and do not contain express words authorising the Court to make orders refusing such applications. I think further that this interpretation is supported by the construction put by their Lordships of the Privy Council upon the 76th section of the Registration Act in the case of *Reasut Hossein v. Hadjee Abdoolah* (L. R., 3 I. A., 221, at pp. 225, 226; s.c., I. L. R., 2 Cal., 131, at p. 137).

I concur in the judgment which has just been delivered on the merits.

*Appeal dismissed.*

#### NOTES.

[The right of appeal is now governed by the Provincial Insolvency Act (III of 1907) Sec. 46, which gives a right of appeal to any person aggrieved by an order made in the exercise of insolvency jurisdiction; and orders under Sec. 15 are appealable.

By reasoning similar to that in this case an order rejecting an application to appoint a Receiver was held appealable: (1886) 10 Mad 179 F.B., similarly from an order refusing to set aside an injunction: (1892) 15 All. 8.]

[6 Cal. 171]

#### FULL BENCH.

*The 1st June, 1880.*

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE JACKSON,  
MR. JUSTICE PONTIFEX, MR. JUSTICE MORRIS, AND MR. JUSTICE MITTER.

Gujju Lall.....Defendant

*versus*

Fatteh Lall. ....—Plaintiff."

*Evidence Act I (of 1872), ss. 13, 40, 41, 43—Admissibility in evidence of Judgment not  
"inter partes."*

*Per GARTH, C.J., JACKSON, PONTIFEX, and MORRIS JJ. (MITTER, J., dissenting).—*A former judgment, which is not a judgment *in rem*, nor one relating to matters of a public nature, is not admissible in evidence in a subsequent suit, either as a *res judicata*, or as proof of the particular point which it decides, unless between the same parties or those claiming under them.

In a suit between *A* and *B*, the question was, whether *C* or *D* was the heir of *H*. If *C* was the heir of *H*, then *A* was entitled to succeed; otherwise not. The same question had been raised in a former suit brought by *X* against *A*, and decided against *A*; and this former judgment was admitted in evidence in this suit between *A* and *B*, and dealt with by the Courts below as conclusive evidence against *A* upon the point so decided.

*Held (MITTER, J., dissenting)* that the former judgment was not admissible as evidence in the suit between *A* and *B*, either as "a transaction" under s. 13, or as "a fact" under s. 11, or under any other section of the Evidence Act.

[172] THIS was a suit to recover possession of certain property, the ultimate determination of which suit in favour of the plaintiff depended on the

Full Bench on Special Appeal, No. 2307 of 1878.

admission in evidence of a certain judgment in a former suit, to which the present plaintiff was no party, but in which the present defendant was the plaintiff. The question as to whether this judgment should have been admitted in evidence was referred by GARTH, C.J., and MITTER, J., to a Full Bench in the terms of the following order :—

**Garth, C.J.**—This special appeal depends upon a question of law, which we think should be referred to a Full Bench.

It was admitted on both sides in the lower Courts, that if Sham Behari Lall survived Mussamut Sheo Bucham Koer, then the plaintiff was the nearest heir of Bhichuk Lall, and as such was entitled to succeed ; but if, on the other hand, Mussamut Sheo Bucham Koer survived him, then he was not so entitled.

In the Court of first instance, the plaintiff relied upon a judgment in a former suit, dated the 26th of June 1876, in which the question was raised between Gujju Lall, the present defendant (who was the plaintiff in that suit), and Janki Singh and others (the defendants in that suit), whether Gujju Lall or Sham Behari Lall was the nearest heir of Bhichuk Lall. It was decided in that suit that Sham Behari Lall was the nearest heir of Bhichuk Lall. In this suit it was contended by the defendant in both the lower Courts, that the judgment in the former suit could not be used as evidence in this suit, because the present plaintiff was no party to the former proceedings, while the plaintiff on the other hand, contended that the former judgment was admissible in evidence under s. 13 of the Evidence Act, as being a transaction by which the right claimed in this suit by the plaintiff was asserted and denied. Both the Courts considered the judgment admissible in evidence, and upon the strength of it decided in the plaintiff's favour.

It has now been contended before us on special appeal, that the lower Courts were wrong in admitting the former judgment as evidence in this case, and upon this one point the special appeal depends.

[173] It has been decided by this Court in several cases, three of which are reported in 23 W. R., pages 162, 293, and 311, that decrees in suits between third parties are admissible in evidence under s. 13 of the Evidence Act, whilst in other cases in this Court such evidence has been constantly rejected.

The question, therefore, referred to the Full Bench is, whether, under s. 13, or any other section of the Evidence Act, the judgment in the former suit, which was admitted and acted upon as evidence in this suit, was legally admissible ?

Mr. M. Ghose (with him Bahoo Jogesh Chunder Dey) for the appellant. — The status of heirship was really determined in the former suit between the defendant in the present suit and a stranger. It was not intended that the words "existence of a right or custom," used in s. 13 of the Evidence Act, should include any and every right. The Evidence Act did not alter what was the previous law on the subject,—viz., the English law. It was intended by this section to include the class of cases such as right of ferries and roads, and all cases in which judgment *inter alios* are admissible.—All that s. 13 of the Act has done, is to adopt Sir Barnes PEACOCK'S judgment in *Kankya Lall v. Radha Churn* (B. L. R., Sup. Vol., 662 ; s.c., 7 W. R., 338). [GARTH, C.J.—The rule in England only applies to public rights.] It will probably be contended by the other side that, under s. 43, the judgment is admissible. Before the Evidence Act was passed, such judgments were not admissible in evidence, and it was not the intention of the framers of the Act to make any alteration.

Clause 4 of s. 32 also shows that the right or custom must be a public right or custom. I contend that the word "right" means a right of a public character or of a *quasi*-public character. Under s. 13 this judgment is not evidence. The cases on which the other side relies are *Neamat Ali v. Gooloo Doss* (22 W.R., 365) and *Guttee Koiburto v. Bhukut Koiburto* (22 W. R., 457), but the judgments there appear to be *inter partes*. The case of *Hunsa Koer v. Sheo Gobind Raoot* (24 W.R., 431) was the case of an *ex parte* decree, and that was held as admissible in [174] evidence "*quantum valeat*" *Naranji Bhukhabhai v. Dipaumed* (I.L.R., 3 Bom., 3) points out that such judgments as the one in question are at best not conclusive evidence; see also *Jogendra Deb Roy Kut v. Funindro Deb Roy Kut* (14 Moore's I. A., 367, s.c., 11 B.L.R., 244), in which the decision of the Full Bench in the case of *Kanhya Lall v. Radha Churn* (B.L.R., sup. Vol., 662, s.c., 7 W.R., 338) is adopted. There are also cases since the passing of the Evidence Act, in which judgments *inter partes* have been rejected. [GARTH, C.J.—Section 91 of Vol. I of Taylor on Evidence (7th ed.) lays down "that such judgments are not admissible, except by way of demurrer or estoppel."]

*Baboo Mohesh Chunder Choudhry* for the Respondent — Although the present plaintiff was no party to the judgment in question, yet the defendant was; and the Evidence Act did not intend to exclude as evidence all judgments which do not come under s. 40. The case of *Lala Ranglal v. Deonarayan Tewary* (6 B.L.R., 69) points out that such a judgment as the present is admissible.

The **opinion** of the Full Bench was as follows :—

**Mitter, J.**—In this case I have the misfortune to differ from his Lordship the Chief Justice and my other colleagues. But the importance of the question referred to the Full Bench, and the fact that the majority of the decided cases on the point are in favour of the view I take, I apprehend, justify me in stating fully the grounds of the conclusion at which I have arrived.

Sections 40 to 43 of the Evidence Act deal with the subject of relevancy of judgments, orders, or decrees of Court. Section 40 provides that the existence of a judgment, decree, or order is a relevant fact, if it by law has the effect of preventing any Court from taking cognizance of a suit or of holding a trial. Section 41 deals with what are usually called judgments *in rem*, and by s. 42 judgments relating to matters of a public nature are declared relevant, whether between the same parties or not. Then s. 43 provides that "judgments, orders, or [175] decree, other than those mentioned in ss. 40, 41, and 42, are irrelevant, unless the fact that such a judgment, order, or decree existed is relevant under some other provision of this Act."

It is clear that the judgment mentioned in the order of reference is not relevant under ss. 40 to 42. Therefore, the question that we have to determine is, whether or not it is relevant under some other provision of the Evidence Act, so as to bring it within the proviso of s. 43.

I am of opinion that it is relevant both under ss. 11 and 13. I shall deal with the question of its relevancy under s. 13 first. That section provides.—

"When the question is as to the existence of any right or custom, the following facts are relevant :—

(a) Any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted, or denied, or which was inconsistent with its existence.

(b) Particular instance in which the right or custom was claimed, recognized, or exercised, or in which its exercise was disputed, asserted, or departed from."

The existence of a right to some immoveable property is in question in this case. That right was asserted and recognized in a previous proceeding of a Court of Justice, and it seems to me that it would not be unwarrantably straining the language of the section in question to say, that that proceeding was "a transaction" within the meaning of s. 13; because the word "transaction" in its largest sense means "that which is done."

If the words "transaction" and "right" be not construed in this way, judgments, decrees, and orders which were, before the passing of the Evidence Act, considered conclusive, and which now, according to the law of evidence as administered in England, are considered, when not pleaded as estoppel, cogent evidence, would be excluded. Take for example the following illustration:—A brings a suit against B for enhancement of rent. B sets up a mukurrari potta in defence. A Court of competent jurisdiction finds the potta to be genuine, and dismisses the suit. After the lapse of several years, B sells his right to C, and A then rejects the latter forcibly. Thereupon [176] C brings a suit against A to recover possession of the land covered by the mukurrari potta. A denies the mukurrari right, and alleges that B was a tenant-at-will. Before the Evidence Act was passed, the former judgment would have been conclusive evidence of B's mukurrari: see *Soorjomonee Dayee v. Suddanund Mohapatter* (12 B.L.R., 304) and *Krishna Behari Roy v. Brojeswari Chowdhranee* (L.R., 2 I. A., 283; S.C., I. L. R., 1 Cal., 144). According to the law of evidence as at present administered in England, it would equally be considered conclusive, and, if not conclusive, at least as cogent evidence in the subsequent suit. See Taylor on Evidence, section 1497.

Was it intended by the Evidence Act to declare such judgment as this irrelevant? But it would be irrelevant, unless it be relevant either under s. 11 or s. 13. It is not relevant under s. 40, because its existence does not by law prevent the Court from "taking cognizance of the second suit." In the second suit it is the plaintiff who would seek to use it as relevant evidence, and it is apparent that he would not rely upon it to bar the cognizance of his own suit. It may be said that, under s. 13 of the present Procedure Code, the existence of the first judgment would prevent the Court from holding a trial of the issue as to the mukurrari right of B, and would therefore be relevant under s. 40. Supposing that the word "trial" in the section in question refers not only to a criminal trial, but also to a "trial" of an issue in a civil suit, the judgment in question would not have been relevant under this section before the present Procedure Code was passed, because, under s. 2\* of Act VIII of 1859, it would not have prevented any Court from holding a trial of the issue as to the mukurrari title in the second suit. Then again, suppose in the second suit the judgment in question was not produced at or before the trial, and evidence bearing upon this issue was allowed to be adduced. Then suppose at a later stage of the case, the plaintiff produced the judgment in question and satisfied the Court, that, in the exercise of its discretionary power, it ought to receive it. Under these circumstances, I apprehend it would not be admissible under s. 40 of the Evidence Act, because its existence would and could not

\*[Sec. 2:—The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim.]

Unless suits previously heard and determined.

at that stage [177] of the case prevent the Court from holding a trial of the issue regarding *B's* mukurrari title.

The judgment in question then, at least in some cases, not being admissible under s. 40, and it being evident that it is not admissible under ss. 41 and 42, it would be excluded altogether, unless its existence be relevant under some other provision of the Act. But if we construe the words "transaction" and "right" in s. 13 in their largest sense, it would be relevant under that section.

But it has been said that law of evidence as administered in England, was the law of evidence in force in this country before the Evidence Act was passed; that the judgment of the description mentioned in order of reference is and was not admissible under English law; and that if the Legislature intended to alter the law in this respect, it would have done so by a more clear and express provision than what is contained either in s. 13.

But I apprehend that the law of evidence as administered in England was not, in its integrity, the law in force in this country before the passing of the Evidence Act. The statutory provision on this subject was contained in the second paragraph of s. 24 of Act VI of 1871, which is to the following effect: "In cases not provided for by the former part of this section or by any other law for the time being in force, the Court shall act according to justice, equity, and good conscience." This is only a re-enactment of the provision of s. 15 of Regulation III of 1793. Therefore, so far as the legislative enactments go, there is no foundation for this proposition.

Upon an examination of the decided cases on the subject, it would be found to be equally untenable.

The question was fully discussed by Mr. Justice MARKBY in *Doorga Doss Roy Chowdhry v. Norendro Coomar Dutt Chowdhry* (6 W. R., 232), and he came to the conclusion that the rule of English law was not applicable "in all its strictness" to mofussil Courts in this country. I may as well cite here the observation of the Judicial Committee upon this point in the [178] case of *Unide Rajaha Roje Bommarauze Bahadur v. Pemmasamy Venkatadry Naidoo* (7 Moore's I. A., 128, at p. 137):—

"With regard to the admissibility of evidence in the native Courts in India, we think that no strict rule can be prescribed. However highly we may value the rules of evidence as acknowledged and carried out in our own Courts, we cannot think that those rules could be applied with the same strictness to the reception of evidence before the native Courts in the East India, where it is perfectly manifest, the practitioners and the Judges have not that intimate acquaintance with the principles which govern the reception of evidence in our own tribunals; we must look to their practice; we must look to the essential justice of the case, and not hastily reject any evidence, because it may not be accordant with our own practice. We must endeavour, as far as the materials will allow us, having received the evidence, to ascertain what weight ought properly to be ascribed to it; and more especially where we find that it has been the practice of the Court to receive documentary evidence without the strict proof which might here be considered necessary; indeed, the consequence of so doing would inevitably be, if the strict rule were adhered to, to reject the most important evidence not only in this case, but almost in every other."

In another case (*Naraguntty Lutchmeedavamah v. Vengama Naidoo*, 9 Moore's I. A., 66, at p. 30) Judicial Committee observed that "the native Courts of India in receiving evidence do not proceed according to the technical

rules adopted in England, and they would, by their usual practice, admit a copy of a public document authenticated by the signature of the proper officer, as *prima facie* evidence, subject to further enquiry if it were disputed."

There is, therefore, no foundation for the proposition that, before the passing of the Evidence Act, the law of evidence as administered in England was applied with all its technical strictness to mofussil Courts in the country. On the other hand, they were guided by their own practice, which was to a great extent moulded on principles of substantial justice.

[179] Acting upon this principle, the Courts in this country, before the passing of the Evidence Act, always held that judgments of the description mentioned in the order of reference were admissible in evidence. See *Doorga Doss Roy Chowdhry v. Narendro Coomar Dutt Chowdhry* (6 W. R., 232) and *Lala Ranglai v. Deonarayan Tewary* (6 B. L. R., 69). In this latter case, speaking of a judgment of the description mentioned in the order of reference, Mr. Justice D. N. MITTER says:—"That decisions like the one under our consideration have been frequently admitted in our Courts as evidence, is, I believe, a proposition beyond all dispute, and I do not see any reason why we should depart from this practice merely because it is opposed to the English law of evidence." The observation of Mr. Taylor in s. 1495 shows that, in his opinion also, the propriety of this rule of English law is questionable.

The law of evidence as administered in England was not, therefore, in its integrity, the law in force in the mofussil Courts of this country, and according to the practice of these Courts before the passing of the Evidence Act, decisions like the one under consideration were admitted in evidence. It seems to me that we ought not to come to the conclusion that this rule of law, founded as it was on a long practice of the mofussil Courts, was altered by the Evidence Act, unless that was clearly made out by the provisions of the Act itself.

Then, again, if we do not construe s. 13 in the way I have suggested above, the result would be, that a class of judicial proceedings, which were always considered as furnishing cogent evidence on the question of possession, would be excluded. I refer to awards under Act IV of 1840, and the corresponding sections of the Criminal Procedure Code. They have been invariably acted upon as affording valuable evidence of possession, even after the passing of the Evidence Act. They would not be relevant under s. 40, because, apart from other grounds, a proceeding under Act IV of 1840 before a Magistrate cannot be called "a suit" within the meaning of s. 13 of the Civil Procedure Code. Then if these awards are not admissible either under s. 11 or s. 13, they would not be relevant at all. I would hesitate to come to the conclusion that the Evidence Act was intended to exclude this class of evidence, unless it was made out as clearly as possible from its provisions.

Then it has been said that, in s. 13 of the Evidence Act, the Legislature intended to refer to incorporeal rights only, because, in other parts of the Act, for example in ss. 32 and 48, where the same word occurs in conjunction with the word "custom," it has been used in that sense. In the first place, it is by no means clear that ss. 32 and 48 deal only with incorporeal rights. It is not impossible to conceive of a corporeal right being of a public or general nature. It is true that, in the generality of cases, such rights are incorporeal, but it is by no means confined to that class only. Then in the next place, the word "right" is qualified by the word "public" in cl. 4, s. 32, and by the word "general" in s. 48. There is no such qualification in s. 13.

Moreover, no reasonable ground can be suggested for the necessity of restricting the meaning of the word "right" in s. 13 to the class "incorporeal." The contention of the appellant does not go to the extent of limiting the section to incorporeal rights of a public nature only. In that case, no doubt, it could be explained upon the ground that such a construction would have the effect of assimilating the provisions of the Evidence Act to the rule of English law on this subject. But the contention that the section in question refers only to incorporeal rights, whether of a public or private nature, does not seem to me to be warranted by any general principle. It is difficult to suggest a reason which would justify the existence of distinction between the rules applicable to the proof of corporeal and incorporeal rights, respectively, whether of a public or of private nature. Why should the transaction of the nature described in s. 13 be relevant when *A* claims a right of way over a piece of land held and owned by *B*, and not so when he claims the land itself, appears to me inexplicable. It seems to me that the distinction would be arbitrary. I may as well here state a special consideration which leads me to think that the Legislature, by the use of the word "transaction," intended to include proceedings of Courts also. Is it at all [181] reasonable to suppose that a mere assertion of a right by a person setting it up (whether that right is corporeal or incorporeal, it is quite immaterial for the purposes of this argument) would be admissible as evidence, and not the recognition of it by a Court of Justice? Certainly it seems to me to be highly improbable that that was the intention of the Legislature.

For these reasons I am of opinion that the judgment mentioned in the order of reference is relevant under s. 13 of the Evidence Act.

Then, as regards its admissibility under s. 11, it has been said that a judgment is not a fact as defined in the Act itself. It is true that the reasons of a decision cannot be called "facts" within the meaning of the Evidence Act; but the result of a particular judgment, *i.e.*, whether it is favourable or unfavourable to a particular party, is, it seems to me, a fact as defined in that Act.

Illustration (d) of s. 43 is as follows:—"A has obtained a decree for the possession of land against B; C, B's son, murders A in consequence.

"The existence of the judgment is relevant as showing motive for a crime."

Now, the decree referred to in the illustration can only be relevant under ss. 7\*, 8† or 11‡. In all these sections I find the word used is "fact," consequently it follows that the word "fact," as defined in the Act itself, includes "decrees and judgments." Besides, the definition itself is comprehensive enough to include them.

If, therefore, the word "fact," as defined in the Evidence Act, is comprehensive enough to include decrees and judgments, then it seems to me that the judgment mentioned in the order of reference would be relevant, because it having recognized the right of the plaintiff to the present suit, by itself and in connection with the circumstance that it was so recognized, notwithstanding the evidence adduced by the defendant, makes the existence of the fact in issue in this suit highly probable.

Again, it may be said, that if we are to admit the judgment under consideration as evidence, we must also hold that a judg-[182]ment to which the

\*[Sec. 7:—States that facts which are the occasion cause or effect of facts in issue are relevant.]

†[Sec. 8:—States that motive, preparation and previous or subsequent conduct is relevant under certain conditions.]

‡[Sec. 11:—Points out when facts not otherwise relevant become relevant.]

person against whom it is sought to be used was not a party, would also be admissible, because the sections in question make no distinction between these two classes of judgments. It is true that that would be the consequence, but ordinarily no weight should be attached to a judgment between other parties. A similar objection may be urged against the rule of English law, by which, in matters of public interest, such as a claim of highway, evidence of reputation from any one is receivable (see s. 545 of Taylor on Evidence). For example, in a claim of a highway alleged to be existing in an obscure village in the district of Nuddea, evidence of reputation of an inhabitant of Benares, evidently not possessing any information on the subject, would be receivable. But what weight would be attached to his testimony? Similarly, when a judgment would be sought to be used against a person who was not a party to it, ordinarily no weight ought to be attached to it. I say ordinarily, because there might be special circumstances which might give to it a weight which it otherwise would not have. For instance, if it be proved that a particular person, although not formally a party to a previous proceeding, was yet substantially represented in it, because the whole control of that proceeding was in his hands, it would be just and reasonable to allow to the previous judgment some weight in that case. It seems to me that the Legislature, in enacting these sections, have followed out the principle which was laid down by the Judicial Committee in the case already cited, *viz.*, to leave to a Court of Justice in each particular instance to assign the proper weight and value to a previous judgment that might be produced as evidence in a cause.

I would, therefore, answer the question in the affirmative.

**Pontifex, J.**—In considering the rules of evidence it is necessary to look to the reason of the matter. With respect to judgments *inter partes*, it would be unreasonable that a person who has proved his case once against his opponent, who had a full opportunity of rebutting it, should be compelled a second time to adduce his proofs against the same opponent. Otherwise there would obviously be no end to litigation.

[183] But it is by no means unreasonable that a person who has never before been put to the trouble and expense of adducing his proofs, should be treated in the same way as if his opponent had suffered no adverse judgment in any other proceeding.

The same opportunities of proof are open as were open to the successful litigant in the first proceeding. Why should a stranger to that proceeding be excused from furnishing evidence in the ordinary course?

In matters of public right the new party to the second proceeding, as one of the public, has been virtually a party to the former proceeding, and therefore he is properly excused.

The observations of the Privy Council, quoted by Mr. Justice MITTER, seem to me to refer more to matters of form than to matters of substance, and to apply to the manner in which a case should be treated by the final tribunal after having passed through all its stages.

But the matters we have to deal with is essentially one of substance and not of form, and in giving our judgment we shall be laying down the principle on which a case ought to be tried in its earliest stage.

The reason of the matter being, as it appears to me, against the admission in evidence of a judgment not *inter partes*, I think we ought not to give a final construction to ss. 11 and 13 of the Evidence Act, which construction would



also, as pointed out in the judgment of the Chief Justice which I have had the opportunity of seeing, make ss. 40—43 surplusage.

I remain of opinion that the judgment in question in this reference is neither a "fact" within the meaning of s. 11, nor a "transaction" within the meaning of s. 13.

**Jackson, J.**—In my opinion the previous judgment was not admissible as evidence in this case.

In order to arrive at a conclusion on this point, it seems to me a relevant fact that the Indian Evidence Act, 1872, was passed by the Legislature of this country under the direction of a skilled lawyer, for the express purpose of consolidating, defining, and amending the law of evidence in India; that the construction of the Act is marked by careful and methodical [184] arrangement; and that many of the more important expressions used in it are plainly interpreted.

It would be wholly inconsistent with the plan of such an enactment that a specific rule contained in one part of it should at the same time be contained in or deducible from one or more other rules relating apparently to topics quite distinct, which rules should be at the same time so expressed as to include not merely the specific rule in question, but also matters which that rule taken by itself would specifically exclude.

If we are to accept the argument for the respondent in this case, a judgment becomes relevant not only as a judgment, but also as a transaction, and again as a fact. If this be so, it is not very easy to see why the framers of the Act should have taken the trouble to frame the elaborate provisions which follow.

On the other hand, when in a law prepared for such a purpose, and under such circumstances, we find a group of several sections prefaced by the title "Judgments of Courts of Justice when relevant," that seems to me a good reason for thinking that, as far as the Act goes, the relevancy of any particular judgment is to be allowed or disallowed with reference to those sections.

But admitting, for the sake of argument, that the Act could have been drawn in so loose and unskilful a fashion, I proceed to consider whether the judgment in question can be admitted as a transaction or as a fact.

The kind of transaction relied on is that mentioned in s. 13, "where the question is as to the existence of any right or custom." It seems to me as clear as anything can be, that the "right" here spoken of is something quite distinct from *ownership*. How can it possibly be said, when the question between plaintiff and defendant is which of them is entitled to a thing, that the question relates to the *existence of a right*. That some one has a right to the property is undoubted. The question is, to whom it belongs. What is referred to in the section cited is evidently a right which attaches either to some property or to *status*: in short, incorporeal rights, which though transmissible, are not tangible or objects of the bodily senses. To this interpretation, the object, the particular facts selected, and the illustrations to the section, all seem to me to conduce.

But, in addition, I cannot look upon the description of a judgment of a Court of Justice as a *transaction* otherwise than as a misuse of language; nor can any of the verbs which must come in to complete the relevancy of such transaction be properly used in respect of judgments.

A *transaction*, as the derivation denotes, is something which has been concluded between persons by a cross or reciprocal action as it were, whereas, the judgment of a Court is something imposed by the authority of the tribunal.

But the Court neither creates, claims, modifies, recognizes, asserts, nor denies a right or custom. It determines for or against. Consequently, in every point of view from which this section can be looked at, it seems to me wholly inapplicable to the case.

But then it is said that the judgment is a fact, and a relevant fact under s. 11.

No doubt, everything which has been called into being by some agency or other, is, in the widest sense, a fact; and in a certain sense, it may be said that a judgment is a fact within the meaning of s. 3 of the Evidence Act, and facts are relevant when connected with another fact in any of the ways referred to in connection with relevancy.

Now, if we strip a judgment of the peculiar character of authority given to it by s. 40 *et seq.*, all that it amounts to is this, that *A* and *B* were before *Z*, who is a Judge on a particular day, and that *Z* formed a particular opinion on a subject as to which *A* and *B* were at issue. This, according to the argument, makes it highly probable that *X*, a different Judge, should come to the same conclusion upon a similar dispute between *A* and *C*.

That the Legislature should have intended to give that sort of efficacy to the judgments of the Courts, I should have much difficulty in believing, even if the words otherwise suggested the construction which, in my opinion, they do not.

I have had the opportunity of reading the judgment which the Chief Justice proposes to deliver, as well as the observations of my brother PONTIFEX, in both of which I generally [186] concur, and for the reasons there stated, and those which I have shortly given, I consider the evidence inadmissible.

**Garth, C. J.**—I am of opinion that the former judgment was not admissible as evidence in this suit.

It was contended, in the first place, that it was admissible under s. 13 of the Evidence Act, as being a "transaction," in which the right in question in the present suit was claimed and recognized.

I consider that the former judgment was not a "transaction," and that the right claimed in this suit is not "a right" within the meaning of s. 13.

A transaction, in the ordinary sense of the word, is some business or dealing which is carried on or transacted between two or more persons. If the parties to a suit were to adjust their differences *inter se*, the adjustment would be a transaction, and by a somewhat strained use of the word, the proceedings in a suit might also be called "transaction," but to say that the decision of a Court of Justice is a transaction, appears to me a misapplication of the term.

Then again as to the meaning of the word "right" in this section.

It is argued by the respondent's counsel, that it means any right which can possibly be made the subject of a suit; but if this were its true meaning, the provisions of the section would necessarily apply to all suits, because the plaintiff in every suit claims a right of some kind, the existence of which forms the ground of his claim. Surely, this view is inconsistent with the first sentence of the section, because that sentence seems very plainly intended to confine its operation to a particular class of suits, *viz.*, those in which "a question as to the existence of some right or custom" is raised.

It may be difficult, perhaps, to define precisely the scope of the word "right," but I think it was here intended to include those properties only of an incorporeal nature, which in legal phraseology are generally called "rights,"

more especially, as it is used in conjunction with the word "custom." It is certainly used in that sense in subsequent parts of the [187] Act (see s. 48 and sub-section 4 of s. 32), which deal with matters of public or general "right or custom;" and in s. 13 the word is probably intended to include both public or private rights of that nature. The "right of fishery" mentioned in the illustration is a right which may be either public or private, according to circumstances.

That the expression is used in this limited sense is shown also, as it seems to me, by the words with which it is associated. The right mentioned in the section is one which can be "created or exercised," which expressions are perfectly appropriate when speaking of an incorporeal right, but would be wholly inapplicable to the word "right" when used in its more extended sense. It would be quite correct to speak of the creation or the exercise of a right of way or of a franchise, but no lawyer would think of saying that a right to a chattel or to damages had been "created or exercised."

I consider therefore, in the first place, that the judgment in the former suit is not a "transaction" within the meaning of s. 13; and in the next place, that if it were, it does not relate to the sort of right which is intended by the section.

But then it is argued that if the former judgment was not admissible under s. 13, it was so under s. 11, as being a "fact," which, either by itself or taken in connection with other facts, makes the case set up by the defendant improbable.

No doubt, the former judgment decided that the present defendant was not entitled to the right which he claims in this suit, but the question is, whether that decision can be properly considered as a fact. If it can, then all judgments or decisions of a Court of Justice, whatever may be their nature, and whoever may be the parties to them, would be equally admissible under s. 11, so long as they contained an adjudication, which is adverse to the claim of either party in a subsequent civil suit. Thus a decision by a third class Magistrate in a criminal proceeding, with reference to the possession of land or other property, would be admissible as evidence in a civil suit between third parties, who were not represented in that proceeding, provided only that the decision of the Magistrate was adverse to the claim of either party to the suit. As for instance, if the [188] Magistrate decided that *X* was in possession of certain property, his decision would be admissible in a subsequent civil suit between *A* and *B*, where both claimed the same property, in order to show the improbability that, at the time of the Magistrate's decision, the property belonged either to *A* or *B*.

It is said that, in this particular case, the defendant, against whom the former judgment is sought to be used, was the plaintiff in the former suit, and had therefore ample opportunity in that suit of contradicting the evidence that was brought against him. But s. 11 makes no exception in favour of that or any other class of cases. If a previous adverse judgment is admissible in a civil suit under that section, it matters not what may have been the nature of the previous proceeding, nor who may have been the parties to it.

I consider that an adjudication or opinion expressed in a judgment, is not, properly speaking, "a fact," and certainly not a fact within the meaning of s. 11. The delivery or existence of the judgment itself may be a fact, but the decision which the judgment contains is no more a fact than an opinion expressed by any other person, who is not exercising judicial functions. Thus, if an opinion were given by the Legal Member of Council in answer to a question

by the Government, or by a person skilled in any art or science with regard to some matter especially within his own province, that opinion, as it seems to me, would be quite as much a fact, and as admissible in evidence under s. 11, as the decision of a Judge upon a question which it was his duty to determine.

But, apart from these considerations, which arise out of the particular language of ss. 11 and 13, I think that, upon far higher and more substantial grounds, it is plain that the Legislature could never have intended to allow that wholesale departure from the English law upon this subject, which the respondent's contention would involve, and that they certainly never intended to effect that departure by means of ss. 11 and 13, which professedly do not relate to judgments at all.

I suppose it must be generally acknowledged, that, with some few exceptions, the Indian Evidence Act was intended to, and did in fact, consolidate the English law of evidence.

[189] The different chapters of the Act deal *seriatim* with the relevancy and consequent admissibility of the different kinds of evidence, and upon this principle, ss. 5 to 16 deal with the admissibility of facts, whilst ss. 40 to 45 deal expressly with judgments;—and I cannot help thinking, with all deference to the opinions of those learned Judges who have expressed a contrary opinion, that if it had been really the intention of the Legislature to depart entirely from the English rule, and to make a very large class of judgments admissible here, which had never been admissible before the Act, either in England or in this country, they would have expressed their intention more plainly, by means of suitable provisions introduced into that portion of the Act which deals exclusively with judgments.

If there is one rule of law which is better known and approved than another, as being founded upon the most manifest justice and good sense, it is this; that (except in the case of judgments in *rem* and judgments relating to matters of a public nature, which are governed by a different principle) no man ought to be bound by the decision of a Court of Justice, unless he or those under whom he claims were parties to the proceedings in which it was given.

But if the construction which the respondent would put upon s. 13 is the correct one, any judgment of a competent Court, founded upon any conceivable right, would be evidence in any subsequent suit relating to the existence of the same right, although the parties to the two suits might be altogether different. And it is argued, moreover, that this radical change in the law of evidence has been brought about not by any direct enactment upon the subject of judgments, but by treating judgments as "transactions" under s. 13, and giving to the words "transactions" and "right" in that section what appears to me to be an incorrect interpretation. And with all due respect to the learned Judges who have adopted this view, I would add, that the mistake (as I consider it) into which they have fallen, has arisen, in great measure, from an erroneous supposition that under ss. 40 to 43, the English law upon the subject of judgments has been imperfectly enacted, and that, in order to give it its full scope, it is necessary to have [190] recourse to ss. 11 and 13. Thus it has been considered, that s. 40 only makes former decrees admissible when they have the effect of preventing a Court of Justice from taking cognizance of a suit, that is, from dealing with a suit in its entirety, and that the words "holding a trial" must necessarily refer to criminal proceedings only.

This construction of s. 40 would, of course, confine its operation very materially. For example, in the case of a suit for three years' rent, if a former decree had decided against the claim as regards the first year's rent

only, that decree would by law be a bar to the suit as regards that one year's rent. But in the view which has been taken of the section, the decree, though a bar to the second suit *pro tanto*, would not be admissible in evidence under that section; because it would not prevent the Court from taking cognizance of the whole suit, but only of a part of it.

So again, if, in answer to a suit, some ground of defence were set up, which had been decided against the defendant in a former judgment between the same parties, that judgment, although, undoubtedly, a legal bar to the defence set up, would not be admissible under s. 40; because it would not prevent the Court from taking cognizance of the suit, but only of a defence set up to it. But surely it could never have been the intention of the Legislature to confine the effect of s. 40 in this way, to let in as relevant evidence under that section one portion of a class of judgments which operate by law as estoppels, and to leave another portion of the same class of judgments which operate equally as estoppels to be admissible as "transactions" under some other section of the Act.

It is true that s. 40 might have been more clearly worded. It has, in fact, much the same defect as s. 2 of Act VIII of 1859, which was pointed out by the Privy Council in the case of *Soorjomonee Dayee v. Suddanund Mohapatter* (12 B. L. R., 304). But I cannot doubt that it was intended to include all judgments which by law operate to prevent a Court, whether civil or criminal, from taking cognizance of a suit, or trying any particular issue. The words "holding a trial" are amply large [191] enough to admit of this construction; and it is not because in some other Act the words "holding a trial" may have been construed to refer to criminal trials only, that we ought to confine their meaning in the same way in s. 40 of the Evidence Act.

If this view is right, it disposes, as it seems to me, of the only real difficulty suggested by the respondent; and it will be found that many of the judgments which, in the cases cited to us in argument, have been held by learned Judges to be admissible under s. 13 only, were really admissible under s. 40. Thus, in the case put by my learned brother Mr Justice MITTER in his judgment of the mukurrari potta, the former judgment would, undoubtedly, be admissible under s. 40, and would have the effect of prohibiting the Court from trying the same issue a second time. So in the case of *Naranji Bhihhabhai v. Dipaumed* (I. L. R., 3 Bom. 3), decided by Sir MICHAEL WESTROPP and Mr. Justice MELVILL, I entirely agree in the conclusion arrived at by those learned Judges, because I consider that the former decrees were clearly admissible under s. 40, and were conclusive between the parties as to the existence of the plaintiff's right at the time when those decrees were passed.

Section 40, in my opinion, admits as evidence all judgments *inter partes* which would operate as *res judicata* in a second suit. Section 41 admits judgments *in rem* as evidence in all subsequent suits where the existence of the right is in issue, whether between the same parties or not. And s. 43 admits all judgments not as *res judicata*, but as evidence, although they may not be between the same parties, provided they relate to matters of public nature relevant to the enquiry.

Putting this construction upon these three sections, it will be found that they do really embody the English law as to the admissibility of judgments as it existed at the time when the Indian Act was passed; and it would be strange, indeed, if having taken the pains to confine by these sections the admissibility of judgments to those cases where they would be admissible by English law, the framers of the Act had, by [192] another and a previous section, disregarded

the English law entirely, and had admitted as evidence all judgments, whether between the same parties or not, which related to the same subject-matter.

It is obvious that, if the construction which the respondent's counsel would put upon s. 13 is right, there would be no necessity for ss. 40, 41, and 42 at all. Those sections would then only tend to mislead, because the judgments which are made admissible under them would all be equally admissible as "transactions" under s. 13, and not only those, but an infinite variety of other judgments which had never before been admissible either in this country or in England. And it is difficult to conceive why, under s. 42, judgments though not between the same parties should be declared admissible so long as they related to matters of a public nature, if those very same judgments had already been made admissible under s. 13, whether they related to matters of a public nature or not.

But then it is said, that s. 43 expressly contemplates cases in which judgments would be admissible under other sections of the Act, which are not admissible under ss. 40, 41 or 42. This is quite true. But then I take it, that the cases so contemplated by s. 43 are those where a judgment is used not as a *res judicata* or as evidence more or less binding upon an opponent by reason of the adjudication which it contains, (because judgments of that kind had already been dealt with under one or other of the immediately preceding sections). But the cases referred to in s. 43 are such, I conceive, as the section itself illustrates, *viz.*, when the fact of any particular judgment having been given is a matter to be proved in the case. As for instance, if *A* sued *B* for slander, in saying that he had been convicted of forgery, and *B* justified upon the ground that the alleged slander was true, the conviction of *A* for forgery would be a fact to be proved by *B* like any other fact in the case, and quite irrespective of whether *A* had been actually guilty of the forgery or not. This, I conceive, would be one of the many cases alluded to in s. 43.

Then, again, it was argued, that, in this country, the rules of evidence in the mofussil, especially as to the admissibility [193] of former decrees, were never so strict as in England, and in support of that contention several cases were cited to us decided by Mr. Justice DWARKANATH MITTHER and other eminent Judges of this Court; and we were referred to certain observations made by their Lordships of the Privy Council to the same effect (see 7 Moore's I. A., at p. 137; and 9 Moore's I. A., at p. 90). But those cases, it must be borne in mind, occurred many years ago, at the time when the practice in the mofussil in this respect was very lax and before the Evidence Act was passed; and the observations of the Privy Council were made, as I humbly conceive, not as approving of this laxity of practice, but rather as excusing it, upon the ground that the mofussil Courts were not at that time so sufficiently acquainted with our English rules of evidence as to be able to observe them with anything like accuracy.

I conceive that one great object of the Evidence Act was to prevent this laxity, and to introduce a more correct and uniform rule of practice than had previously prevailed; and if that Act can now be made the means, as I trust it will, of preventing the mischief which too frequently occurs, of decrees between third parties being improperly admitted as evidence in mofussil Courts, it will prove a very valuable aid to the administration of justice. I consider that the reception of loose evidence of that kind is especially dangerous in a country like this, where unhappily decrees are so often collusively obtained for no other purpose than to make them evidence in future suits between third parties.

It was argued that, instead of binding the Courts of this country by the strict rules of evidence, it would be more desirable, and was in fact the intention of the Evidence Act, to render all decrees admissible in evidence "as facts" or "transactions," leaving it to the discretion of the Courts to attribute to each judgment its due weight. But to my thinking this liberty of action would be extremely unsafe; and I certainly am not surprised to find that the Legislature here were unwilling to leave to the subordinate Courts in this country a discretion, which it has not been thought safe or right to entrust to English Judges.

[194] I am, therefore, of opinion that the former judgment was not admissible in the present suit: and as the majority of this Court are of that opinion, the case must go back to the Court below to be decided upon the other evidence.

The appellant will be entitled to his costs in this Court; and those of the Court below will follow the result of the suit.

**Morris, J.**—I agree with the Chief Justice in holding that the former judgment was not admissible as evidence in the present suit.

### NOTES.

#### [I. ENGLISH LAW OF EVIDENCE HOW FAR REPRODUCED IN THE EVIDENCE ACT—

"I suppose it must be generally acknowledged that with some few exceptions, the Indian Evidence Act was intended to, and did in fact consolidate the English law of Evidence"—*per* Garth C.J. in 6 Cal. 171 at 188.

See also 17 Bom. 129 at 141 *per* Bayley C.J.; 14 Bom. 576 at 581; 3 Bom. 12 at 17; 3 Mad. 48 at 52; 10 Bom. 439 at 442, where it is pointed out that the Act is not a servile copy of the English Law.

#### II. JUDGMENTS WHETHER ADMISSIBLE UNDER THE EVIDENCE ACT 1872, sec. 13—

There has been much conflict of decisions and the general tendency of the Courts has been towards the views of Justice Mitter and not of the majority in this case.

In 9 C.W.N. 402 at 414 Ghose J. observed, "I am disposed to hold that the Judicial Committee in 22 Cal. 533; 19 All. 277; rather adopted the views expressed by Mitter J. in 6 Cal. 171 wherein the learned judge held that a judgment though not *inter partes* may be received in evidence either under Sec. 11 or sec. 13 of the Evidence Act." For observations to a similar effect, see also 25 Cal. 522. F.B.=2 C. W. N. 501.

The views of the Bombay High Court are contained in cases like 24 Bom. 591 at 599; 5 Bom. L. R. 230; 10 Bom. 439; 31 Bom. 143 which differ from the majority in this case.

The Allahabad High Court also dissented from the majority in this case in 12 All. 1 (affirmed in 15 All. 261). For the Madras view, see 15 Mad. 378, 30 Mad. 510;

It may be noted that the views of the majority were followed in 11 Cal. 562; 12 Cal. 207; 13 Cal. 352; 18 Mad. 73; 12 Mad. 9; 11 Mad. 116; but as shown above, the later cases do not adopt the views of the majority.

*Judgments have been held admissible in these cases.—*

- (a) for showing ancient possession and assertion of title:—22 Cal., 533 P. C.
- (b) police orders, to show nature of dispute concerning and who was entitled possession of land:—29 Cal. 187 P. C., See also 31 Bom. 143.
- (c) for showing the character of possession of land and nature of enjoyment:—11 Cal. 745; 11 Cal. 588.
- (d) for shewing who was in possession:—23 Cal. 693.
- (e) for showing the previous assertion of the title set up:—12 C. W. N. 739=9 C. L. 597; 34 Cal. 868; 7 C. L. J. 563 at 576.
- (f) for showing whether the land was *debutter* or not:—15 C. W. N. 126 at 135.]

[8 Cal. 195]

## APPELLATE CIVIL.

The 9th June, 1880.

PRESENT:

MR. JUSTICE PONTIFEX AND MR. JUSTICE McDONELL.

Mullick Ahmed Zumma, *alias* Tetur.....Decree-holder*versus*

Mahomed Syed.....one of the Judgment-debtors.\*

*Limitation Act (XV of 1877), sched. ii, art. 179†—Execution of joint decree against two or more defendants.*

In a suit for possession of land brought by A against B, C, and D, a decree was passed on the 14th of April 1874 for possession and costs against B, C, and D jointly. This decree was afterwards reversed on an appeal by B, who alone claimed the property. A then preferred a special appeal to the High Court, and on the 29th June 1877 the decision of the Judge was reversed and the decree of the Court of first instance restored.

\* Appeal from Appellate Order, No. 31 of 1880, against the order of G. E. Porter, Esq., Officiating Judge of Gya, dated the 14th October 1879, affirming that of the Subordinate Judge of that district, dated the 12th May 1877.

† [Art. 179 :—

Description of application.	Period of Limitation	Time from which period begins to run.
For the execution of a decree or order of any Civil Court not provided for by No. 180, or by the Code of Civil Procedure, Sec. 230,	Three years, or where a certified copy of the decree or order has been registered, six years.	(1) The date of the decree or order ; (2) Where there has been an appeal the date of the final decree or order of the appellate Court or ; (3) Where there has been a review of judgment) the date of the decision passed on the review ; or

(4) Where the application next hereinafter mentioned has been made, the date of applying in accordance with law to the proper Court for execution, or to take some step in aid of execution of the decree or order or

(5) Where the notice next hereinafter mentioned has been issued, the date of issuing a notice under the Code of Civil Procedure, Section 248 ; or

(6) Where the application is to enforce any payment which the decree or order directs to be made at a certain date etc.

*Explanation I.*—Where the decree or order has been passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each, the application mentioned in clause 4 of this number shall take effect in favour only of such of the said persons or their representatives as it may be made by. But when the decree or order has been passed jointly in favour of more persons than one, such application, if made by any one or more of them, or by his or their representatives shall take effect in favour of them all. Where the decree or order has been passed severally against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each, the application shall take effect against only such of the said persons or their representatives as it may be made against. But where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of them, or against his or their representatives, shall take effect against them all.

*Explanation II.*—"Proper Court" means the Court whose duty it is, whether under section 226 or 227 of the Code of Civil Procedure or otherwise, to execute the decree or order.



On the 30th December 1878, A applied to the Court of first instance for execution to issue against C and D for the costs specified in the decree passed on the 14th April 1874. C and D successfully objected in the Court of first instance and the lower Appellate Court, that more than three years having elapsed since the date of the decree, the decree for costs could not be executed, the application for execution being barred by art. 179 of sched. ii of Act XV of 1877. Held, on appeal to the High Court, that, inasmuch as B's appeal had related to the whole case, and the decree obtained by him dismissing the suit would, if not reversed, have deprived A of his right to any costs at all, A, upon succeeding in getting the original decree restored upon special appeal to the High Court, was entitled to execute such restored decree at any time within three years of the order of the High Court.

[196] THE appellant brought a suit against Mahomed Syed, the present respondent, and two other persons, for possession of certain land; and a decree was, on the 14th April 1874, made therein against the three defendants jointly, with costs. One of them alone appealed to the Judge of Gya from that decision, claiming possession of the whole of the property. The Judge of Gya reversed the decree of the first Court; but on special appeal to the High Court preferred by the present appellant, the decision of the Judge was set aside, and the decree of the Court of first instance, of 14th April 1874, was restored.

On the 30th December 1878, the decree-holder applied for execution of the decree of 14th April 1874, against Mahomed Syed, one of the defendants who had not appealed from that decree.

The Subordinate Judge of Gya held, that the decree of 14th April 1874 not having been appealed against by Mahomed Syed, was final as between him and his decree-holder, and as the application for execution was made more than three years from the date of the decree, it was barred by lapse of time.

On appeal, the Judge of Gya upheld this decision, on the ground that "the fact that an appeal was preferred by one of the defendants will not prevent limitation running in favour of the others against the execution of the decree." in support of which he referred to the case of *Hur Proshad Roy v. Enayet Hossein* (2 C.L.R., 471). From this decision the decree-holder appealed to the High Court.

Mr. Sandel for the Appellant.

No one for the Respondent.

The Judgment of the Court (PONTIFEX and McDONELL, JJ.) was delivered by

**Pontifex, J.**—In this case there seems to have been a decree for possession with costs against three defendants. Inasmuch as possession was claimed by only one of the defendants that defendant alone appealed and was successful before the Judge. But the plaintiff appealed to this Court, and obtained a decree restoring the decision of the first Court. The Judge in the [196] Court below has relied on the case of *Hur Proshad Roy v. Enayet Hossein* (2 C.L.R., 471), in which it was held that an appeal by one defendant did not prevent time from running for the purpose of executing the decree against the non-appealing defendants.

The reason why in that case it was held that limitation would apply, was because the appeal there was on the part only of a ten-pie shareholder of the property, leaving the decree capable of execution against the remainder of the property, which could not be affected by the result of that appeal. But in the present case the appeal of the one defendant related to the whole case of the plaintiff, and he was successful in getting the suit dismissed by the lower Appellate Court, which would have deprived the plaintiff of his right to any

costs at all. In special appeal the plaintiff succeeded in getting the Judge's decree reversed ; and therefore the original decree for costs was restored.

We overrule the orders of the Court below, and declare the plaintiff entitled to proceed with the execution of his decree for costs against the respondent.

The appeal is allowed with costs.

*Appeal allowed.*

#### NOTES.

#### [LIMITATION—APPEAL FROM SOME PORTION OF THE DECREE, OR BY SOME OF THE PARTIES ONLY—

The Limitation Act 1908, art. 182, cl. 2 corresponds to art. 179 of the repealed Code of 1877, and this clause has been amended so as to include the *withdrawal* of an appeal.

There have been two currents of case-law upon the scope of this clause ; one of them applied it only where the whole decree was imperilled by the appellate decree ; and the other adopted a literal construction.

This decision is still good law ; but the *ratio decidendi* adopted here, viz., that the whole decree should be imperilled, is no longer the *criterion*.

The same view as in this case was taken by the majority in (1889) 13 All. 1 F. B. ; 12 Mad. 479 ; 4 All. 96 ; (1889) 16 Cal. 598, etc.

The *prevailing* view is that which dispenses with that criterion, and it has been laid down in cases such as 25 Cal. 594 ; 26 Mad. 91 ; 22 Bom. 500 ; 8 All. 573 ; 10 Bom. L. R. 939 ; (1907) P. R. 32 , (1911) 21 M. L. J. 546 ]

[6 Cal. 196]

The 28th June, 1880.

PRESENT :

MR. JUSTICE MORRIS AND MR. JUSTICE PRINSEP.

Konaram Gaonburah.....Plaintiff

versus

Dhatoaram Thakoor and another.....Defendants.\*

*Right of occupancy in Assam—Act X of 1859, s. 6—Government Ryot.*

A Government ryot can acquire a right of occupancy in respect of lands cultivated by him under the rent law in force in Assam.

THIS was a suit for the recovery of possession of one biga and one cotta of land situate in Assam.

The plaint alleged, *inter alia*, that a portion of the land in dispute had been held by the plaintiff's father in 1860; that [197] these lands were measured in the year 1863, and found to be in extent three cottas and six bechas; and that a potta of these lands was granted to the plaintiff's father by the Government in that year. In the year 1875, one Malai Deoree relinquished his holding, and on the application of the plaintiff, these lands were leased to him by the Government, the lands comprising his original holding and those now leased to him being incorporated in a single potta, the extent of the lands so included being the one biga and one cotta of land, the subject of the present suit. In the following year certain lands, including the lands now in dispute, were transferred as the debutter lands of the Bhoirobi Temple, and the first defendant, the presiding priest of the temple, leased the plaintiff's land to the second defendant, who thereupon ousted the plaintiff from the possession of these lands.

The defendants contended, that the lands in dispute had always been debutter lands appertaining to the temple; that the second defendant had been in possession of these lands either through himself or his ancestors for a long period.

The Court of first instance found that the lands in dispute at the time of the potta granted in 1875 was kherajee or Government rent-paying lands; that in respect of three cottas and six bechas of such land, it having been held by the plaintiff for upwards of twelve years as a Government ryot, a right of occupancy had accrued to him; and that in respect of the remaining portion of such land, the plaintiff had proved his right to the possession of the same. The lower Appellate Court was of opinion that, under Act X of 1859, s. 6 \* (the law

\* Appeal from Appellate Decree, No. 1378 of 1879, against the decree of Colonel A. K. Comber, Deputy Commissioner and Subordinate Judge of Durrang, dated the 21st of April 1879, reversing the decree of K.N. Burroon, Esq., Munsif and Extra Assistant Commissioner of Tejjore, dated the 13th December 1878.

\*[Sec. 6 :—Every ryot who has cultivated or held land for a period of twelve years has a right of occupancy in the land so cultivated or held by him, whether it be held under pottah or not, so long as he pays the rent payable on account of the same; but this rule does not apply to khamar, nijjote, or seer land belonging to the proprietor of the estate or tenure and let by him on lease for a term or year by year, nor (as respects the actual cultivator) to lands sub-let for a term, or year by year by a ryot having a right of occupancy. The holding of the father, or other person from whom a ryot inherits, shall be deemed to be the holding of the ryot within the meaning of this section.

still in force in Assam), no right of occupancy could accrue to a ryot holding lands under the Government, and that the lands having been transferred to the Bhoirobi Temple, the plaintiff, being in the position of a mere tenant-at-will, could be legally ousted by the defendants, and thereupon set aside the judgment of the Court below.

The plaintiff appealed to the High Court.

*Baboo Doorga Mohun Dass* for the Appellant.

The Respondents were unrepresented.

[198] The Judgment of the Court (MORRIS and PRINSEP, JJ.), so far as is material to this report, was as follows, and was delivered by

**Morris, J.**—We are unable to assent to the proposition laid down by the lower Appellate Court in this case, that a Government ryot cannot acquire a right of occupancy in lands cultivated by him under the Rent Law in force in Assam. The law in force in Assam is, as we understand, Act X of 1859, and it is in operation without any reservation ; consequently, under s. 6, a tenant contracting with the Government can certainly acquire a right of occupancy. The Government is not in the position of a proprietor holding land *khamar*, *nijjote*, or *seer* in the entire province. As in the other settled provinces of Bengal, it gives out the land in settlement *ryotiwari*, and neither under the settlement, nor under the law, is the ryot prevented from acquiring, after twelve years, a right of occupancy. The case must, therefore, be remanded to the lower Court for retrial. It will be necessary, as the lower Appellate Court has not expressed any opinion on the finding of the first Court on the point, to determine whether, in respect of the two plots of land held by him, the plaintiff has a right of occupancy. . . . .

The case is, therefore, remanded, in order that the Court below may come to a finding on this question of the right of occupancy. Costs will abide the event.

*Case remanded.*

#### NOTES.

#### [OCCUPANCY RIGHTS IN ASSAM—

*See, however, 9 Cal. 330= 11 C. L. R. 554 where a different ruling was given ]*

[6 Cal. 199]

The 19th July, 1880.

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MITTER.

Chottoo Misser.....One of the Defendants

*versus*

Jemah Misser and others.....Plaintiffs.

*Hindu Law—Suit to set aside Alienations by Hindu Widow—Suit to restrain Hindu Widow from committing Waste—Contingent Reversionary interest.*

Persons having a contingent reversionary interest in lands, expectant on the death of a Hindu widow, though they cannot sue for a declaration of title to the lands as against third persons, may sue as presumptive heirs to set aside [199] alienations of the property made by the widow, upon the ground of there being no legal necessity for such alienations, or to restrain her from committing waste.

Unless such suits could be brought, it might be impossible, if the widow lived to a great age, to bring evidence after her death to prove that there was no legal necessity for the alienations. Nor would it be possible to prevent the widow from committing irremediable mischief to the estate.

THIS was a suit for declaration of the plaintiffs' right as reversionary heirs over certain land inherited by the defendant No. 1, a Hindu widow, as heir of her deceased husband Pertab Misser, to set aside an alienation made by her of a portion of the land to the defendant No. 2, as having been made without any legal necessity; and to restrain her from committing waste of the properties in her possession.

The defendant contended, that the alienation in question was made for legal and necessary purposes. The lower Court, without going into the question of necessity, dismissed the suit, on the ground that the plaintiffs, though presumptively the heirs of Pertab Misser, had no right to set aside the mortgage during the widow's lifetime, because their interest in the property was only contingent upon their surviving her. The lower Appellate Court reversed this decision, holding that the plaintiffs could not obtain a declaration of their reversionary rights, as their interest was contingent; that there was no legal necessity for the mortgage; but that the plaintiffs were entitled to a decree declaring the mortgage invalid against them after the widow's death, in case they should survive her. From this decision the second defendant appealed to the High Court.

Baboo Hari Mohun Chuckerbutty for the Appellant.

Mr. M. L. Sandel and Mr. C. Gregory for the Respondents.

The Judgment of the Court (GARTH, C.J., and MITTER, J.) was delivered by

Garth, C.J. (who, after shortly stating the facts, continued):—In this Court, it has been argued by the appellant, that, according to the rule laid down

\* Appeal from Appellate Decree, No. 358 of 1879, against the decree of Baboo Kaliprosuno Mookerjee, Additional Subordinate Judge of Saran, dated the 9th December 1878, reversing the decree of Baboo Birj Mohun Pershad, Munsif of Parsa, dated the 13th of March 1877.

by the Privy Council in the [200] *Shivagunga* case (*Kathama Natchiar v. Dorasinga Tever*, L. R., 2 I. A., 169), the plaintiffs were not entitled to the decree which the lower Court has given them; that their interest being only contingent, the Court could make no declaration of title in their favour; and that the decree which they have obtained is not one which can give them any consequential relief in this or any other suit.

It appears to me, however, that this is one of that class of cases which are referred to in the *Shivagunga* case (L.R., 2 I. A., 169) as being exceptions to the general rule, which is there laid down. In page 191 of the judgment, their Lordships allude to suits brought against Hindu widows by presumptive reversioners to restrain waste and the like, as being "suits of a very special class, which have been entertained by the Courts *ex necessitate rei*." They expressly say, that, in such cases, the reversioner cannot get a declaration of his own title as against third persons; but he is permitted to sue as the presumptive heir, because, unless he were allowed to bring such a suit, there would be no means of preventing the widow from doing perhaps irremediable mischief to the estate. And suits like the present, it seems to me, come clearly within the principle of that exception.

It was held by the Privy Council in the case of *Thakooram Sahiba v. Mohun Lall* (11 Moore's I. A., 386; s. c., 7 W. R., P. C., 25), that suits of this kind would lie "upon the ground of the necessity that the contingent reversioner may be under, of protecting his contingent interest."

Unless such a suit could be brought, it might be impossible, if the widow lived to a great age, to bring evidence after her death to prove that there was no legal necessity for alienations which she may have made when a young woman; and it is for this reason,—namely, the probability of failure of evidence through lapse of time,—that the right to bring these suits has been constantly upheld by this Court; see *Gobindman Dasi v. Shamlal Bysak* (B. L. R., Sup. Vol., 48; s.c., W. R., Sp. No., 165) *Lalla Chuttur Narain v. Wooma Koonwaree* (8 W. R., 273), *Behary Lall Mohurwar v. Modho Lall Shur Gyawal* (13 B. L. R., 222; s.c., 21 W. R., 430), *Kamu-[201]kha Prasad Roy v. S. M. Jagadamba Dasi* (5 B. L. R., 508). I think, therefore, that the lower Appellate Court was quite right, and that this appeal should be dismissed with costs.

*Appeal dismissed.*

#### NOTES.

##### [I. HINDU WIDOW'S ALIENATION—REVERSIONER'S SUIT—

This is settled law that a presumptive reversioner can bring a declaratory suit in respect of the alienations by the widow.—

See also 6 Cal. 764; (1904) 32 Cal. 62 at 66; (1906) 29 Mad. 390 at 402.]

[6 Cal. 201.]

PRESENT :

The 23rd June, 1880.

MR. JUSTICE WHITE AND MR. JUSTICE FIELD.

Hurro Pershad Roy Chowdhry.....Judgment-debtor

versus

Bhupendro Narain Dutt and others.....Decree-holders.\*

*High Court, Appellate Side—Jurisdiction to execute decrees—Civil Procedure Code (Act X of 1877), s. 649—Limitation Act (IX of 1877), sched. ii, art. 167.*

Although the High Court in its Appellate Side does not, as a general rule, execute its own decrees or orders, yet this circumstance in no way affects the vitality of its jurisdiction in this respect, and it cannot therefore be included among Courts which have ceased to have jurisdiction to execute decrees as specified under s. 649† of the Code of Civil Procedure.

The period of limitation within which application must be made for execution of an order for costs passed by the High Court when rejecting a petition for leave to appeal to the Privy Council, is that specified in sched. ii, art. 167‡ of Act IX of 1871 (*Cf.* sched. ii, art. 179, Act XV of 1877).

Baboo *Bhobany Churn Dutt* for the Appellant.

Baboo *Gooroo Dass Banerjee* for the Respondents.

THE facts of this case sufficiently appear in the **Judgment** of the Court (WHITE and FIELD, JJ.), which was delivered by

**White, J.**—This is an appeal against an order of the Subordinate Judge of the 24-Pargannas, dated the 13th of October 1879.

It appears that the High Courts, on the 4th of August 1876, upon the application of Hurro Pershad Roy Chowdhry for leave to lodge an appeal in the Privy Council, dismissed the application, and directed him to pay to the

\* Appeal from Order, No. 16 of 1880, against the order of Baboo Krishna Mohun Mookerjee, Second Subordinate Judge of the 24-Pargannas, dated the 13th October 1879.

Rules applicable to all civil process for arrest, sale or payment.

† [Sec. 649 :—The rules contained in Chap. XIX shall apply to the execution of any judicial process for the arrest of a person or the sale of property or payment of money which may be desired or ordered by a Civil Court in any civil proceeding.]

‡ [Art. 167, Sch. II—

Description of application	Period of limitation.	Time when period begins to run.
For the execution of a decree or order of any Civil Court not provided for by No. 169.	Three years. ...	The date of the decree or order, or (where there has been an appeal) the date of the final decree or order of the Appellate Court, or (where there has been a review of judgment) the date of the decision passed on the review, or (where the application next hereinafter mentioned has been made) the date of applying to the Court to enforce, or to keep in force, the decree or order, or (where the notice next hereinafter made has been issued) the date

of issuing a notice under the Code of Civil Procedure, section two-hundred and sixteen, or where the application is to enforce payment of an instalment which the decree directs to be paid, at a specified date, the date so specified.]

respondents before [202] us Rs. 50 as costs. But the order was silent as to the Court which should compel the payment of the costs, in case Hurro Pershad would not pay them.

The respondents, when the costs were not paid, applied for the execution of the order to the Court of the Subordinate Judge of the 24-Pargannas. The suit had been originally instituted in that Court, but had been called up by the District Judge for trial in his own Court; and this was therefore the Court which passed the decree.

Two objections were taken before the Subordinate Judge, which have been renewed before us on this appeal. The first is, that the execution of the order was barred.

We are of opinion that the lower Court has dealt properly with the objection. The period of limitation applicable to the execution of the order is three years from its date. It clearly falls under art. 167 of the Limitation Act, which prescribes the period for the execution of "an order of any Civil Court not provided for by art. 169."\* Article 169 relates to the execution of orders on the Original Side of the High Court, and is therefore out of the question.

The second objection is, that the Subordinate Judge had no jurisdiction to execute the order.

The Subordinate Judge considers that he has jurisdiction under s. 649 of the Code, which provides, amongst other things, that "where the Court which passed the decree has ceased to exist or to have jurisdiction to execute it," the decree may be executed by "a Court which would have jurisdiction to try the suit in which the decree was passed." The Subordinate Judge considers that the section applies to orders as well as decrees, and treats the High Court as a Court which had either ceased to exist or to have jurisdiction to execute the order.

\* [Art. 169—

Description of suit.	Period of limitation.	Time when period begins to run.
To enforce a judgment, or decree or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction.	Twelve years	When a present right to enforce a judgment, decree or order accrued to some person capable of releasing the right:— Provided that, when the judgment, decree or order has been revived, or some part of the principal money secured thereby, or some interest on such money has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person liable to pay such principal or interest or his agent, to the person entitled thereto or his agent, the twelve years shall be computed from the date of such revivor, payment or acknowledgment, or the latest of such revivors, payments or acknowledgments, as the case may be.]



Whether the section applies to an order like the one before us, it is not necessary to decide now, for it is clear that the High Court does not fall within the description of a Court which has either ceased to exist, or ceased to have jurisdiction to execute its own order. It is true that the High Court, on its Appellate Side, does not, as a general rule, execute its own decrees or orders, but directs them to be executed by one or other of the Mofussil [203] Courts subordinate to its jurisdiction. But this circumstance does not affect the vitality of its jurisdiction any more than it affects the fact of its actual existence.

The decision, therefore, of the Subordinate Judge, which proceeds on the applicability of s. 649 to the case before him, is, in our opinion, erroneous.

That being so, and there being no other section in the Code under which the order of the Subordinate Judge can be upheld, we must allow this appeal and set aside the order with costs.

*Appeal allowed.*

#### NOTES.

#### [LEAVE TO APPEAL TO PRIVY COUNCIL—LIMITATION—

The Article that corresponds to Art. 167 of the Limitation Act of 1871 is 182 of the Act of 1908; (equivalent to Art. 179 of the Act of 1877).

In (1900) 24 Mad. 1 P. C. at 12, it is pointed out that leave to appeal to the Privy Council is not equivalent to an appeal.

#### II. EXECUTION OF ORDERS—

The C. P. C. of 1908 by sec. 36 enacts that the provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders.

#### III. COURT WHICH CEASED TO EXIST—

*See* (1880) 6 Cal., 513 and the Notes thereto.]

[6 Cal. 203.]

*The 28th June, 1880.*

PRESENT.

MR. JUSTICE WHITE AND MR. JUSTICE FIELD.

Hurrosoondary Dasse and another.....Judgment-debtors

*versus*

Jugobundhoo Dutt and others.....Decree-holders.\*

#### *Application for execution of decree—Res judicata*

An order refusing an application to execute a decree is not an adjudication within the rule of *res judicata*.

*Delhi and London Bank v. Orchard* (I. L. R., 3 Cal., 47, S.C., L. R., 4 I. A., 127) followed.

Baboo Akhil Chunder Sein and Baboo Kashee Kant Sein for the Appellants

Baboo Bungshi Dhur Sein for the Respondents. •

THE facts of this case sufficiently appear in the Judgment of the Court (WHITE and FIELD, JJ.), which was delivered by

\* Appeal from Appellate Order, No. 58 of 1880, against the order of R. F. Rampini, Esq., Officiating Judge of Dacca, dated the 27th November 1879, affirming the order of Baboo Jodo o Nauth Dass, Munsif of Moonsheegunge, dated the 23rd May 1879.

**White, J.**—This was an appeal against an order of the District Judge of Dacca, dismissing an appeal which the appellants before us had preferred against an order passed by the Munsif of Moonsheegunge on the 23rd of May 1879.

On the 8th of July 1878, the appellants had procured the reversal of an order by which the Munsif had directed execution to issue for the possession of certain land under a decree [204] obtained by the respondents. The reversal was procured on the ground that execution was barred. In as much as, before the reversal was obtained, the respondents had been put in possession of the land by the first Court, it became necessary for the appellants to apply, and they accordingly applied on the 23rd of May 1879, to be restored to possession. In consequence, however, of certain prior proceedings that had taken place (to which I shall presently refer), the Munsif simply made an order that a notice should be served on the opposite party—that is, the respondents—directing them to give up possession, which order the District Judge has confirmed on appeal.

The prior proceedings alluded to are these; very shortly after the appellants obtained the reversal of the order for the execution, they, on the 6th November 1878, made a similar application to the one that was made in May 1879—namely, to be restored to possession of the land. The Munsif on that occasion, instead of making the order, merely directed, as he did on the 23rd May 1879, that a notice should be given calling upon the respondents to give up possession. His reason for making the order in that limited form was, that he could find no section in the Civil Code which directed that, when a decree which had been executed is reversed, restitution should be made, or which provided any machinery for effecting the restitution. The reason is altogether insufficient. There was no occasion to resort to any section of the Code in order that a first Court may give effect to the order of an Appellate Court reversing its own order. It has full authority, and is moreover bound, to execute the order of the Appellate Court; and if, before the reversal, anything has been done under its own order, it has full authority, and is moreover bound, to undo what has been so done, and to put the parties back into precisely the same position as they stood in before its own order was made. No appeal was preferred by the appellants against the Munsif's order of the 6th of November 1878; but after waiting some time and not getting possession, they again applied to the Munsif to be put into possession. The Munsif refused that application (the ground on which he did so is not stated); but on that occasion the appellants did appeal to Mr. Dickens, the then Judge of Dacca.

[205] Mr. Dickens dismissed the appeal, on the ground that it was out of time, but at the same time made some observations which the present Judge of Dacca thinks that the appellants misunderstood, and which were, that the proper course for the appellants to adopt was to apply to have effect given to the order of the 6th November 1878.

The present Judge of Dacca is of opinion that the suggestion made in Mr. Dickens's order when he dismissed the appeal, was a suggestion that the proper way of carrying out the order of the 6th November was to direct the issue and service of the notice mentioned in the order. He has accordingly, in that view of the case, dismissed the appeal, which was preferred to him against the order of the 23rd of May 1879; and he further states that, in consequence of the order of the 6th November 1878 not having been appealed against by the appellants, it must be accepted as final and binding in the matter, and that whether it is right or wrong, it is now *res judicata*.

It is not necessary to consider what Mr. Dickens meant when he made the suggestion referred to, because whatever might have been his intention, the appellants, in May 1879, made a fresh application to be put in possession of the property, which, in our opinion, ought to have been granted, unless the order of the 6th of November is properly held to have the effect of a *res judicata*. It is not clear that the several application ought to be treated as distinct applications to be restored to possession, rather than as one continued application; but, taking them as distinct applications, they were in substance applications for the execution of the Appellate Court's decree. It has been held by the Privy Council in *Delhi and London Bank v. Orchard* (I. L. R., 3 Cal., 47; s.c., L. R., 4 I. A., 127), that the refusal of an application to execute a decree is not a bar to a second application being made for the execution of the same decree. The precise ground upon which their Lordships' decision proceeded is not stated. Possibly, it may have been that the refusal of the application was not to be considered as an adjudication on the point. But whatever their reasons may be, the case that I have cited is a clear authority, that the application which the appellants made on the 23rd May 1879 is [206] not barred by the refusal either of their application on the 6th of November 1878, or of their intermediate applications between that date and the 23rd of May.

We have been referred to a case (appeal from Appellate Order, No. 169 of 1878), in which my brother MITTER and myself held, that a question decided in the course of prior execution proceedings was deemed *res judicata*, and could not be raised again in subsequent proceedings. But that was a very different case from the present. There the question was as to the construction of a decree; it was raised by the judgment-debtor a second time after it had on a previous application for execution been decided in favour of the judgment-creditor, and after the judgment-debtor had preferred an appeal against the decision, but had not thought fit to prosecute it.

The orders of both the lower Courts must be set aside, and we make the following order, that the appellants be restored to the possession of the property of which the respondents were put in possession under the order for execution, which has been reversed.

*Appeal allowed.*

#### NOTES.

##### [‘RES JUDICATA’—APPLICATIONS IN EXECUTION—

The head-note in this case does not quite convey the purport of the decision. There was an erroneous idea as to the scope of *Delhi and London Bank v. Orchard* 3 Cal. 47.

The notes to that case in the Law Reports Reprints deals fully with the point. The head-note here is evidently based on this sentence at p. 6 Cal. 205, “Possibly, it may have been that the refusal of the application was not to be considered as an adjudication on the point”——inspite of the doubts conveyed in the words we have under-lined.

The actual decision here may be supported on the ground that the order of 6th November 1878 directing merely the issue of notice (p. 204) did not *decide* the point, and thus could not be *res-judicata*.

The rule now understood to have been laid down in the said case is explained in the notes thereto, where the later cases such as 9 Cal. 65, 15 All. 84; 14 C. W. N. 114, etc. are noted.

See also the notes to 8 Cal. 51 in the Law Reports Reprints.

##### RESTITUTION ON REVERSAL OF DECREE—

The C. P. C. 1908 has an express provision for this :—*See* Sec. 144.]

[6 Cal. 206]

The 20th May, 1880.

PRESENT :

MR. JUSTICE JACKSON AND MR. JUSTICE TOTTENHAM.

Koylash Chunder Koosari and another.....Two of the Defendants  
*versus*

Ram Lall Nag.....Plaintiff.\*

*Appeal from Appellate Decrees—Appellant dissatisfied with findings in judgment—civil  
 Procedure Code (Act X of 1877), ss. 540 and 584.*

An appellant, who has obtained a decree setting aside the decision of the Court of first instance, is not entitled to a further appeal to the High Court, on the ground that he is dissatisfied with some of the findings recorded in the judgment of the lower Appellate Court, an appeal from an appellate decree under s. 584 being strictly restricted to matters contained in the decree alone

IN this suit the material facts are as follows:—One Prosonno Chunder Chowdhry, together with other co-sharers in an estate, [207] created a sub-taluk in favour of Bishto Dutt and Kamal Dutt, who, in turn, created further sub-tenancies in favour of certain parties represented by the intervenors in the present suit. Prosonno Chunder Chowdhry brought on his own behalf a suit against the sub-talukdars Bishto Dutt and Kamal Dutt for rent, and having obtained a decree, sold the right, title, and interest of the judgment-debtors in the sub-taluk. The plaintiff, the purchaser at that sale, instituted the present suit for the recovery of rent from the ryot-defendants holding lands within the said sub-taluk, contending that such rent was directly payable to the plaintiff, he being a purchaser who obtained his land free of incumbrances. The holders of the various under-tenancies in the taluk intervened in this suit, on the ground that the plaintiff's purchase did not pass the land free of incumbrances, and that such intervenors were entitled to receive the rent from the ryot-defendant. They also raised the further question, whether the plaintiff, as a fractional shareholder, was entitled to bring a separate suit for his share of the rent.

• The Court of first instance was of opinion that the intervenor-defendants were estopped from raising these contentions by a decree in a previous suit brought by the plaintiff for the recovery of rent from a ryot occupying lands in the same taluk, and in which suit some of the present intervenor-defendants had similarly intervened, and thereupon gave the plaintiff a decree.

The lower Appellate Court coincided on opinion with the Court of first instance, that the previous decree was a *res judicata* in respect of the contention that the purchase of the plaintiff was one free from incumbrance; but that such previous decree did not touch the second contention raised by the defendants. On this point the Court found that the plaintiff, as a fractional shareholder, was not entitled to bring a separate suit for the recovery of his share of the rent, and reversed the judgment of the Court below. The decree embodying this decision of the lower Appellate Court simply stated that the order of the lower Court had been set aside, and the appeal affirmed with costs.

The intervenor-defendants, being dissatisfied with the reason upon which the lower Appellate Court had reversed the decision of the Court below, appealed to the High Court, on the ground that the lower Appellate Court had

\* Appeal from Appellate Decrees, Nos. 1776 and 1777 of 1879, against the decree of A. C. Brett, Esq., Judge of Jessore, dated the 25th June 1879, reversing the decree of Baboo Monmothonnath Chatterjee, First Munsif of Bageerhat, dated the 16th December 1878.

erred in finding that the plea of *res judicata* raised by the plaintiff was, for the reasons stated, a valid objection to the suit.

Baboo Mohiny Mohun Roy and Baboo Rash Behari Ghose for the Appellants.

Baboo Sreenath Dass and Baboo Troylokonath Mitter for the Respondent.

The Judgment of the Court (JACKSON and TOTTENHAM, JJ.) was delivered by

**Jackson, J.**—In this case, after the questions raised in appeal had been fully argued by Baboo Mohiny Mohun Roy, it was brought to our notice by Baboo Sreenath Dass, on the part of the respondent, that in this case the defendants before us are not entitled to appeal, inasmuch as, under s. 584, as under s. 540,\* of the Code of Civil Procedure, an appeal lies only as against the decrees of the Subordinate Courts. The words in s. 540 are, "from the decrees, or from any part of the decrees," and the last mentioned expression is not to be found in s. 584. The contention of the respondent's vakil is, that the defendants in these cases, who have obtained the benefit of the decree of the Court below, by which the suits are dismissed, are not entitled to come up here in appeal by reason of a particular expression or finding contained in the judgment, against which the Code does not allow an appeal. It appears to us that, in regard to s. 584, that undoubtedly is so. It no doubt frequently happens that, in cases before the Court of first instance, the defendant is enabled to set up various pleas, and by succeeding on one or other of those pleas he may defeat the plaintiff: as for instance in a suit for rent at an enhanced rate, the plaintiff may, after contest, succeed in showing that the defendant's tenure is liable to enhancement, but he may fail to prove either that he served sufficient notice, or that the particular rent was claimable, or for some other cause the suit may ultimately fail. In such a case it appears to me that the plaintiff ought to take care that the decree sets out a declaration of the Court as to [209] that part of the case on which he succeeds, because, when that is done, the defendant has an opportunity, under s. 540, to appeal against that part of the decree which is prejudicial to his interest. Where that has not been done, where the decree of the Court is simply one dismissing the suit, there I apprehend the defendant is not entitled to appeal, but of course the question will afterwards arise whether the plaintiff, where the decree is in such terms, is entitled to the benefit of any expression favourable to him which may occur in the judgment upon which the decree is founded. This of course will be a question which may hereafter be of great importance with reference to the terms of s. 13<sup>1</sup> expl. ii (see *Niamut Khan v. Phadu Buldra*, *post*, p. 319). We express no opinion on that point at present. We dismiss this appeal, but, under the circumstances, without costs.

*Appeal dismissed.*

\* [Sec. 540 :—Unless when otherwise expressly provided in this Code or by any other law for the time being in force, an appeal shall lie from the decrees, or from any part of the decrees, of the Courts exercising original jurisdiction to the Courts authorized to hear appeals from the decisions of those Courts.]

Appeal to lie from all original decrees, except when expressly prohibited.

† [Sec. 13 :—No Court shall try any suit or issue, in which the matter directly and substantially in issue has been heard and finally decided by a Court of competent jurisdiction, in a former suit between the same parties, or between parties under whom they or any of them claim litigating under the same title.]

'Res judicata.'

*Explanation II* :—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.]

**NOTES.**

**[APPEAL FROM FINDING IN JUDGMENT NOT FORMING PART OF THE DECREE—**

*See* however (1884) 11 Cal. 301=12 I. A. 28.

The rule laid down in this case is generally followed :—(1880) 6 Cal. 319 ; (1885) 7 All. 610 ; (1893) 18 Mad. 73 ; (1893) 18 Bom. 597 ; (1897) 24 Cal. 900 ; (1904) P. R. 56.

As to whether such a finding will have the effect of *res-judicata* or not, *see* (1897) 24 Cal. 900 ; (1891) 18 Cal. 647 ; (1895) 17 All. 174.]

**[6 Cal. 209]**

*The 29th April, 1880.*

**PRESENT :**

**MR. JUSTICE JACKSON AND MR. JUSTICE TOTTENHAM.**

Uggrakant Chowdhry and others.....Plaintiffs

*versus*

Hurro Chunder Shiekdar and others.....Defendants.\*

*Evidence—Documents upwards of thirty years old—(Proof of—Evidence Act I of 1872), s. 90.*

A Court is not bound to accept as genuine the signature on the document upwards of thirty years old, even though it be produced from proper custody. Before accepting such document as proof of title, the Court must satisfy itself that the person who purports to have affixed his signature to the document was a person who at the time was entitled to grant such a document.

THIS was a suit for the recovery of possession of certain lands and for setting aside an alleged miras ijara potta set up by the defendants. The defendants did not question the plaintiffs' taluqdari right ; they, however, contended that they had for some considerable time been holding the lands in dispute as part and parcel of lands granted them by the plaintiffs under a miras potta, dated the 25th October 1774.

**[210]** Both the lower Courts gave decrees dismissing the suit.

On the appeal to the High Court the case was remanded to the lower Court, the learned Judges (JACKSON and McDONELL, JJ.) being of opinion that, under the circumstances of the case, it lay upon the defendants in the first instance to prove the miras tenure set up by them, or a possession of the disputed lands adverse to that of the plaintiffs for upwards of twelve years.

On remand the defendants produced certain documentary evidence in support of their case, *viz.*, the miras potta and certain receipts for rent alleged to have been received from the plaintiffs' ancestors by the defendants' ancestors as mirasdars, and the Court was of opinion that these documents, being professedly more than thirty years old, and therefore not requiring any attestation, were receivable in evidence, and on such documentary evidence found that the defendants had established their claim.

The plaintiffs appealed to the High Court.

Baboo Doorga Mohun Das for the Appellant.

Baboo Srinath Das and Baboo Gyanendro Nath Das for the Respondents.

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\* Appeal from Appellate Decree, No. 2486 of 1879, against the decree of J. R. Hallett, Esq., Judge of Furreedpore, dated the 29th July 1879 affirming the decree of Baboo Mohima Ghose, Munsif of Madaripore, dated the 20th November 1876.

The Judgment of the Court (JACKSON and TOTTENHAM, JJ.) was delivered by

**Jackson, J.**—We find ourselves obliged very reluctantly to order a second remand in this case. The order with which the case was sent back to the lower Appellate Court in January 1879 was sufficiently precise. The Judge, on the case going back, appears to have done that which was perhaps not absolutely open to him, *viz.*, to admit fresh evidence, and the plaintiffs contend that, owing to the manner in which that was done, they were put at a certain disadvantage. However that may be, the Judge, we find, refused credit to the witnesses whom the defendants called to prove that the plaintiffs had knowledge of their claim to the miras tenure, and he relies altogether upon certain documents which the defendants have put in. He says:—"It remains to be seen what the documentary evidence shows. The potta certainly does not show by itself that the [211] plaintiffs knew for more than twelve years of the title set up by defendants. There is nothing to show that it came to their notice before 1866, which is only ten years before the institution of the present suit in the Munsif's Court. As to its genuineness, I see no reason to doubt that." Now a potta which is an instrument purporting to confer on the defendants an absolute right to hold land forever at a fixed rate is a very important instrument, and a Judge does not discharge himself of his duty in regard to that when he simply looks at it and says he sees no reason to doubt the instrument. This is a matter of which the proof lay wholly upon the defendants, and they had to satisfy the Court that this was a genuine valid instrument. The provisions of the Evidence Act which relates to documents of thirty years of age is one which requires great care in its application, especially in this country. It would be very serious indeed for persons owning land if the mere production of an instrument purporting to be thirty years old absolutely entitles the person producing it to a decision that it is a genuine valid instrument. All that s. 90 says is:—"Where any document purporting or proved to be thirty years old is produced from any custody which the Court in the particular case considers proper, the Court *may* presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting"; that is to say, if in this case the Court was satisfied as to the production of this instrument from what it considered to be proper custody, it would not be *bound* to presume that the signature attached to it was in the handwriting of the person whose handwriting it purported to be; and still, much would be left before the defendants would be entitled to the benefit of that instrument as establishing their title. They would have to show that the persons whose handwriting the signature was, was a person entitled to grant such a document. And in like manner, as to the dakhillas the Judge says: "I see no reason to doubt the genuineness of these upwards of thirty years old, of which no attestation is required." Here again, the utmost that the Court would be entitled to presume, and that it could only do with considerable caution, is, that [212] they were signed by the person whose signature they purported to bear. It would still remain to be shown that the person signing was authorized to sign, and that his signature bound the plaintiffs. In these circumstances the Judge says:—"The plaintiffs producing no evidence at all, I consider that the potta is genuine, and that the receipts admitted are genuine, and I consider that between them they prove both the validity of the claim set up by defendants, and the plaintiffs' knowledge of it for more than twelve years prior to suit." This, as I have already said, was a case in which the burden of proof as regards this issue lay upon the defendants. They were bound to prove the case. The lower Appellate Court had not sufficient materials before it for

coming to the conclusion either that the potta was genuine, or that the receipts, if genuine, were binding on the plaintiffs. It is said no doubt that this potta had been already put in evidence in a previous suit between the parties in the year 1866, and the respondents rely upon the result of that suit as being a decision in their favour that they had a valid miras tenure. It appears to us that the decision is far from going that length. The potta put in by the defendants was in answer to a suit by the plaintiffs claiming enhanced rent, and the result of the suit was that the plaintiffs failed to obtain the enhanced rent; but, although the respondents' pleader read to us such parts of the decision as he thought fit, we find nothing in it like a decision, still less a conclusive decision, between the parties that the plaintiffs had a valid miras. Under these circumstances, we think the case must go back. Of course it may be that the defendants may fail to make out a valid miras tenure, and yet the plaintiffs may not be entitled to a decree, because the defendants may be holding this land under such a tenure that they are not liable to be ousted, possibly at all, at any rate without sufficient notice. These points will have to be considered by the Court when it disposes of the question of miras. No application being made before us for leave to admit fresh evidence, the case must be disposed of on the evidence as it stands. The costs of this appeal will abide the result.

*Case remanded.*

#### NOTES.

##### [ANCIENT] DOCUMENTS—

Similarly it has been held that even where the signature is genuine, the authority to affix it when done under a power of attorney should be proved.—*Re Aney* (1897) 1 Ch. 164. See the NOTES to (1878) 3 Cal. 557 in the Law Reports Reprints, 15 C. L. J. 220.

"We are fully aware of the danger of treating old documents as established, merely because they are thirty years old and come from the proper custody." (1895) 20 Bom. 1, at 5, citing 6 Cal. 209, 11 Bom. 99. See also (1885) 11 Cal. 539, 9 C. L. R. 425; 15 C. L. J. 7; 26 All. 581 P. C. In the same case it was added, "we cannot reject as unproved an ancient document simply because it is not a prudent act for a lessee to lay out money upon the tenure which it discloses". (1895) 20 Bom. 1, at 5

See (1902) 27 Bom. 452 as to proper custody.

The finding that an ancient document is *admissible* in evidence does not amount to a finding that it is *genuine* and *valid* 15 C. L. J. 220 P. C.



[213] PRIVY COUNCIL.

*The 12th and 13th April, 1880.*

PRESENT:

SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, AND  
SIR R. P. COLLIER.

Ganesh Lal Tewari..... Representative of the Decree-holders  
*versus*

Shamnarain and others..... Representatives of the Judgment-debtors

[*On Appeal from the High Court of Judicature at Fort William in Bengal.*  
*Civil Procedure Code (Act VII of 1859), s. 259—Certificate of sale—Mesne profits.*

The possession, with mesne profits, of land comprised in a zur-i-peshgi-lease of the year 1851, was decreed to the zur-i-peshgidars in 1860; and litigation as to their rights under the lease was carried on till 1874, when, after their deaths, it ended in favour of their representatives. In 1869, one of the parties to that litigation obtained a decree for money against the zur-i-peshgidars; and in 1874, in execution of this decree, all the right, title, and interest of the representatives of the latter, in the lease of 1851, was sold to a third party.

*Held* (reversing the decision of the High Court), that the right to the mesne profits awarded by the decree of 1860 did not pass by the sale, but remained in the representatives.

APPEAL from a decree of the High Court of Bengal, 24th August 1876, affirming a decree of the Subordinate Judge of the Sarun District, 1st March 1876.

In December 1851, Perhlad Sen, Raja of Ramnagar, to secure Rs. 49,453, executed a zur-i-peshgi lease of certain mouzas, including Kukurha, to Maddan Mohan Tewari and Kalipershad Tewari, whom the present appellant represented. The decisions against which this appeal was presented disposed of the petition of the present appellant, dated 18th June 1875, to execute so far as related to wasilat, or mesne profits, a decree obtained by the lessees abovenamed on the 2nd of June 1860 upon the zur-i-peshgi lease "for possession of Mouza Kukurha, together with mesne profits, principal with interest, from the Fasli year 1262 (1855) to the date of delivery of possession." On objections filed by the present respondents, the question was raised, whether mesne profits were still claimable by the appellant, a sale having taken place in 1874, in execution of a decree of 1869, against the zur-i-peshgidars, the lessees abovenamed, comprising whatever right, title, and interest the then judgment-debtors had in the zur-i-peshgi lease.

The Subordinate Judge of the Sarun District, on the 1st March 1876, allowed the objection, because, as he stated, "their right of zur-i-peshgidars had passed from the decree-holders." This judgment was confirmed on appeal to the High Court on the 24th August 1876.

The representative of the zur-i-peshgidars appealed to the Privy Council.

Mr. R. V. Doyne for the Appellant.

Mr. C. W. Arathoon for the Respondents.

For the appellant it was argued that his right to recover mesne profits up to the date of the sale was distinct from a right to recover possession of the

mouza, which also was the subject of the decree of 1860. The certificate of sale showed that this distinction existed. The right to recover mesne profits withheld by those against whom the decree of 1860 was made, did not pass to a purchaser under words transferring only the right under the zur-i-peshgi lease.

For the respondents it was maintained that there having been an execution-sale of all the right, title, and interest of the appellant in 1874, no interest was left for him to take in execution of the decree 1860.

At the conclusion of the arguments their Lordships' Judgment was delivered by

**Sir M. E. Smith.**—This was an application by Ganesh Lal Tewari, the appellant, as the representative of Maddan Mohan Tewari and Kalipershad Tewari, who had obtained a decree against the respondents, to execute that decree so far as relates to the recovery of the mesne profits of a mouza called Kukurha awarded by it. The judgment is dated the 2nd of June 1860, and was the result of an action which had been brought [215] by the Tewaris against the predecessors of the respondents. The facts are shortly these: Perhlad Sen, who was the Raja of Ramnagar, executed, on the 23rd December 1851, a zur-i-peshgi mortgage to the Tewaris of certain mouzas including Mouza Kukurha, for a sum of Rs. 19,453. Shortly after the mortgage, one Binda Lal, the predecessor of the respondents, set up a mokurari lease of Mouza Kukurha, which, as he affirmed, had been granted to him by the Raja prior to the zur-i-peshgi mortgage. The suit was brought by the Tewaris to set aside that mokurari, on the ground that it was colourable and put forward by Binda Lal in collusion with the Raja to defeat the zur-i-peshgi, so far as related to Mouza Kukurha. The judgment of the 2nd June 1860, the execution of which is in question, states that the claim was for the recovery of "the entire 16 annas of Mouza Kukurha, the property let out in zur-i-peshgi lease, on the basis of a zur-i-peshgi lease dated 23rd December 1851." The decree was, that the plaintiffs do recover possession of the entire 16 annas of the mouza, and that the mokurari potta be set aside. Then there is this award with reference to mesne profits: "That the amount of mesne profits from 1262 Fasli to the date of recovery of possession, with interest on the principal amount of each year from the following year up to date of realisation, be awarded to the plaintiffs from the defendant Binda Lal." This was the decree of the Principal Sudder Amin. There was an appeal from it to the High Court, and ultimately an appeal from the High Court to this country; and those appeals went on concurrently with another litigation which was initiated by the Raja to set aside the zur-i-peshgi lease altogether, on the ground that it had been improperly obtained; and in this litigation also there was a series of appeals, ending in an appeal heard before this Committee—*Kaleepersad Tewari v. Lalla Binda Lal* (12 Moore's I. A., 343). In the result the Raja failed in his suit; and the Tewaris succeeded in theirs, maintaining the decree of the 2nd June 1860, on which the present execution-proceedings are founded.

Prior, however, to any proceedings taken to execute this [216] decree, the Raja obtained a judgment for some debt against the Tewaris, and in the under in which he obtained that judgment, he by the usual proceedings attached and sold their interest in the zur-i-peshgi lease. The purchaser under that sale was his own Rani, and it is said that she purchased benami for him. However that may be, no question now arises as to the validity of that purchase. It must be taken that the Rani purchased what she professed to

have purchased under that decree. The single question in the case is, whether the mesne profits awarded by the decree of the 2nd June 1860 passed by that sale.

We have nothing on this record but the certificate of sale. The preliminary proceedings do not appear. The certificate of sale is as follows; "And a petition being put in for the sale of his estate, a sale notification was issued pursuant to an order of this Court, and the estate aforesaid publicly sold at auction on the 7th December 1874 A. D. Whatever title, right, and concern the judgment-debtor had in the said estate have been purchased by Mussamat Maharani Bind Basini Debi, inhabitant and proprietor of Ramangar. Parganna Maihwa, for Rs. 15,500, and she has deposited the entire consideration-money. Therefore, this certificate is granted to Maharani Bind Basini Debi, the auction-purchaser of the estate aforesaid; and it is hereby proclaimed that whatever title, right, and concern the said judgment-debtor had in the estate aforesaid have become extinct from the 7th December 1874, the date of sale, and vested in Maharani Bind Basini Debi, the auction-purchaser. Hereafter this certificate will be considered as a valid deed in respect of transfer of the right, title, and interest of the judgment-debtor." Then there is this description of what is sold: "The right and title under the original deed of zur-i-peshgi lease, dated the 23rd December 1851, for Rs. 42, 453 in respect of 15 mouzas,"—naming them, and including Kukurha. It may be observed that the purchase-money is only Rs. 15,500 (fifteen thousand five hundred) and the zur-i-peshgi was given to secure a sum of Rs. 42,453. Upon the application made by the appellant for the execution of the decree of 1860, so far as it awarded mesne profits, the respondents, who represent the Judgment [217] debtor, Binda Lall, set up this sale as an answer, contending that the right to the mesne profits had passed by virtue of it to the Rani, the auction-purchaser. But the decree which had been obtained by the Tewaris was not sold, and presumably was not attached; what was sold is that which appears on the certificate, namely, the right and title under the deed of zur-i-peshgi, and the right of the judgment-debtor is declared to have become extinct only from the 7th December 1874. This being all that was sold, their Lordships think that the right to the mesne profit under the decree was not the subject of sale. It was no more the subject of sale than any profits of the estate which the mortgagee had received prior to that sale would have been. The title to the mesne profits is derived from the decree. The defendants in that suit were wrong-doers, and the action was brought by the mortgagee against them as wrong-doers. The right to the mesne profits, therefore, depends wholly upon the decree; and if the decree had been sold, the purchaser, as assignee of the decree, would, no doubt, have been entitled to them. The High Court have based their judgment on the erroneous assumption that the rights under the decree were sold. Their Lordships think that is not the effect of the sale. The High Court refers to the judgment of the Subordinate Judge. The Judges say: "The Subordinate Judge has held that the decree cannot be executed, and that all the rights of the judgment-creditor in that decree have been transferred to the purchaser of the zur-i-peshgi rights, including the right to execute the decree obtained originally by the appellant before us." Then their own judgment is: "We also think with him, that the whole of the rights of the decree-holder (appellant before us) under the decree which he obtained have passed, with the zur-i-peshgi right on which the decree was based, to the purchaser of those rights. Their Lordships think that this is an erroneous view of the sale. If it had been meant to attach and sell the decree,

that might have been done. What was done was to sell the existing rights of the judgment-debtors under the zur-i-peshgi.

For these reasons their Lordships think the judgments of both the Courts below are wrong. They will, therefore, humbly advise Her Majesty to reverse them, and to remit the case with [218] a declaration that the appellant is entitled to execute the decree of the 2nd June 1860 for the mesne profits up to the 7th December 1874, the date of the sale to the Maharani, with interest, and is also entitled to the costs of the proceedings in both the Courts in India. The appellant will also have the costs of this appeal.

*Appeal allowed.*

Solicitors for the Appellant : Messrs. *Wrentmore and Swinhoe*.

Solicitor for the Respondents : Mr. *T. L. Wilson*.

#### NOTES.

[A decree for money, though saleable under the C. P. C. of 1859, has been held not saleable, under the subsequent Code : (1879) 2 All., 290 ; (1883) 6 Mad., 418 , (1891) 16 Bom., 522 ; (1898) 20 Cal., 111—by virtue of the special procedure contained in s. 273 of the C. P. C. (1877 ; 1882)=C. P. C. 1908, Sch. I, O. 21, r. 53 ]

#### [6 Cal. 218]

*The 4th and 5th December, 1879.*

#### PRESENT :

SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH,  
AND SIR R. P. COLLIER.

Drig Bijai Singh.....Defendant

*versus*

Gopal Dat Panday.....Plaintiff.

[*On Appeal from the Court of the Commissioner of Fyzabad, Oudh.*]

*Under-proprietary right in Oudh—Settlement Circular Order, 29th January 1861—Oudh Sub-settlement Act (XXVI of 1866) Birt Sankalp and Khushust Sankalp\* Limitation.*

A provision in the Chief Commissioner's Circular Order of 29th January 1861 in effect declares, that, to found a claim to a *hafi* tenure in Oudh, possession must be shown to have existed in 1855, the year before annexation. This was assumed, for the purposes of this decision, to have had the force of law at the time when the Financial Commissioner ruled, in Circular Orders 5 and 6 of 5th June 1868, that "a claimant who cannot prove possession of his *sankalp* holding in 1262-63 Fash (1854-55) has no *locus standi* in Court." Whether rightly treated by the Oudh Courts as an enactment of limitation, or rather to be considered as a disability affecting title, this provision was repealed by the effect of Acts XVI of 1865,

\* *Birt* means a grant or endowment to any person for his maintenance or for religious and charitable objects. It also signifies proprietary right, whether acquired by purchase, inheritance, or grant, heritable and transferable, subject to payment of revenue either to Government or to the Raja or zemindar, when not specially exempt. *Sankalpa* means a tenure held under a grant or bequest. *Sankalp birt* is a religious grant to a Brahmin, and held at first rent-free, but latterly subject to a small payment. *Khushust sankalp* means a *sankalp* held as a favour, not as of right.—Wilson's Glossary. *Rep. note.*

s. 5,\* and XIII of 1866, s. 1†; the suit of a birtiah becoming thereupon cognizable, notwithstanding that he might not have been in possession in 1855.

[219] The words of limitation in the Circular Order apply to all birt tenures, including those that are termed sankalp, when the latter are in the nature of birts.

Rules I and II in the schedule of the Oudh Sub-Settlement Act, XXVI of 1866, held not to exclude the plaintiff, he having shown that he, and those through whom he claimed, did not, in the words of those rules, hold the land "through privilege, or by favour of 'the talukdar, but held by an under-proprietary right, under contract 'pucka,' with some degree of continuousness, since the village came into the taluka."

APPEAL from the order of the Commissioner of the Fyzabad Division, 18th March 1874, affirming the decree of the Assistant Commissioner of Gonda, 21st December 1875, certified for appeal by the order of the Judicial Commissioner of Oudh, 19th August 1875.

The plaintiff sued in 1870 in the Court of the Settlement Officer of Gonda, during the progress of a regular settlement, to establish his claim to the under-proprietary right in villages forming an ilaqua of the Bulrampur estates, as his birt zamindari, granted by the defendant's ancestors to his predecessors (as he alleged), and held by them and him down to the year 1258 Fasli (1850-51) when he was forcibly ejected.

The defence was, that the plaintiff's family had been no more than tikadar, or lessees. The Settlement Officer, making an exception as to two villages called Datrangawa and Parsa, and half of third village called Lakhawa, part of this appellant's taluqa of Bulrampur, which he reserved for a separate investigation, finding that they were "sankalp," dismissed the claim as to the rest of the ilaqua. Afterwards the question as to these two villages and-a-half was disposed of, and the claim to them was dismissed, on the ground that the plaintiff admitted dispossession in the year 1258 Fasli (1851-52). The Settlement Officer referring to the Financial Commissioner's Rulings V and VI, dated 5th June 1868, held, that "the settlement ruling lays down as a *sine qua non* that in claims to birt and sankalp the claimant must prove possession in 1262-63 Fasli (1854-55)."

On appeal to the Commissioner of Fyzabad this decision was reversed, the Commissioner holding that, since the passing of Act XXXII of 1871 (the Oudh Civil Courts Act), such [220] suits were permitted with a regard only to the general law of limitation.

\*[Sec 5 :—No suit relating to any under-tenure which shall be cognizable in any Revenue

Limitation rules not to apply to certain suits relating to under tenures.

Court under this Act shall be debarred from a hearing under the rules relating to the limitation of suits in force in the Province of Oudh, if the Cause of action shall have arisen on or after the Thirteenth day of February 1844. Provided that this Section shall not apply to any suit by a person claiming only a right to cultivate as a tenant-at-will, or as a tenant with the right of occupancy, or a tenant at fixed or favourable rates.]

†[Sec. 1 :—No suit relating to any tenure which, under the provisions of Act No. XVI of

Certain suits relating to tenures not to be barred if cause of suit arose on or after 13th February 1844.

1865, shall be solely cognizable in the Courts of Revenue in the said Province, shall be barred under the rules of limitation in force in such Courts if the cause of suit shall have arisen on or after the 13th day of February 1844. And any suit or appeal relating to any tenure and cognizable as aforesaid, which may have been rejected or dismissed upon the ground that the suit was barred under the said rules, may be revived and heard on the merits, if the cause of suit shall have arisen on or after such day.]

On this remand a decree was made in favour of the plaintiff that he was entitled to the under-proprietary right in the two and-a-half villages as a "sankalp," on payment of the Government demand, together with a malikana of ten per cent. to the Raja.

This was upheld by the Commissioner, who was of opinion that the plaintiff had proved a sankalp "intermedate title."

The Judicial Commissioner, on the application of the defendant, granted a certificate permitting an appeal to Her Majesty in Council, observing as follow:— "A distinction has always been made between birts purchased and birts granted by favour without valuable consideration. The Financial Commissioner's Rulings V and VI of 5th June 1868 apply to both sankalp and birt by favour, and they are ordered to be similarly dealt with." He then quoted Ruling V, which is set forth in their Lordships' judgment, adding that it seemed that the rulings were in no way affected by Act XXXII of 1871, "The Oudh Civil Courts Act, 1871."

Mr. *Doyme* and Mr. *J. H. W. Arathoon* for the Appellant

The Respondant did not appear.

It was pointed out that Act XVI of 1865, s. 5. with which was to be read Act XIII of 1866, repealed the rules of limitation relating under-tenures previously in force. But it was contended that the question was not one merely of the limitation of a class of suits but one of title. The rules in the schedule of Act XXVI of 1866, "The Oudh Sub-Settlement Act," were referred to.

Their Lordships' **Judgment** was delivered by

**Sir R. P. Collier**,—In this case the plaintiff made a claim to a settlement in virtue of his under-proprietary right, which he describes as that of a "birt zamindar," in twenty-eight village; but that claim has now been reduced to a claim in respect of two villages and half of a third. It was at first dismissed by the Settlement Officer, on the [221] ground that, inasmuch as the plaintiff did not prove that he had been in possession in 1262 and 1263 Fasli—in other words, in the year 1855, the year before the annexation of Oudh—his claim could not be entertained. The Commissioner of Oudh not being satisfied with the decision on this ground, remanded the case; and upon remand, first the Settlement Officer, and secondly the Commissioner, found that the plaintiff was entitled to the right he claimed, which is sometimes described as a "birt sankalp" right, sometimes as a "sankalp" right (some kinds of sankalp being almost identical with that of birt, some being different from it), and an under-settlement was decreed to him. The Judicial Commissioner, in pursuance of a power which he possessed, allowed an appeal to this Board upon a point of law which he states to be, whether para. 5 of Ruling V of the Financial Commissioner, which he sets out, was or was not correct. The ruling is in these terms: "In the investigation of this and all cases of the nature it must be remembered that the extension of the term of limitation made by Act XVI of 1865 is founded only on the agreement of the talukdars, and does not apply to tenures originating in favour. A claimant who cannot prove possession of his sankalp holding in 1262-63 Fasli, has no *locus standi* in Courts' This ruling appears to be based upon a circular of 1861, which their Lordships will assume to have had at the time the force of law. The passages in that circular on which the ruling is supposed to be founded are principally these: The first section enacts, 'Though the settlement recently concluded with the talukdars has been declared final and perpetual, subject only to revision of assessment, it has at the same time been

provided that the rights of the under-proprietors, or parties holding intermediate interest in the land between the talukdar and the ryot, shall be maintained, as these rights existed in 1855." Then follows s. 24, which relates to birt tenures, and is in these terms: "Where the birtiah has lost possession, there is no more to be said. We are not to restore it to him. But the Chief Commissioner is clearly of opinion that the birtiahs who are found in direct engagement with the State at annexation, or who have [222] uninterruptedly held whole villages on the terms of their pottas under the talukdars, must be maintained in the full enjoyment of their rights in subordination to the talukdars." Then come other sections which illustrate the meaning of birt. Section 25 says: "The meaning of the term 'birt' is a 'cession.' It was the purchase of the proprietary rights subordinate to the talukdar on certain conditions as to payment of rent, which were held to be binding, though undoubtedly often violated by superior power." Section 26 runs thus: "Instructions are also required regarding the treatment of sankalp at settlement. Some sankalp is of much the same nature as birt, and therefore will be governed by the same rules: but it differs so far from 'bai-birt' that it is a condition of the former tenure that the talukdar can redeem it at any time by repaying the purchase-money. The option of availing himself of this condition should be afforded him at settlement. Other 'Sankalp,' that which is styled 'kushust,' and is usually given to Brahmins and Pundits, is a pure maafi tenure given by the talukdar, and will be treated like other rent-free grants by talukdars." The latter words refer us back to s. 20, which is in these terms: "Those birts conferred by favour, or 'regatte,' birts, as they are styled, in contra-distinction to the former, or 'bai-birts,' are not birts in their essential characteristics, but are identical with the rent-free grants made by talukdars, and therefore liable to resumption by them at regular settlement, when the Government will take its full share of the rental, as has already been explained in para. 14 of the maafi rules."

Their Lordships observed that the ruling referred to by the Judicial Commissioner draws a distinction in reference to the application of the term of limitation (as it is called) to birt tenures and to tenures in the nature of sankalp, which are to some extent different from birt tenures, and are assumed to be held at the option of the talukdar; but their Lordships find no such distinction in the circular of 1861. The words treated as words of limitation in s. 24 apply to all birt tenures. If a sankalp be a birt tenure, they apply to it; if it be not a birt tenure, they do not apply to it, and it follows [223] that there is no term of limitation in the circular order applicable to sankalps. But it must be assumed for the present purpose that this is a sankalp to which the term of limitation, as it is called, applies; that is to say, that it is a sankalp of the nature of a birt, which seems to be the effect of all the holding in this case.

Sections 1 and 24 enact in effect that if a birtiah is out of possession in the year 1855, his claim cannot be recognized. They are not, in the technical sense, enactments of limitation, though their effect is in some respects the same, viz., to prevent the owner of a birt tenure being heard to support his claim; and they appear to be treated as enactments of limitation by the authorities in Oudh, and to some extent by the Legislature itself. We then come to a statute, No. XVI of 1865, which is entitled, "An Act to remove doubts as to the jurisdiction of the Revenue Courts in the Province of Oudh." Section 5 is in these terms: "No suit relating to any under-tenure which shall be cognisable in any Revenue Court under this Act"—and claims of this kind come under that category—"shall be debarred from a hearing under the rules relating

to the limitation of suits in force in the Province of Oudh, if the cause of action shall have arisen on or after the 13th day of February 1844," that is, twelve years before the annexation of Oudh, which occurred on the 13th February 1856. Act XIII of 1866 followed, which is very much *in pari materia*. The 1st section, after re-enacting in almost the same words the provisions of the 5th section of the former Act, goes on to say :

" And any suit or appeal relating to any tenure, and cognisable as aforesaid, which may have been rejected or dismissed upon the ground that the suit was barred under the said rules, may be revived and heard on the merits if the cause of suit shall have arisen on or after such day," that day being the 13th February 1844. It appears to their Lordships that, whether the provision in the Chief Commissioner's circular order referred to be considered a provision of limitation or not, it was in effect repealed by these statutes, and that the suit of a birtiah become cognisable, notwithstanding that he may not have been in possession in 1855. Therefore, as far as any objection could [224] be raised on the question of limitation, their Lordships are of opinion that these two statutes are an answer to it.

But it has been contended that the disability which it is said the plaintiff labours under to prove his title, is not in effect a disability under a Statute of Limitations, but a disability affecting the title itself. Act No. XXVI of 1866 is relied upon for this purpose. It is entitled " An Act to legalise the rules made by the Chief Commissioner of Oudh for the better determination of certain claims of subordinate proprietors in that Province," and it enacts, " Whereas certain rules have been made by the Chief Commissioner of Oudh for the better determination of certain claims by persons possessed of subordinate rights of property in the territories subject to his administration ; and whereas it is expedient that such rules shall have the force of law, it is hereby enacted as follows :—1. The rules for determining the conditions to which persons possessed of subordinate rights of property to taluqas in the territories subject to the administration of the Chief Commissioner of Oudh shall be entitled to obtain a sub-settlement of lands, villages, or sub-divisions thereof which they held under talukdars on or before the 13th day of February 1856, and for determining the amounts payable to the talukdars by such subordinate proprietors, which rules were made by the said Chief Commissioner, sanctioned by the Governor-General of India in Council, and published in the *Gazette of India* for September 1st, 1866, and which are republished in the schedule to this Act, are hereby declared to have the force of law."

It has been contended that the rules which have the force of law under this schedule bar the plaintiff's claim. The chief reliance has been placed upon ss. 1 and 2. The first section is to the effect that—" The extension of the term of limitation for the hearing of claims to under-proprietary rights in land, makes of itself no alteration in the principles hitherto observed in the recognition of a right to sub-settlement." Rule 2 goes on to say, " When no rights are proved to have been exercised or enjoyed by an under-proprietor during the period of limitation, beyond the possession of certain lands, as seer or nankar, no sub-settlement can be made. But the [225] claimants will be entitled, in accordance with the rules contained in the circular orders which have hitherto been in force in Oudh upon this subject, to the recognition of a proprietary right in such lands." That does not apply to this case. " To entitle the claimant to obtain a sub-settlement, he must show that he possesses an under-proprietary right in the lands of which the settlement is claimed, and that such right has been kept alive over the whole area claimed within the period of limitation." So far it appears to their Lordships that the finding of the Courts is in the favour of the plaintiff. He must be taken



to have kept alive his rights until he was ousted in the year 1851, which their Lordships find upon the evidence was the time when he was ejected by the Rajah. Then follow these words, on which reliance has been placed; "He must also show that he, either by himself, or by some other person or persons from whom he has inherited, has, by virtue of his under-proprietary right, and not merely through privilege granted on account of service or by favour of the talukdar, held such lands under contract (pucka), with some degree of continuousness since the village came into the taluka;" and the next section explains what is meant by "some degree of continuousness." It has been argued that, inasmuch as this is a sankalp tenure of the kushust description, and held merely by favour, and not as of right, the plaintiff is excluded by the above words. Their Lordships are of opinion, however, that he is not so excluded; they adopt the findings of fact of the different Courts. The claim of the plaintiff is treated in the first place by the Settlement Officer, who originally dismissed it on the grounds which have been stated, as a claim not to "kushust," but to "birt sankalp." The judgment of the first Court upon remand is to this effect. "I consider it proved that there were five sankalp villages held by the plaintiff's family, that about 1256 Fasli" (it is agreed that that should stand 1258 Fasli) "they lost possession when Jadunath executed the conditional deed-of-sale. There is proof that the plaintiff held his share separately, from the defenant's own written note on the wajib-ul-arz presented by Jadunath, and as the defendant neglects, to produce the deed, there is no evidence to [226] show that Jadunath did or could legally convey the rights of Gopal Dutt; that the Rajah had no right to eject him in 1256 Fasli, and he is now entitled to regain possession and to hold as an under-proprietor." That decision is confirmed by the Commissioner, Mr. Capper.

It appears to their Lordships that the effect of the finding is, that the plaintiff did hold, not merely in the words of the section, "through privilege granted on account of services or by favour of the talukdar," but by an under-proprietary right which is distinguished from a holding through privilege or favour; that he was entitled to hold, not merely during the will of the talukdar, to which the latter part of the section appears to point, but *in invitum*; and their Lordships are of opinion that from the length of his holding, which appears to be considerable, and the circumstances which have been found in the case, it may fairly be inferred that he held "pucka," or under contract, or at all events under an arrangement from which a contract might be inferred. That being so, their Lordships are of opinion that he is not excluded, by the words which have been read, from the right of coming before the Court and proving his case.

It has not been seriously disputed that, if this be so, he has held with that degree of continuousness which is required by the Act.

For these reasons their Lordships are of opinion that the decision appealed against is right, and they will humbly advise Her Majesty that the judgment of the Commissioner be affirmed.

*Appeal dismissed.*

Solicitors for the Appellant: Messrs. *Young Jackson, and Beard.*

#### NOTES.

[See also (1907) 29 All. 709 P. C.; (1909) 31 All. 394 P. C.]

[227] SMALL CAUSE COURT REFERENCE.

*The 19th, 20th and 23rd July, 1880.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE PONTIFEX.

Mackillican

*versus*

The Compagnie Des Messageries Maritimes De France.\*

*Bailment—Passenger's Luggage—Ticket—Conditions endorsed—Negligence—Registration of Luggage—Common Carriers—Foreign Steam Ship Company—Contract Act (IX of 1872). s. 151*

In a suit for damages for loss of passenger's luggage by the wreck of a ship belonging to a foreign company, it appeared that the plaintiff had received a ticket in the French language, which on its face stated that it ought to be signed by the passenger, and that it was issued subject to certain conditions on the back. These conditions, among other things, stated that the company would not be responsible for loss or damage arising from accidents or risks of the sea; that the ticket was delivered subject to the conditions that certain articles of a specified nature should be made the subject of a special declaration, in default of which the company would not be liable; that the company would not be answerable for unregistered luggage, and that luggage might be insured at any of the company's offices. It was not stated where registration of luggage might be effected. The ticket was not signed by the plaintiff. The plaintiff alleged that he did not understand the French language, and that the conditions had not been explained to him by any person.

*Held*, that the company being a foreign company were not common carriers;

that the plaintiff was bound by the clauses and conditions on the back of the passage-ticket;

that none of the conditions had the effect of relieving the company from the consequences of their own negligence;

that, in order to establish a defence upon the ground that the plaintiff's luggage was not registered, it was necessary for the defendants to prove, not only that the plaintiff was bound by the conditions, but also that they were ready and willing to register the plaintiff's luggage, and that the plaintiff did not in fact register it,

that as the contract was made in Calcutta, the defendants were bound by the provisions of s. 151† of the Indian Contract Act.

THIS was a suit for damages for loss of luggage. On the 17th June 1877 the Steamer *Mikong*, belonging to the defendant com-[228]pany, by which the plaintiff was a passenger was wrecked off Cape Guardafui, and the plaintiff's luggage was lost. The plaintiff sued the company as common carriers, alleging that the loss was caused by unskilful navigation, and by the negligence of the officers and crew of the vessel. The passage-ticket, which was in the French language, stated the name of the vessel, the name of the captain, the time of departure, the place of departure, and the place for which the passenger was booked, and also the amount of passage-money

\* Case stated for the opinion of the High Court under s. 7 of Act XXVI of 1864 by H. Millett, Esq., First Judge of the Calcutta Court of Small Causes.

†Sec. 151 :—In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

received. Towards the top of the ticket, in a conspicuous position, the following words were printed in red letters: "This ticket, in order to be available, ought to be signed by the passenger to whom it is delivered;" and at the foot of the ticket the following words, also in red letters, were printed: "I, the undersigned passenger, accept this passage-ticket subject to the clauses and conditions printed on the back." The material clauses and conditions were as follows:—

"The company is not responsible for losses or damages arising from accidents or risks of the sea, or from any other fortuitous cause."

"Passage-tickets are delivered subject to the conditions thereon."

"Specie, jewellery, and precious articles should be made the object of a special declaration; in default the passengers will be without remedy against the company."

"The company will not be answerable for unregistered luggage."

"The company will not be answerable for delays or damages which luggage may sustain; but luggage may be assured against maritime risks, by means of a moderate premium by virtue of the floating policies of the company. This assurance may be effected in all the officers of the company."

The plaintiff did not sign the ticket, and he stated that he did not understand the French language, and that the clauses and conditions on the ticket had not been explained to him. The learned First Judge of the Calcutta Small Cause Court found that the captain of the steamer failed to exercise that amount of care that a prudent man would, under similar circumstances, have done, that the plaintiff was not bound by the [229] clauses and conditions on the back of the passage-ticket; that, if he was so bound, the defendant-company had not shown that they were absolved from liability by means of such conditions; that the defendant-company were not common carriers; and that they were subject to the provisions of s. 151 of the Indian Contract Act. He further found, that the plaintiff had proved his damages, and, contingent upon the opinion of the High Court, gave the plaintiff a decree for the whole amount claimed.

The following were the questions submitted:—

(i)—Are the defendant-company common carriers?

(ii)—Is the plaintiff bound by the clauses and conditions at the back of the passage-ticket?

(iii)—Could the defendant-company, by express contract, or by special acceptance of conditions as to the terms upon which it was prepared to carry passengers and their luggage, protect itself from liability for loss resulting from its negligence?

(iv)—Has it done so in this? *i. e.*, are the conditions wide enough to include loss resulting from negligence, and is the plaintiff bound by such negligence?

(v)—Whether it lay on the company, under all circumstances, to prove substantively that it had provided machinery for the registration of passengers' luggage?

(vi)—Under the circumstances set out, does the defendant-company come under the provisions of s. 151 of the Indian Contract Act, 1872?

(vii)—If the defendant-company come under the provisions of s. 151 of the Indian Contract Act, 1872, are such provisions absolute, or can the defendant-company protect itself from liability for negligence by special contract?

Mr. Stokoe for the Plaintiff.

Mr. Hill for the Defendants.

Mr. Stokoe.—The only question is whether the defendant-company is discharged from liability by the terms of the passage-ticket. In the case of *Taubman v. The Pacific Steam Navigation Co.* (26 L. T., N. S., 704), which was relied upon on the other side [230] in the Court below, as showing that conditions of the nature of these would relieve a company from liability for negligence the words were much wider. The condition there was, that the company would not be liable “under any circumstances whatever.” [PONTIFEX, J.—Is not the case within s. 151 of the Contract Act. Have not the company taken as much care of the goods bailed to them as a man of ordinary prudence would of his own goods?] Our case is, that the company were guilty of negligence. The effect of this section is to prevent bailees from contracting themselves out of liability for negligence. [PONTIFEX, J.—Is a steamship company a bailee of goods which remain in their owner’s possession?] Yes, the loss was occasioned by an act entirely beyond the plaintiff’s control. In *Cohen v. The South-Eastern Railway Co.* (L. R., 2 Exch. D., 253), the ticket given to the plaintiff contained a proviso, that the company would in no case be responsible for damages to luggage to a greater extent than £6; and it was held, that the condition was void by reason of s. 7 of 17 and 18 Vict., c. 31, and s. 16 of 31 and 32 Vict., c. 119, and that the defendants were liable for loss to a greater extent than £ 6 caused by the negligence of their servants. In *Henderson v. Stevenson* (L. R., 2 Sc. App., 470) the ticket contained, on the back of it, an intimation that the Company would not be liable for losses of any kind, or from any cause. It was proved that the plaintiff did not look at the ticket, and that his attention was not called to the intimation, and the House of Lords held, that the plaintiff was not bound by it. It has been decided by the Bombay High Court that carriers are governed by s. 151 of the Contract Act—*Kaverji Tulsidas v. The Great Indian Peninsula Railway Co.* (I. L. R. 3 Bom., 109) and *Ishwardas Golabchand v. The Great Indian Peninsula Railway Co.* (I. L. R., 3 Bom., 120). [GARTH, C. J.—This contract is to be performed on the high seas. Is there not any Carriers’ Act which would apply?] It was assumed that, according to the *Peninsular and Oriental Co. v. Shand* (3 Moore’s P. C. (N.S.) 272) the contract was to be governed by the law of the place where it was entered into. [PONTIFEX, J.—The plaintiff did not sign the ticket; can [231] he be said to have complied with the conditions?] No, and even if the contract was completed, s. 151 prevents the defendants from contracting themselves out of their liability. It is against public policy to allow carriers to protect themselves from the consequences of their own neglect. The defendants point out where insurances may be effected, but they do not point out where a passenger is to register luggage, and the Court will not assume that the plaintiff was aware of the place. It is doubtful whether the defendants are common carriers. If they are, they are insurers, and they may protect themselves from liability by special contract—*The Duero* (L. R., 2 Ad. and E. 393). But where the conditions imposed by a common carrier are capable of two constructions, the Court will lean to that construction which will prevent the carrier from contracting himself out of his liability—*Phillips v. Clerk* 2 C.B. (N.S.) 156 and *Grill v. General Iron Screw Colliery Co.* (L.R., 3 C. P., 476). The defendants are in this dilemma. If they are common carriers, they are insurers, and liable for damages however caused, and they will not be allowed to contract themselves out of their liability for negligence, unless they expressly say that they will not be liable, and that is assented to by the other party to the contract. If they are not common carriers, then they come under the Contract Act, and

under s. 151 cannot relieve themselves from the duty of taking as much care of the goods bailed to them as a man of ordinary prudence would take of his own property. The contents of the ticket should have been explained to the passenger. [GARTH, C.J.—Why should not the defendants be able to contract themselves out of their liability under s. 10 ?] It would be an unlawful act. [GARTH, C.J.—Such a contract is not “forbidden by law” under s. 23\* ; there is nothing in s. 151 to “forbid” it.] I contend that on the effect of s. 152 it would defeat the provisions of the Act. Section 152 gives the bailee power to affect his special liability by special contract. He may contract to incur a greater liability, but not a loss.

Mr. Hill.—It has been contended that s. 151 of the Contract Act casts a duty on bailees of goods which they cannot contract [232] themselves out of. But the case of *Kuverji Tulsidas v. The Great Indian Peninsula Railway Co.* (I. L. R., 3 Bom., 109), and *Iswardas Golabchand v. The Great Indian Peninsula Railway Co.* (I. L. R., 3 Bom., 120), do not go so far as that. The question referred in the first case was, whether the defendants could rely on the provisions of s. 152 as protecting themselves from liability in respect of goods carried by them for reward, and all that the High Court says is, that the Carriers' Act does not apply, that railway companies are governed by the Contract Act ; and that they come under s. 151, and the Court held, that they do not come under the higher burden imposed on common carriers. Section 1 of the Contract Act provides that nothing in the Act shall affect the provisions of any Statute, Act, or Regulation not thereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract not inconsistent with the provisions of the Act. There is nothing in the Act to prevent parties to a contract of bailment importing into the contract a provision exempting the bailee from liability. Freedom of contract is not fettered otherwise than as provided in Chap. II. The case does not come within any of the provisoes contained in ss. 10 and 23. Section 150 provides that if goods are bailed for hire, the bailor shall be responsible for any damages arising from faults in the goods bailed, whether he was or was not aware of the existence of such faults. But suppose *A* goes to *B*, and says,—“ send me your carriage for hire”, and *B* says,—“ There are defects in it, but I will not be responsible for any damages ;” and *A* takes the carriage and suffers damage ; would not the contract be a good defence to an action ? A contract by a bailee contracting himself out of liability cannot be said to be opposed to public policy. The cases of *Phillips v. Clark* (2 C. B. (N. S.), 156) and *Grill v. General Iron Screw Colliery Co.* (L. R. 3 C. P. 476) are English cases, and I submit that English law does not apply to a French company. Prior to the Railway and Canal Traffic Acts, conditions very similar to those in this case were held to cover loss by negligence—*Peek v. North Staffordshire Railway Co.* (10 H. L. C. 473). Before the Carriers' Act. 11 Geo. IV, and 1 Wm. IV, c. 68, carriers [233] used to limit their liability by public notice—*Carr v. Lancashire and Yorkshire Railway Co.* (7 Ex., 707), and they also had some power of imposing conditions on their common law liability by special acceptance without the assent of the customer to those conditions—*McManus v. Lancashire and Yorkshire Railway*

\* [Sec. 23 :—The consideration or object of an agreement is lawful, unless it is forbidden by law ; or is of such a nature that, if permitted, it would defeat

What considerations and objects are lawful and what not. the provisions of any law ; or is fraudulent ; or involves or implies injury to the person or property of another ; or

the Court regards it as immoral or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful, is void.]

*Co.* (4 H. and N., 327), or by special notice—*Walker v. York and North Midland Railway Co.* (2 E. and B., 750). The plaintiff must have known that the ticket contained the terms upon which the defendants contracted with him. It cannot be said that the omission by the defendants to require the plaintiff to sign the ticket amounted to a waiver of the conditions in the ticket. The question is, has the carrier given notice of the conditions upon which he will carry the passenger? If he has, that is sufficient to discharge him—*Zunz v. South-Eastern Railway Co.* (L. R., 4 Q. B., 539, and *Van Toll v. South-Eastern Railway Co.* (12 C. B. (N. S.), 75). In *Harris v. The Great Western Railway Co.* (L. R., 1 Q. B. D., 515) the plaintiff deposited luggage with the company to be kept in the cloak-room of the company, and received a ticket, which on the face of it referred to conditions at the back which limited the company's liability. It was held (the Court having power to draw inferences), that the luggage must be taken to have been deposited subject to the conditions on the back of the ticket, and that the company was protected. The principle which applies to that case applies equally to this. In *Parker v. South-Eastern Railway Co.* (L. R., 1 C. P. D., 618; s. c. on app., 2 *Id.*, 416) the facts were similar to those in *Harris v. The Great Western Railway Co.* (L. R., 1 Q. B. D., 515). Two questions were left to the jury—(i) Did the plaintiff read, or was he aware of the special conditions upon which the articles were deposited? (ii) Was the plaintiff under the circumstances, under any obligation, in the exercise of reasonable and proper caution, to read or make himself aware of the conditions? Both questions were answered in the negative, and the Court, having no power to draw inferences, followed *Henderson v. Stevenson* (L. R., 2 Sc. App., 470), on the ground that the conditions had not been [234] assented to, and held that the company was liable. The case was appealed, and a new trial was directed on the ground of misdirection, inasmuch as the plaintiff could be under no obligation to read the conditions; and that the second question left to the jury ought to have been whether the company did that which was reasonably sufficient to give the plaintiff notice of the conditions. This last case entrenches still further on *Henderson v. Stevenson* (L. R., 2 Sc. App., 470).

Mr. *Stokoe* was not called upon to reply.

The **Opinion** of the Court (GARTH, C. J., and PONTIFEX, J.) was delivered by

**Garth, C. J.**—We think that the questions referred to us should be answered as follows :—

(i)—The defendants, being a French company, are certainly not common carriers in the ordinary English sense of the word.

(ii)—We consider that the plaintiff was bound by the clauses and conditions on the back of the passage-ticket.

Although he may not understand French, he was a man of business contracting with a French company, whose tickets he knew very well were written in the French language. He had ample time and means to get the ticket explained and translated to him before he went on board: and it very plainly disclosed upon the face of it that the conditions endorsed were those upon which the defendants agreed to carry him. We think, therefore, that he was bound by those conditions.

The case of *Henderson v. Stevenson* (L. R., 2 Sc. App., 470) has been relied upon as showing, that if the plaintiff was not actually aware of the contents of the conditions, he could not be bound by them; but that case is not in

point. There the ticket which the plaintiff received did not disclose upon the face of it that there were any conditions on the back, and it was found, as a fact, that the plaintiff was not aware of any such conditions.

Here the fact that there were conditions was plainly disclosed upon both sides of the ticket, and it was the plaintiff's own fault if he did not make himself acquainted with them. We think [235] that the principle of *Parker v. The South-Eastern Railway Co.* (L. R., I. C. P. D., 618, s. c. on app., 2 *Id.*, 416), and the observations of Lord Justice BRAMWELL in that case are directly applicable to the present.

It was contended also, that the conditions were not binding upon the plaintiff, because he did not sign the ticket; but we think that the clause as to the passenger's signature was inserted for the benefit of the company, and that they had a right to waive it if they thought fit.

(iii)—We do not consider it necessary to answer this question.

(iv)—We are of opinion that none of the conditions have the effect of relieving the company from the consequences of their own negligence, the existence of which has been found in the case submitted for our opinion.

(v)—We think that, in order to establish a defence, upon the ground that the plaintiff's luggage was not registered, it was necessary for the defendants to prove, not only that the plaintiff was bound by the conditions, but also that they (the defendants) were ready and willing to register the plaintiff's luggage, and that he (the plaintiff) did not in fact register it. So far as we can see, they have failed to establish both these points. It has not been shown that, on the one hand, they were ready to register the luggage, nor on the other, that he did not in fact register it.

(vi)—We think that, as the contract was made in Calcutta, the defendants were bound by the provisions of s. 151 of the Indian Contract Act.

(vii)—We do not consider it necessary to answer this question.

The judgment, therefore, that has been entered for the plaintiff will stand, and the defendants must pay the costs of this reference.

Attorneys for the Plaintiff. Messrs. *Watkins and Watkins*.

Attorney for the Defendants. Mr. *Orr*.

#### NOTES.

#### [COMMON CARRIER—

In (1905) 28 *Mad.* 400, it was held that a foreign company might be a common carrier, differing from this case. See as to whether there may be exemption from liability, (1908) 32 *Mad.* 95 and the cases cited there at p 120 ] •

[236] The 19th July, 1880.

PRESENT :

SIR. RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MITTER.

Shumsher Ally.....Defendant

versus

Kurkut Shah.....Plaintiff.\*

*Review—New Trial—Mofussil Small Cause Court Act (XI of 1865.) s. 21—Civil Procedure Code (Act X of 1877) s. 624.*

A judge of a Mofussil Small Cause Court has jurisdiction to direct a new trial of a case tried by his predecessor, s. 21† of Act XI of 1865 not having been repealed by the Civil Procedure Code 1877.

*Per* GARTH, C. J.—The Judge, however, in dealing with applications for new trial under s. 12, should have regard to the rule laid down in s. 624 of the Code of Civil Procedure.

THIS was an application made to the Officiating Judge of the Sealdah Small Cause Court, under s. 21 of Act XI of 1865, for a new trial of a case, which had been decreed in favour of the plaintiff by Mr. Ryland, the Permanent Judge of the Court. The plaintiff contended, *inter alia*, that, under s. 624 of the Code of Civil Procedure, no application could be made to the Officiating Judge for a new trial. The plaintiff contended that the section in the Civil Procedure Code relating to reviews, which are made applicable to Courts of Small Causes, had virtually repealed s. 21 of Act XI of 1865, and that at any rate no new trial could be granted by a Small Cause Court Judge of a case tried by his predecessor unless upon the ground of some clerical error in the proceedings, or the discovery of some new and important matter or evidence.

Baboo Saroda Churn Mitter for the Plaintiff.

Munshee Sciaqul Islam for the Defendant.

The following **Judgments** were delivered:—

**Garth, C. J.**—As s. 21 of Act XI of 1865 has not been repealed or affected by the Civil Procedure Code, 1877, I am of opinion [237] that the provisions

\* Reference, No. 12 of 1880, from Baboo Boloram Mullick B. L., Officiating Judge of the Small Cause Court at Sealdah, dated the 8th May 1880.

† [Sec 21 —In suits tried under this Act, all decisions and orders of the Court shall be

Decision in suits tried under this Act to be final *ex parte* against a defendant, he may within thirty days after any process for enforcing the decree has been executed give notice to the Court by which the decree was passed, of his intention to apply

*Ex parte* decree may be set aside

summons was not duly served or that the defendant was prevented by any sufficient cause from appearing when the suit was heard the Court shall pass an order setting aside the decree and shall appoint a day for proceeding with the suit, upon such terms as to costs or otherwise as shall to the Court seem proper, provided also that it shall be

New trial.

of the intention to apply for the same at the next sitting of the Court be given to the Court within the period of seven days from the date of the decision, and if the same be applied for at the next sitting of the Court; but no such new trial shall

On deposit of debt and costs.

be granted where the party applying for the same is the defendant or one of the defendants, unless he shall with his notice of application deposit in Court the amount for which a decree shall have been passed against him, including the costs (if any) of the opposite party ]



of that section are still in force with regard to applications for a new trial, and that they are not directly controlled in their operation by s. 624\* of the Civil Procedure Code.

That the two procedures (*viz.*, the one for a new trial, and the other for review) are both still in force, has virtually been decided by Mr. Justice JACKSON and Mr. Justice TOTTENHAM in the Small Cause Court Reference, Nos. 69 and 70 of 1879.

At the same time, I think it right to add that, having regard to the nature of the question referred to us, in my opinion any Small Cause Court Judge, in dealing with applications for a new trial under s. 21, is bound to observe and respect the manifest intention of s. 624 which is indeed only an enactment by the Legislature of the rule which had been previously laid down by this Court as a guide to the Judges of Subordinate Courts when dealing on review with their predecessors' judgments: see *Ellem v. Basheer* (I. L. R., 1 Cal., 184) and *Roy Meghraj v. Beejoy Gobind Burrall* (I. L. R., 1 Cal., 197).

It is to my mind manifestly improper for one Judge to review, or grant a new trial of, a case decided by his predecessor, where the alleged error consists in the determination of some question of law or fact upon which the one Judge has only the same materials and the same means of forming a satisfactory conclusion as the other.

I think that it would be quite as indecent under such circumstances for one Small Cause Court Judge to reverse a decision of his predecessor, as it would be for one Division Bench of a High Court, consisting of two Judges, to reverse the decision of another Division Bench of the same Court, also consisting of two Judges.

Our attention was directed during the argument to a case decided by the Privy Council in the year 1876—*Reasut Hossein v. Hadjee Abdoolah* (I. L. R., 2 Cal. 131; s.c., I. R., 3 I. A., 221), but the point now under consideration was not discussed or even alluded to in that case.

The question there arose was, whether one District Judge had jurisdiction to review the decision of his predecessor for any cause other than some positive and apparent error of law, or the [238] discovery of new evidence, and their Lordships state in their judgment that, looking to the extreme generality of the terms used in ss. 376 to 378 of Act VIII of 1859, they were not prepared to say that one Judge had absolutely no jurisdiction to review the decision of his predecessor, whenever the parties failed to show that there was some positive error of law in the former judgment, or new evidence to be brought forward.

That case was decided upon the language of the Civil Procedure Code of 1859, which differs in some respects from that of the new Code, and in which, notably, there was no provision similar to that in s. 624.

This section seems to me to declare very plainly what the views of the Legislature are upon the point now under discussion.

It is very probable that, at the time when these review sections of the Civil Procedure Code were passed, the operation of s. 21 of the Act of 1865 did not receive sufficient attention.

\*[Sec. 624 :—Except upon the discovery of such new and important matter or evidence as aforesaid, or of some clerical error apparent on the face of the

To whom applications for review may be made. decree, no application for a review of judgment, other than that of a High Court, shall be made to any Judge other than the Judge who delivered it.]

As Small Cause Court cases in this country are tried, both as regards law and fact, by the Judge alone, it is difficult to conceive any reasons which would justify a new trial which would not also afford good grounds for a review ; and, if so, the principle, if not the actual provisions, of s. 624 ought to be applicable to new trials as well as to reviews.

Although, therefore in this instance, the Small Cause Court Judge has jurisdiction, under the circumstances, to entertain the application for a new trial, I think that, in the exercise of that jurisdiction, he should be guided by the considerations to which I have referred.

**Mitter, J.**—I am also of opinion that the present Officiating Judge of the Court of Small Causes at Sealdah has jurisdiction to entertain an application for a new trial. As to the grounds upon which he should grant a new trial in the case out of which this reference has arisen, I express no opinion, as that is not one of the questions referred to us.

#### NOTES.

[See also (1881) 8 Cal. 287 = 10 C. L. R. 275, (1884) 10 Cal. 297]

### [239] APPELLATE CIVIL.

*The 10th June, 1880.*

PRESENT :

MR. JUSTICE MORRIS AND MR. JUSTICE PRINSEP.

Almas Baneer and others ... .. Plaintiffs

*versus*

Mahomed Ruja and others.. .... Defendants.

*Limitation Act (XV of 1877), s. 25, sched n, Art 66 -Bond.*

Where a bond, by its terms, stated that money advanced should be repaid on the 30th Pous 1283 B. S., and it so happened that, in the year 1283, the month of Pous consisted only of twenty-nine days (the 29th Pous, answering to the 12th January 1877), held, that a suit brought on the 13th January 1880 was in time.

THIS was a reference made to the High Court under s. 617 of Act X of 1877.

The plaintiff brought a suit on the 1st Magh 1286, B. S. (corresponding with 13th January 1880) to recover a sum of money advanced to the defendant, and secured by a bond dated the 16th Kaitic 1283 B. S., the due date of repayment of the advance under the bond being stated to be the 30th Pous 1283 B. S.

It so happened that, in the year 1283 B. S., the month of Pous consisted only of twenty-nine days, the last day of the month corresponding with the 12th January 1877.

The plaintiff contended that, as there was no 30th Pous in the year 1283, his suit was in time if brought on the 1st Magh 1283.

The defendant contended, that the suit was barred by limitation, it not having been brought on or before the 29th Pous 1283, corresponding with 12th January 1877.

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\* Civil Reference, No. 6 of 1880, from Baboo Karunamoy Banerjee, B. L., Sudder Munsif of Sudharam, in the District of Noakhally, dated the 26th February 1880.

The Munsif held, that the parties evidently intended that the bond should be payable on the last day of the month of Pous 1283, irrespective of the number of days the month should consist of, and that, therefore, the suit was barred; but, at the request of the plaintiff, he referred the case for the opinion of the High Court.

[240] The **Opinion** of the Court (MORRIS and PRINSEP, JJ.) was as follows.—

**Morris, J.**—This is a case referred by the Sudder Munsif of Sudharam, under s. 617 of the Code of Civil Procedure, raising the question of the date of payment fixed in a bond as governing the application of the law of limitation.

The date for payment of the money due under the bond is entered in it as the 30th Pous 1283. The month of Pous varies, sometimes containing twenty-nine and sometimes thirty days. In the year 1283 the month of Pous contained only twenty-nine days, and the 29th, or the last day of Pous, corresponded with the 12th January.

The present suit, to realize the money due on this bond, was brought on the 13th of January 1880, and the point submitted to us is, whether the suit has been brought within three years from the date on which the money became payable.

The Munsif states as his opinion, that “the parties never intended that the day of repayment should be in the month of Magh. By “30th Pous” the parties, according to the custom of the country, evidently intended the last day of the month of Pous 1283, irrespective of the number of days the month should consist of.”

This is, no doubt, one mode of interpreting this term of the contract. At the same time we think that, when the bond, by its terms, gives expressly thirty days from the commencement of Pous as the limit of payment, the period of limitation applicable to a suit brought to enforce payment should be reckoned from such thirtieth day. Both parties, at the time of execution of the bond, understood that there were thirty days in Pous of that year, and so made the thirtieth day the limit day of the term of payment. There is nothing in their conduct, or in the terms of the agreement, from which it can be inferred that they intended the 29th of Pous to be the limit. We are not aware that the custom of the country is as stated by the lower Court, nor does it appear that it was established in evidence in the present case. Consequently, the present contention of the obligor is, in our opinion, in direct opposition to this the original understanding between the parties. The obligor, as it seems to us, wishes to [241] evade, by this plea of limitation, the payment of a just debt and to act contrary to the expressed intentions of the parties at the time of entering into the contract.

Accordingly, we are of opinion that this suit is not barred by limitation.

#### NOTES.

[See also 17 Mad. 61; 6 Bom. 83; 24 Cal. 382. 12 Bom. 617.]

[6 Cal. 241]  
PRIVY COUNCIL.

*The 5th March, 1880.*

PRESENT:

SIR J. W. COLVILLE, SIR B. PRACOCK, SIR M. E. SMITH, AND  
SIR R. P. COLLIER.

Gourchandra Rai.....Defendant

*versus*

Protapchandra Dass.....Plaintiff.

[*On Appeal from the High Court at Fort William in Bengal.*]

*Principal and surety—Giving time—Interest paid in advance—Discharge of surety—  
Accommodation Acceptor—Contract Act (IX of 1872), v. 135.*

The drawer of hundis paid advance interest to the holder to obtain time which he did obtain, for payment after due date. *Held*, that the liability of an accommodation acceptor of the hundis depended on whether he knew of and consented to this arrangement.

*Held* on the merits, that he knew of, and consented to, advance interest being taken.

APPEAL from a decree of a Divisional Bench of the High Court of Bengal, dated 16th May 1878, reversing, so far as it affected this appellant, a decree of the Subordinate Judge of Dacca, dated 14th September 1876.

The facts of the case and judgment appealed from are reported in the Indian Law Reports, 4 Cal., 132.

Mr. Cowie, Q.C., and Mr. Doyne, for the appellant, argued, that the plaintiff had failed to prove that such an assent had been obtained from the surety as was contemplated in the proviso contained in the 135th section of the Indian Contract Act, 1872, which was the law governing this case, and that, therefore, the surety had been discharged.

Mr. Leith, Q. C., and Mr. Graham, for the respondent, were not called upon.

Their Lordships' Judgment was delivered by

**Sir J. W. Colville.**—Accepting the facts found by both the [242] Courts in India, their Lordships agree with the High Court that the liability of the appellant, as accommodation acceptor of the hundis, depends on the answer to be given to the question whether he knew of, and consented to, the advance interest being taken. The High Court has answered the question in the affirmative and their Lordships entirely agree in that conclusion. Monohur Laha's evidence alone is sufficient to establish the fact that the defendant did know of, and consent to, the payment of the advance interest; and he was as a witness called by the appellant. Nor do their Lordships think that the testimony of the witnesses adduced by the plaintiff is, though exceptions may be taken to parts of it, altogether inconsistent, as has been argued, with that of Monohur Laha. That which relates to a conversation between the plaintiff and defendant in the billiard-room of the former, upon which there was no cross-examination, is quite consistent with all that Monohur Laha has deposed to. Again, the probabilities of the case appear to their Lordships to be all in favour of the conclusion of the High Court. Pogose, the drawer of the hundis and the party primarily liable upon them, was absent from his place of business; his affairs were evidently in a very shaky condition; and although it was possible that when he came back again he might be able

to make some arrangement for the payment of the hundis, he had no present means of meeting them. In these circumstances it is hardly conceivable that the plaintiff would enter into a transaction, the effect of which would be to relieve the only solvent party from liability upon the hundis. On the other hand, it was much to the interest of the defendant to take the chance of the re-establishment of Pogose's credit, and therefore to assent to such an arrangement as was actually made.

Their Lordships, therefore, will humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal with costs.

*Appeal dismissed.*

Agent for the Appellant: Mr. T. W. Wilson.

Agent for the Respondent: Messrs. Watkins and Lattey.

#### NOTES.

[See also *Hodges v. Delhi and London Bank*, (1900) 23 All. 137 where the surety by his general consent was held not discharged; *Rouse v. Bradford Banking Co.* (1894) 2 Ch. 82 affirmed in (1894) A. C. 587; *Blake v. White* (1835) 1 Y. & C. Ex. 420; *Tucker v. Laing* (1856) 2 Kay & J. 745; *Munster and Leinster Bank v. France* (1889) 24 L. R. Ir. 82.]

[243] *The 4th May, 1880.*

PRESENT.

SIR J. W. COLVIE, SIR B. PEACOCK, SIR M. F. SMITH, AND  
SIR R. P. COLLIER.

Grishchunder Chuckerbutty and another.

Guardians of Dwarkanath Chuckerbutty, a Minor.....Defendants.

*versus*

Jibaneswari Debia, Mother and Guardian of  
Kailas Chunder Chuckerbutty. . . . .Plaintiff  
and

Grishchunder Chuckerbutty, Guardian of  
Dwarkanath Chuckerbutty, a Minor. ....Defendant

*versus*

Biseswari Debia, Mother and Guardian of  
Prosunno Kumar Chuckerbutty.. ....Plaintiff.

[*On Appeal from the High Court, Bengal*].

*Sale in execution of the "right, title, and interest" of a Judgment-debtor in a partly executed decree—Possession of land attached under Reg. V of 1805, s. 26—Right of purchaser.*

A decree of the year 1843 awarded to persons, afterwards represented by the respondents, the possession of a moiety of a taluk, which had been since 1837, and remained till 1866, under attachment by the Collector in virtue of an order made under Reg. V of 1812. The Court which granted the decree, intending to execute it, approved the proceedings of an Amin purporting to put the decree-holders into constructive possession of a certain number of mouzas of the taluk.

In 1860, the appellants, in execution of a decree for money obtained by them against the respondents, purchased at a sale, amongst other things, "their right, title, and interest" in the decree of 1843. *Held*, that possession of the mouza having been delivered, so far as it could be delivered, considering the attachment to which the taluk containing these mouzas

was subject, the decree of 1843 had been so far executed; and that what was acquired by the appellants at the execution-sale was only the unexecuted portion of the decree of 1843.

APPEALS, on leave obtained, from decrees of the High Court of Bengal, dated 12th June 1876, affirming decrees of the Subordinate Judge of Mymensing, dated 4th January 1875, so far as they were adverse to the defendants, appellants. The suits were originally dismissed by the Court of first instance, on the ground of limitation (14th June 1873); but, on appeal to the High Court, having been remanded for trial, as being not barred by limitation, they were tried and decided in favour of the plaintiffs, against the appellants—decisions which were upheld in the High Court.

[244] The same question was raised by both appeals, *viz.*, whether the entire rights of the respondents, and of those whom they represented, under a decree, dated 11th November 1843, of the Court of the Principal Sudder Amin of Mymensing, had been purchased in 1850 on behalf of the predecessors in estate of the appellants, or only such portion of that decree as then remained unexecuted, it being contended by the respondents that, at the date of the sale, the decree had been partly executed.

Mr. Cowe, Q.C., and Mr. J. Graham, Q.C., for the Appellants.

The Respondents did not appear.

The facts of the case are stated in the **Judgment** of their Lordships, which was delivered by

**Sir R. P. Collier.**—This case was reduced during the argument to a point of law, which becomes intelligible upon the statement of a few facts.

Brojo Kishor and Ram Kishor were brothers, joint in estate, of whom Ram Kishor died sometime before 1835, leaving two sons, Ram Kumar and Nobo Kumar. In the year 1835 an estate, consisting of an 8-anna share in a taluk, called Newaz Ali, and belonging to one Abdul Samad, was bought in the name of Ram Kumar, but with the joint funds of the family. Brojo Kishor died in 1836 having shortly before his death separated from the other branch of the family. He left two widows, each of whom adopted a son, one adopted son being Ishan Chunder and the other Mohesh Chunder. Upon, or sometime after, the death of Brojo Kishor, Ram Kumar set up an exclusive title to the purchased estate; and the representatives of Brojo Kishor, who at that time were the adopted sons, in the year 1839, brought a suit against Ram Kumar and his brother Nobo Kumar, for the purpose of having their title declared and obtaining possession of Brojo Kishor's moiety of this property, and obtained a decree awarding to them that possession on the 11th November 1843. Both the plaintiffs in that suit afterwards died, Ishan Chunder being now represented by his widow Jibaneswari, the respondent in one of these appeals, and [245] Mohesh Chunder by his adoptive mother Biseswari, the respondent in the other appeal. After their death, and in or about 1848, the representatives of Ram Kishor obtained a decree against the two last-named widows, as the then representatives of Brojo Kishor, in respect of a money demand against Brojo Kishor. They proceeded to the execution of that decree. The usual notice and proclamation of sale were made, and on 16th<sup>o</sup> July 1850 the appellants bought, in pursuance of the usual proclamation, among other things, the right, title, and interest of the judgment-debtors in the decree of the 11th November 1843. The question in the cause is, what passed by the sale of that decree.

It is necessary to state that, in the year 1837, the whole taluk of Newaz Ali, which was subject to a number of disputed claims, was attached by an order of the Civil Court, and remained in the possession of an officer of the Collector until

the year 1866. But, notwithstanding this, the Court, upon the representatives of Brojo Kishor obtaining their decree in November 1843, attempted to give the decree holders, at all events, constructive possession of a certain number of the mouzas, part of their share of the purchased estate, and for that purpose deputed an Amin to ascertain what belonged to them. The Amin, made a lengthened investigation, and, after hearing both parties, and going over the ground, he marked out by sticks and posts certain lands which, according to his view, the decree-holders were entitled to, and he gave them, or professed to give them, possession of those lands, and he also required the ryots to sign kabuliats with respect to these lands. These proceedings came before the Court, and were approved by the Court. It is undoubted, therefore, that the Court intended to deliver possession as far as it could, and believed that it had the right to deliver possession effectual for the execution of the decree to the decree-holders of a certain number of mouzas. The question is, whether the representatives of Ram Kishor, buying the decree on the 16th of July 1850, bought with it those mouzas with respect to which it had been executed in the manner described, or only so much of the property to which it relates with respect to which it remained unexecuted?

[246] The attachment continued until 1866, when it was discharged. Thereupon Jibaneswari brought her suit for the purpose of obtaining possession of her share of those mouzas of which, as she alleged, possession had been given in execution of the decree of the 11th November 1843. Biseswari also brought a suit for the purpose of obtaining her share of the same mouzas. These suits involve the same question, and the same judgment applies to both of them. The defendants alleged their right to the whole of that which had been bought of Abdul Samad. The first Court in India found in favour of the plaintiffs in the two suits with respect to the greater part of the property. That decision was affirmed by the High Court, upon the grounds on which it was given, the main ground of both decisions being that, in point of fact, possession was delivered of the mouzas in question before the sale of the 16th August 1850, as far as it could be delivered, considering the Government attachment to which the whole taluk was subject, and that the delivery of the possession, such as it was, was effectual to execute the decree.

Their Lordships have felt some difficulty about this case; but, on the best consideration they are able to give it, they do not see their way to reversing the decision of the High Court. It has been contended, with a good deal of force, that no actual possession could have been given while the whole taluk was under attachment. At the same time, the Court appears to have undertaken to execute the decree, to give such possession as could be given, and to have adopted proceedings which they deemed proper for that purpose, and possession has been given in the manner described of the mouzas now in question. That being so, the question is, what was sold by the description of "the right and interest of the judgment-debtors in the decree?" Was it that of which possession had been given in the manner described, or was it only of that portion of the decree which remained to be executed? Their Lordships, on the whole, think it must be taken that what was put up for sale, what was intended and what was understood to be sold, must have been the unexecuted portion only of the decree. Under these circumstances, although the case is not unattended with difficulty, their Lordships will humbly advise Her Majesty that the deci-[247] sion of the High Court be affirmed. Inasmuch as the respondents have not appeared by counsel, there will be no costs of this appeal.

*Appeal dismissed.*

Solicitors for the Appellants: Messrs. *Watkins and Lattey.*

Solicitor for the Respondents: *Mr. T. L. Wilson.*

[6 Cal. 247]

## APPELLATE CRIMINAL.

*The 16th July, 1880.*

PRESENT :

MR. JUSTICE WHITE AND MR. JUSTICE FIELD.

Gogun Chunder Ghose

*versus*

The Empress.\*

*Evidence, Admissibility of—Judgment in Civil suit out of which criminal prosecution arises.*

In suit by *A* against the obligors of a bond, the Court held, for the reasons stated in its judgment, that the signatures of the obligors were not genuine, and directed the prosecution of *A* on a charge of forgery. On the trial of *A* before a jury, this judgment of the Civil Court was put in evidence on behalf of the prosecution, and its contents commented on by the Sessions Judge in his charge to the jury.

*Held*, that this judgment had been illegally admitted

Mr. *M. Ghose* and Baboo *Bykant Nath Dass* for the Accused

THE facts of this case sufficiently appear in the **Judgment** of the Court (WHITE and FIELD, JJ.), which was delivered by

**White, J.**—This was an appeal by the prisoner Gogun Chunder Ghose against a conviction under s. 471 of the Code and a sentence of five years' rigorous imprisonment.

The circumstances out of which the prosecution arose are these : The prisoner had brought a suit against Basheeram Mundle and his two brothers, Babooram Mundle and Dharani Dhur Mundle, for the recovery of 726 rupees, being the amount of principal and interest due upon a kistibandi, or bond, alleged to have been executed in favour of the prisoner by the three brothers.

[248] The Munsif found that the bond had been executed by one of the three, Dharani Dhur, but dismissed the suit, because he was of opinion that the signature of the other two defendants, Basheeram and Babooram, were forged, and he entertained so strong an opinion upon the point that he directed this prosecution, which we are now considering, to be instituted against the prisoner for forging the kistibandi, and using it as genuine knowing it to be forged.

The case has been tried by a jury, and they have come to a unanimous verdict that the prisoner is guilty of using this bond knowing it to be forged, and in answer to a question they said, that they found the signatures of Basheeram and Babooram to be forged, but the signature of Dharani Dhur to be genuine. At the trial, the judgment of the Munsif in the civil suit, although objected to on the part of the prisoner, was put in evidence by the prosecution, and read out to the jury, and the substance of the judgment was also referred to by the Sessions Judge in his charge to the jury.

The ground of the appeal is, that this judgment was improperly admitted as evidence, and that eliminating the judgment there is not sufficient evidence to justify the verdict. There can be no doubt the judgment was improperly received: Technically it was inadmissible, because it was not between the same parties, the present parties technically being the Queen-Empress on the one

\* Criminal Appeal, No. 433 of 1880, against the order of W. H. Page, Esq., Officiating Additional Sessions Judge of the 24-Pargannas, dated the 10th June 1880.



hand, and the prisoner on the other, and the respective parties in the civil suit being the prisoner and the three defendants ; and furthermore, it was not admissible on the substantial ground that the issues in the civil and criminal suits were not identical, and that the burden of proof rested in each case on different shoulders. It was not necessary for the Munsif in the civil suit to find more than that the execution of the bond by the three defendants was not proved. When the Munsif went further and pronounced the bond a forgery, and directed a prosecution, it was not a decision on the question of forgery, but merely an opinion which, although he was entitled to give expression to, ought no more to have been put in evidence on the present charge than the opinion of a Magistrate who commits a prisoner to take his trial upon a criminal charge.

[249] The Judge, in his summing up, draws the attention of the jury to this judgment and to the Munsif's opinion contained in it, and uses the following words: "The Munsif believed that one of the brothers, Dharani, executed the document, and that the other names were added afterwards by the prisoner, or with his knowledge, and with a dishonest intent. Whether this or whether all three names are forgeries, the offence is the same." It is true that the Judge, later on, says to the jury—"You are not in any way bound by the finding of the Munsif," and that he also, still later on, draws their attention to the fact that in the civil suit the *onus probandi* was on the prisoner, whereas at the trial of forgery the onus was on the prosecution. But inasmuch as neither the judgment nor the Munsif's opinion were evidence, the Judge, if he referred to them at all, ought to have told the jury not merely that they were not bound by them, but that it was their duty to dismiss them altogether from their mind. We have next to consider whether, independently of the objectionable evidence, there is sufficient evidence to justify the verdict of the jury.

[The learned Judge then proceeded to consider the other evidence in the case, and ultimately arrived at the opinion that, independently of the Munsif's judgment, there was not sufficient evidence which, even if believed, pointed with reasonable certainty to the guilt of the accused, and therefore made an order of acquittal.]

*Conviction set aside.*

#### NOTES.

[For a similar view, see (1880) 4 All. 97 ; (1896) 23 Cal. 610 , (1900) 4 C. W. N. clxxvi.]

[6 Cal. 249]

APPELLATE CIVIL.

*The 10th June, 1880.*

PRESENT :

MR. JUSTICE PONTIFEX, AND MR. JUSTICE McDONELL.

Ajoodhya Pershad and others..... Plaintiffs

*versus*

Gunga Pershad and another. ....Defendants

*Appeal against order rejecting plaint—Plaint insufficiently stamped—Court Fees Act (VII of 1870), s. 12, para. 1 sched. ii, div. ii, art. 17, part iii—Civil Procedure Code (Act X of 1877), s. 1, tit "Decree".*

An appeal lies against an order rejecting a plaint on the ground of its being insufficiently stamped.

[250] THE plaint in this case was declared by the Court to be insufficiently stamped under sched ii, div. ii, art. 17, part iii of the Court Fees Act, and the plaintiffs failing to affix the additional stamps, the plaint was rejected.

From this decision the plaintiffs appealed.

Baboo *Taruck Nath Sen* for the Appellants.

Baboo *Hury Mohun Chuckerbutty* for the Respondents.

The **Judgment** of the Court (PONTIFEX and McDONELL, JJ.) was delivered by

**Pontifex, J.**—We agree with the Court below that the plaint was insufficiently stamped under art. 17 of the Court Fees Act, cl. 3

Preliminary objections were taken to the appeal, on the ground that the order of the lower Court was final under s. 12 of the Court Fees Act, which enacts, that "every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit."

But of s. 588 of the Civil Procedure Code, as it originally stood, cl. (c)† provided that an order under s. 54, cl. (b)—being such an order as the present is—should be appealable, thereby removing the finality declared by s. 12 of the Court Fees Act.

A second preliminary objection taken was, that although by s. 588, cl. (b), an appeal was given in respect of rejection of plaints under s. 54, cl. (b), yet, under s. 588 as amended, no appeal is now given. But then, on behalf of the appellants it was urged, that, under the definition of "decree" in the amended Code, an order rejecting a plaint is within the definition. Similarly, the new

\* Appeal from order No. 64 of 1880, against the order of Roy Matadeen, Bahadur, Subordinate Judge, of Gya, dated the 21st November 1879.

Orders appealable. † [Sec. 588 :—An appeal shall lie from the following orders under this Code and from no other such orders :—

(c) Orders under section 44, adding a cause of action.

The orders passed in appeals under this section shall be final.]

definition of "decree" also includes questions under s. 244, which were made appealable by cl. (j)<sup>†</sup> of s. 588 as it originally stood, but which are omitted in s. 588 as amended.

We think though the amended s. 588 applies only to appeals from orders directing that the plaint shall be amended, and not to rejection of a plaint, yet the amended definition of the word [251] "decree" shows that an appeal lies in the present case. But, although an appeal lies, we are of opinion that the decision of the lower Court is correct. The appeal will, therefore, be dismissed with costs.

*Appeal dismissed.*

# NOTES.

[The same view was taken in (1888) 11 All. 91 F. B.=8 A W. N. 286, (1882) 12 C. L. R. 148, in (1890) 14 Mad. 169 an appeal was held to lie against an order for payment of additional Court Fees (1890) 14 Mad. 163]

See (1890) 12 All. 129 where a question of category was held not to be a question relating to valuation, (1898) 23 Bom 486.

For similar orders held to be appealable, see Messrs. Woodroffe and Ameer Ali's Civil Procedure (1908) p. 45-47.]

[6 Cal. 251]

*The 8th July, 1880.*

PRESENT.

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Khemna Gowala.....Defendant

*versus*

Budoloo Khan.....Plaintiff.\*

*Arbitration—Civil Procedure Code (Act X of 1877), Chap. xxvii—Kabulhat, Suit for—Suit under Act X of 1859.*

Notwithstanding that chap. xxxvii of Act X of 1877 (in reference to arbitration) does not refer specially to suits brought under Act X of 1859, yet, if both parties to a suit for a kabulhat brought under the latter Act, agree to refer the matters in dispute between them to certain arbitrators named by them, and file a joint petition in the Court of the Deputy Collector, stating that they had so agreed, and praying that the case may be referred to such arbitrators, neither of them will be afterwards at liberty to object to a decree made, embodying the award of the arbitrators, on the ground that the reference to arbitration was irregular, and not warranted by any of the provisions of Act X of 1877.

When a case has been so referred, the arbitrators are at liberty to determine what appears to them to be a fair and equitable rate of rent, and notwithstanding the amount so found is less than that demanded by the plaintiff in his plaint, the Court out of which the reference

\* Appeal from Appellate Decree. No 2055 of 1879, against the decree of R. Towers, Esq., Officiating Judicial Commissioner of Chota Nagpore, dated the 18th June 1879, reversing the decree of Baboo Hurihur Churn Lall, Deputy Collector of Chatra, dated the 8th November 1878.

Orders appealable.

† [Sec. 588 —An appeal shall lie from the following orders under this Code and from no other such orders.—

\* \* \* \* \*

(j) Orders under section 244, as to question relating to the execution of decrees, of the same nature with appealable orders made in the course of a suit.

\* \* \* \* \*

The orders passed in appeals under this section shall be final.]

issued is not at liberty on that ground to dismiss the suit, but is bound to order the defendant (with the alternative of eviction) to execute a kabuliat in favour of the plaintiff, engaging himself to pay rent to the plaintiff at the rate determined by the arbitrators to be fair and equitable.

The plaintiff in this case, Budoloo Khan, sued the defendant, Khemna Gowala, who was his tenant, in the Court of the Deputy Collector of Chatra, to obtain a kabuliat at an enhanced rate of rent for the land held under him. It appeared that the defendant had been previously paying rent at the rate of Rs. 8 per annum. The rent demanded by the plaintiff in his plaint was [252] Rs. 21-15. When the case came on to be heard before the Deputy Collector, both parties agreed to refer all matters in dispute between them to certain arbitrators named by them, and filed a joint petition, praying that the case might be referred to such arbitrators. The Deputy Collector made the order prayed for.

The arbitrators came to the conclusion that Rs. 15 per annum was the fair and equitable rent payable by the defendant to the plaintiff, and their award was, that the defendant should execute a kabuliat in favour of the plaintiff, engaging himself to pay rent in future at that rate.

On the award being returned to the Deputy Collector, the defendant objected, first that there was no provision in Act X of 1877, empowering a Civil Court to refer to arbitration a suit of this description,—namely, a suit brought under Act X of 1859; and secondly, that the arbitrators having found the fair and equitable rent for the land held by the defendant under the plaintiff to be Rs. 15 per annum, and not Rs. 21-15, as claimed by the plaintiff in his plaint, the Court was not at liberty to order the defendant to give a kabuliat at the rent allowed by the arbitrators, but was bound to dismiss the suit of the plaintiff with costs. In support of this contention the case of *Gogan Manji v. Kashushwary Debi* (L. R., 3 Cal., 498) was relied upon. The Deputy Collector dismissed the suit with costs upon both grounds.

Upon appeal to the Officiating Judicial Commissioner of Chota Nagpore, the decision of the Deputy Commissioner was reversed with costs, and a decree passed, ordering the defendant to execute a kabuliat as directed by the award of the arbitrators. Against this decree the defendant appealed to the High Court.

*Baboo Jogendra Chunder Dey* for the Appellant

*Mr. Sandel* for the Respondent.

*Baboo Jogendra Chunder Dey*.—The judgment of the lower Court of appeal is wrong, because the Code of Civil Procedure, in chap. xxxvii, contains no provisions empowering any Civil Court to refer to arbitration any case instituted under Act X of 1859, and the reason for this is obvious. These cases are of a [253] special character, they are suits between opulent or comparatively opulent landlords, who are able to command the assistance of the best professional skill and experience on the one hand, and needy ignorant and defenceless ryots, usually without the means of securing similar assistance, on the other. It is true that, in other suits, the rich and the poor appear frequently as antagonistic parties; but while in all other suits this is an accident, in this particular class of suits it is an almost invariable rule. It would not, therefore, be rash to assume that, while the Legislature intended to permit ordinary cases to be referred, with the consent of parties, to the determination of non-professional arbitrators, it deliberately omitted to extend that permission to the large and important class of cases in which the knowledge,

experience, and humanity of its own officers might be the only shield between the weak and the strong, the oppressor and the oppressed. As to the other point,—namely, whether upon its appearing from the award of the arbitrators that the rate of rent demanded by the plaintiff in his plaint was exorbitant and excessive, and not what they found to be the fair and equitable rental, the Court of first instance was not right in dismissing the plaintiff's suit, I submit that this has been decided by authority—see *Gogon Manji v. Kashishwary Debi* (I. L. R., 3 Cal., 498) and *Gholam Mohamed v. Asmut Ali Khan* (B. L. R., Sup. Vol., 974; s.c., 10 W. R., F. B., 14). It is true that in all other suits in the mofussil, if a plaintiff has claimed a larger sum than is ultimately found to be really due to him, a decree is passed in his favour for such sum, and he also gets his costs for the amount decreed to him; but that is because ordinary cases differ, as I have already observed, from the class of suits which includes the case now before the Court; and also because it is provided by s. 13 of Act X of 1859, that “no ryot who holds land without a written engagement shall be liable to pay any higher rent for such land than the rent payable for the previous years, unless a written notice has been served on such ryot in or before the month of Choit, specifying the rent to which he will be subject for the ensuing year.” In the present case no notice was served on the defendant informing him that he would be required to pay [254] at the rate of Rs. 15 for the ensuing year. If any notice was in fact served upon him, it was a notice that he would be required to pay at the rate of Rs. 21-15. Had the claim made upon him been for Rs. 15 only, perhaps he would not have resisted it. Again, s. 9 of the same Act provides that “the tender to any ryot of a pottah, such as the ryot is entitled to receive, shall be held to entitle the person to whom the rent is payable to receive a kabuliati from such ryot.” The tender of such a pottah as the ryot is entitled to receive, which in the present would be a pottah stating the rent reserved to be Rs. 15 per annum, appears therefore, to be a condition precedent to the right to demand a kabuliati, but no such tender was made before the institution of this suit.

Mr. Sandel for the respondent.—By the general law of the land all parties to disputes are entitled to refer any matters in dispute between them to arbitration, and there is nothing either in Act X of 1877 or in any other Act of the Legislature which makes the fact, that a suit under Act X of 1859 is pending between them sufficient to deprive them of this right. As to the second point, if the submission to arbitration be ruled to have been a good submission, as it is submitted it is, then it follows that both parties voluntarily agreed that the arbitrators should decide all matters in dispute between them in that suit. The matters in dispute were not merely what was the proper rent to be assessed on the land, the rent of which the plaintiff claimed to enhance, but every other matter of defence which the defendant might urge, and the last, but not the least in importance, was, whether the plaintiff was entitled to receive from the defendant a kabuliati for rent at the rate which they should come to the conclusion was a fair rate, or whether his suit should be dismissed. The award therefore ought to be upheld.

The Judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

Mitter, J.—The plaintiff, who is the respondent in this Court, brought this suit for a kabuliati against the defendant, appellant, in the Court of the Deputy Collector of Chatra, in the Manbhum District, on 3rd June 1878, and on 7th August following, both plaintiff and defendant filed a joint petition before [255] the Deputy Collector, stating that they had agreed to refer the matters in dispute to certain arbitrators.

These arbitrators, accordingly, delivered their award on 8th November, and it was sent in to the Deputy Collector. He, however, rejected it, as he considered that it was at variance with the decision in the case of *Gogon Manji v. Kashishwary Debi* (I. L. R., 3 Cal., 498), as it awarded a lower rate of rent than was claimed in the plaint. He, therefore, dismissed the suit. The lower Appellate Court, however, after discussing the legality of a reference to arbitration in a suit under Act X of 1859 (as to which he decided that such a reference could be legally made), and, finding that there were no valid objections to the proceedings of the arbitrators, reversed the decree of the Deputy Collector, and passed a decree in terms of the award.

In this Court it is contended that the reference to arbitration was null and void, as the chapter of the Civil Procedure Code relating to reference to arbitration is not applicable to suits under Act X of 1859.

It is quite true that that part of the Civil Procedure Code does not apply, and the lower Appellate Court was in error in relying upon two cases reported in the N. W. P. Reports as authorities. We have referred to those cases, and find that they are based upon an Act (No. XIV of 1863), which was only applicable to the N. W. P.

But we think that, on other grounds, we can uphold the decision of the lower Appellate Court. Irrespective of any Code of Procedure, persons are at liberty to refer any matter in dispute to arbitration, and any award made under such circumstance may be enforced by a suit brought for that purpose. It has also been held by this Court that parties, who have a suit pending in Court may submit the subject-matter of that suit to arbitration, see *Thakoor Doss Roy v. Hurry Doss Roy* (W. R., 1864, Mis. Rul., 21), and the same law has been laid down in Bombay, see *Harivalabdas Kallandas v. Utamchand Mankchand* (I. L. R., 4 Bom., 1). We see no reason why this principle should not be applied to a suit in Court under Act X of 1859. At any rate, if there was any [256] irregularity in the reference to arbitration at the request of both the parties, we think, on the authority of *Puna Bibee v. Khoda Buksh* (22 W. R., 396) it is one which the respondent cannot be allowed to object to in appeal.

No valid grounds for setting aside the award of the arbitrators have been shown to us. We, therefore, affirm the decree of the lower Appellate Court, and dismiss this appeal with costs.

*Appeal dismissed.*

#### NOTES.

[See the learned note of Mr **Hukm Chand** in his *Res judicata* (1894) pp. 468-473, under the heading "Non-compliance with procedure essential for exercise of jurisdiction may be waived"]

[6 Cal. 256]  
FULL BENCH.

The 21st June, 1880.

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE JACKSON,  
MR. JUSTICE MORRIS, MR. JUSTICE MITTER, AND MR. JUSTICE TOTTENHAM.

Uma Sunker Moitro.....Plaintiff  
versus  
Kali Komul Mozumdar and others.....Defendants.\*

*Hindu Law—Inheritance—Adoption—Succession of adopted son to relatives  
of adoptive mother.*

According to Hindu law, an adoptive son takes by inheritance from the relatives of his adoptive mother in the same way as a legitimate son.

*Morun Moe Debeah v. Bejoy Krishto Gossamee* (W. R., Sp. No., 121) and *Chinnarama Krishna Ayyar v. Minatchi Ammal* (7 Mad. H. C. R., 245) overruled.

THIS was a suit brought to recover possession of certain property, which, the plaintiff contended, devolved on him as the adopted son of one Hurosoon-doree Debee, the property having previously belonged to her father, and after his death to her brother. The defendants denied the authority to adopt, and contended that an adopted son could not succeed to the property of his adoptive mother's father and brother.

The Subordinate Judge found the adoption to be valid, [257] but decided that the plaintiff, under the Hindu law, could not inherit the property of his adoptive mother's relatives, and dismissed the plaintiff's suit.

The plaintiff then appealed to the Additional Judge, who, for different reasons from those given by the Subordinate Judge as to the question of adoption, but agreeing with him as to the inability of the plaintiff to inherit the property, dismissed the appeal.

The plaintiff appealed to the High Court.

At the hearing, the learned Judges (MORRIS and PRINSEP, JJ.) referred the question of the plaintiff's right to inherit to a Full Bench, with the following remarks:—

"The plaintiff sues to recover certain property by right of inheritance, he being the adopted son of the sister of the deceased Mokund Nath Mozumdar.

"It is contended under the authority of the case of *Morun Moe Debeah v. Bejoy Krishto Gossamee* (W. R., Sp. No. 121) that the plaintiff has no right of inheritance in the family of his adoptive mother. The judgment in that case was delivered by SHUMBHU NATH PUNDIT, J., and was concurred in by LEVINGE and ROBERTS, JJ.

"On the other hand, we are referred to the case of *Pulido Kumaree Debee v. Juggut Kishore Acharjee* (I. L. R., 5 Cal., 615), and also to an unreported case,

\* Reference to Full Bench made by Mr. Justice MORRIS and Mr. Justice PRINSEP, dated the 1st April 1880, in appeal from Appellate Decree, No. 1248 of 1878, against the decree of J.R. Hallett, Esq., Officiating Additional Judge of Rajshahye, dated the 31st May 1878, affirming the decree of Baboo Nundo Coomar Bose Roy Bahadur, Second Subordinate Judge of that district, dated the 20th December 1877.

Special Appeal No. 1414 of 1878. In the first of these cases, MITTER, J. considered it unnecessary, and declined to consider, whether an adopted son does or does not succeed to the relatives of the adoptive mother. But JACKSON and McDONELL, JJ., expressed their opinion, that, 'according to the interpretation of the Hindu law prevailing in Bengal, an adopted son takes by inheritance from the relatives on the maternal side of his father by adoption, in the same manner as a son begotten would take.' And in the latter case, the same two learned Judges laid down the proposition broadly, that 'the adopted son succeeds in all respects as the natural born son does, both on the maternal and paternal sides.'

"We think, therefore, that this question,—whether an adopted son takes by inheritance from the relatives of his adoptive mother—should be referred for the decision of a Full Bench. [258] Not only are the judgments of this Court in conflict on the point, but the subject is one of great importance to the Hindu community."

Baboo Sreenath Dass (with him Baboo Mohiny Mohun Roy and Baboo Gurudas Banerjee) for the appellant.—Can the adopted son of the sister of the deceased present funeral oblations to the deceased? If an adopted son is a sapinda, then he would be entitled to inherit. Section 3, paras. 16 & 17 of the Dattaka Chandrika lays down, that the adopted son presents oblations only to the ancestor of his adoptive mother. My contention is, that the son is the heir of the adoptive mother's relatives—Sutherland's Synopsis, head 4, p. 219. As to the status of an adopted son, see Sec. 1, v. 3, Dattaka Chandrika, and Sec. 5, v. 24. The adopted son takes the whole estate of brothers and other kinsmen if no natural son exists; see also Sec. 3, vv. 25 & 27. As to right of a sister's adopted son to inherit, see 2 Macnaghten's Hindu law, p. 88. *Gunga Mya v. Kishen Kishore Chowdhry* (3 Sel. Rep., 128) decides, that an adopted son is not entitled to succeed to the estate of his adoptive mother; but see the remarks on this case made in 1 Macnaghten, 78. The case of *Gunga Persad Roy v. Bryjessuree Chowdhraim* (S. D. A., 1859, p. 1091) is a converse case to the present, deciding that the relatives of the adoptive mother succeed to the estate of the adopted son. *Tara Mohan Bhattacharjee v. Kripa Moyee Debia* (9 W. R., 423) decides that an adopted son succeeds lineally and collaterally. The other side will rely on Chap. X of the Dayabhaga, s. 8, and say, that if a person does not come within the first six classes as there laid down, he can only succeed to the estate of his father. In *Puddo Kumaree Debee v. Juggut Kishore Acharjee* (I. L. R., 5 Cal., 615) it was held, that an adopted son falls within the first six classes mentioned in Chap. X. *Chinnarama Kristna Ayyar v. Mmatchi Ammal* (7 Mad. H. C. R., 245) refers to the right of an adopted son to succeed to the estate of the relatives of the adoptive mother; and follows the case of *Morun Moe Debeah v. Bejoy Krishto Gossamee* (W. R., Sp. No., 121). The case of [289] *Sham Kuar v. Gaya Din* (I. L. R., 1 All., 255) decides the point I am arguing for in my favour. According to Menu an adopted son is included in the first six classes, and that being so, whatever right a natural son has, the adopted son also has. As to succession of an adopted son *ex parte materna*, see Mayne's Hindu Law, 136-144.

Baboo Mohiny Mohun Roy on the same side.—Section 6, vv. 50 to 56 of the Dattaka Chandrika lays down that the rule regarding the paternal is equally applicable to the maternal grandsire of an adopted son. The adopted son succeeds to the estate of a *sapandia* kinsman, and if he is a *sapinda*, we are entitled to succeed.

Baboo Gopal Lall Mitter (with him Baboo Hem Chunder Benarjee and Baboo Gopal Chunder Sircar) for the respondents.—The highest position given



to an adopted son is that given in the Mitakshara, Chap. IX, v. 158 :— "Although an adopted son may form one of the first six classes enumerated in Menu, yet he is not to have the same advantages as a natural son." In Chap. IX, vv. 185-187, cognates are not mentioned. All the persons mentioned are members of the same family—Mitakshara, Chap. XI, s. 1, p. 14. [GARTH, C.J. —What is there to show that the principle of the text you have just read does not apply to an adopted son?] He is not a blood relation. Chapter XI, s. 6 of the Dayabhaga treats of blood relations, and paras. 27 and 28 go to show that a father's daughter's son cannot mean father's daughter's adopted son. Mitakshara, Chap. II, s. 11, p. 9; Mayne on Hindu Law and Usage, p. 135; Dayabhaga, Chap. X, pp. 7 & 8; and 1 Strange, p. 95, were also referred to.

The following **Judgments** were delivered by the Full Bench :—

**Mitter, J.**—I think that the question referred to us should be answered in the affirmative. An adopted son, according to Hindu law, takes by inheritance from the relatives of his adoptive mother in the same way as a legitimate son.

According to Hindu law, an adopted son occupies the same position, and has the same rights and privileges in the [260] family of the adopter as the legitimate son, except in a few specified instances, which have been clearly and carefully noted and defined by writers on the subject of adoption. The theory of adoption depends upon the principle of a complete severance of the child adopted from the family in which he is born, both in respect to the paternal and the maternal line, and his complete substitution into the adopter's family, as if he were born in it.

Nanda Pandita, in the Dattaka Mimansa, Sec. VI, paras. 50, 51 and 52, after laying down that the ancestors of the adoptive mother are the maternal ancestors of the adopted son, on the authority of certain Rishis mentioned therein, in para. 53, supports that opinion thus upon general grounds :— "And this even is proper. The adopted son, as substitute for the legitimate son, being the agent of rites performed by a legitimate son, it follows that he is the performer of funeral repasts, the objects of which are the manes in honour of whom a legitimate son performs such repast. For without difference relation to the father and the other sires of the adopter obtains." The original of this passage is more clear upon this point. A more faithful translation of it would be as follows :—"For without difference relation to the father's family, &c., obtains." The author here, quite irrespective of the chapter and verse of the Rishis whom he quotes in paras. 51 and 52, supports his position on general grounds, and says, that there is no difference between an adopted son and a legitimate son in respect of his relationship to his adoptive "father's family, &c.," which words, evidently, according to the author, indicate his (the adopted son's) relationship to the ancestors of the adoptive mother.

The cases in which there is a difference are all accurately defined both in the Dattaka Chandrika and the Dattaka Mimansa. It would not have been necessary to define accurately the points of difference, if in all other respects the position of an adopted son had not been exactly similar to that of a legitimate son.

Apart from the general ground, there is a clear and express text in the Dattaka Mimansa, which is cited below, [261] showing that a child, after adoption, is not only completely severed from his own father's family, but also from his own maternal grandfather's family; and that he, by substitution, becomes connected with his adoptive father and mother's family, as if they were his natural parents : "The forefathers of the adoptive mother only

are also the maternal grandsires of sons given, and the rest, for the rule regarding the paternal is equally applicable to the maternal grandsires (of adopted sons)"—Dattaka Mimansa, Sec. VI, page 50.

This case is governed by the authorities of the Bengal school, and it is now settled that the law of inheritance in this school is based substantially upon the theory of spiritual benefits—see the Full Bench case of *Guru Gobind Shaha Mandal v. Anand Lal. Ghose Mozumdar* (5 B. L. R., 15).

There is abundant authority, both in the Dattaka Chandrika and the Dattaka Mimansa, to establish that an adopted son confers on the father of the adoptive mother the same spiritual benefit which a legitimate son does. Speaking of the *Parvana* rite (the rite which is chiefly taken into consideration on the question of spiritual benefit), the author of the Dattaka Chandrika, in para. 17, Sec. III, says:—"But the absolutely adopted son presents oblations to the father and the other ancestors of his adoptive mother only."

On this subject the author of the Dattaka Mimansa says:—"As for what is said by Hemadri, that the precept enjoining the performance of a funeral repast, in honour of the maternal grandfather, refers to the natural maternal grandfather; that is inaccurate, for it is at variance with the passage—'of him who has given away his son, the obsequies fail.' Nor is the capacity of the maternal grandsires as givers wanting, for by reason of their affording their assent to the gift (as appears from this passage, having 'convened his kindred, &c.') they also are parties to the same. Besides, by this passage—'the funeral cake follows the family and estate'—the family and estate are declared to be the cause of performing the funeral repast, and the estate of the maternal grandfather also, like that of the father, lapses [262] from the son given. His incapacity to perform a funeral repast in honour of his original maternal grandfather is properly declared"—Dattaka Mimansa, Sec. VI, p. 51. "Accordingly Hemadri himself, from not being satisfied with that (just stated), has advanced the other position. 'In the same manner, as for the secondary father, a funeral repast must be performed in honour of the secondary maternal grandfather, and the rest'"—Dattaka Mimansa, Sec. VI, para. 52.

It is, therefore, clear that the adopted son confers the same spiritual benefit upon the relatives of his adoptive mother as a legitimate son does, and that he is cut off from the inheritance of the relatives of his original mother. That being so, it would accord with the dictates of natural justice, as well as with the principles upon which the law of inheritance in the Bengal school is based, to hold, that an adopted son succeeds to the property of the relatives of his adoptive mother in the same way as a legitimate son.

In para. 51, Sec. VI of the Dattaka Mimansa quoted above, Nanda Pandita, citing the text of Menu—"the funeral cake follows the family and estate," says,—'that the family and estate are declared to be the cause of performing the funeral repast'; and he argues from it "that the estate of the maternal grandfather also, like that of the father, lapses from the son given." Exactly the same process of reasoning leads to the conclusion that the adopted son, losing his right of inheritance in the family of his original father and maternal grandfather, acquires similar rights in the family of his adoptive father and maternal grandfather, because the family estate is declared to be the cause of performing the funeral repast. The adopted son is, as shown above, bound to perform the funeral repast in honour of the manes of his adoptive mother's ancestors. Therefore, the cause of this obligation, viz., the right to inherit their estate, must follow.

In the Dattaka Chandrika, the right of the adopted son to take by inheritance from the relatives of his adoptive mother is declared in clear words. After referring to certain contradictory texts of the ancient Rishis upon this subject, the author proceeds to reconcile them thus:—

[263] “In the same manner the doctrine of one holy saint, that the son given is an heir to kinsmen, and that of another, that he is not such heir, are to be reconciled by referring to the distinction of his being endued with good qualities or otherwise. By reason of succeeding to the estate of *sapinda* kinsmen, as well as to that of the father, he is (argued by the one to be) heir to kinsmen: and on account of the particle ‘only’ in the phrase ‘of the father only’ (occurring in the passage subjoined) from inheriting merely of the father, he is (argued by the other not to be) such heir. Of these the first six are heirs to kinsmen: the other six of the father only”—Dattaka Chandrika, Sec. V, para. 22. “And thus (the objection of) variation from the son given being enumerated higher—and lower in the order of inheritance, and so forth by different holy saints respectively, is obviated by the distinction as to his qualities, good and bad”—*Ibid* para. 23. “Therefore by the same relationship of brother and so forth, in virtue of which the real legitimate son would succeed to the estate of a brother or other kinsmen, where such son may not exist, (the adopted son) takes the whole estate even”—*Ibid*, para. 24. The words “other kinsmen” in para. 24 clearly indicate *sapinda* kinsmen, because in para. 22 the author expressly says, that, “by reason of succeeding to the estate of *sapinda* kinsmen, as well as to that of the father, he is (argued by the one to be) heir to kinsmen.”

Now, if the brother of the adoptive mother be a *sapinda* kinsman of the adopted son, then there cannot be any doubt that, according to this express authority, the latter inherits to the estate of the former.

According to the author of the Dayabhaga, the leading authority in the Bengal school, there cannot be any doubt that a maternal uncle is a *sapinda* of his sister's son. This is clearly laid down in para. 19, Sec. VI of Chap. XI of the Dayabhaga. The translation of this passage, as made by Mr. Colebrooke, with great deference to him, seems to be strictly accurate. The correct rendering of this passage is as follows:—“Therefore a kinsman, whether sprung from the family (of the deceased), though of different male descent, as his own daughter's son or his father's daughter's son, or sprung from a [264] different family, as his maternal uncle or the like, being allied by a common funeral cake (*pind*) on account of their presenting offerings to three ancestors in the paternal and the maternal family of the deceased owner, is a *sapinda*.”

Therefore, as a legitimate son, being a *sapinda* of his maternal uncle, takes by inheritance from the latter, so does an adopted son inherit the estate of his maternal uncle by adoption, under the express words of para. 24 cited above.

But it has been contended on behalf of the respondent, that though the author of the Dayabhaga has, by an extension of the definition of the word *sapinda*, included in that class persons sprung from a different family and connected by a common *pind*, yet, according to its ordinary signification, as understood by the majority of the Hindu lawyers, it is limited to agnates or persons connected with the deceased through an unbroken line of male descent. It is true that many Hindu lawyers use the word *sapinda* in this restricted sense, and it seems to me that the whole strength of the case on behalf of the respondent lies in this contention. We have, therefore, to determine in what sense the word *sapinda* is used both in the Dattaka Chandrika as well as in the Dattaka Mimansa.

In Sec. I, para. 1, the author of the *Dattaka Chandrika*, after laying down, on the authority of Sanuka, "that the adoption of a son by any Brahmin must be made from among *sapindas*," says in para. 11, "that, by the use of the word *sapinda* in its general sense, it is meant from such, both of the same or different family." Similarly, in the *Dattaka Mimansa* (Sec. XI, para. 3) the same text of Sanuka being cited, the following observation is made:—"From amongst *sapindas*," that is, amongst such kinsmen extending to the seventh degree inclusive; and the term being used in its general sense, it follows—from among such kinsmen belonging to the same or a different general family (*gotra*)—*Dattaka Mimansa*, Sec. XI, para. 3.

These passages leave no room for doubt that both the *Dattaka Chandrika* and the *Dattaka Mimansa* held that, according to the general sense of the term *sapinda*, it would include both agnates and cognates related by a common oblacion.

[265] It is clear, therefore, that, according to the authority of both these treatises on the law of adoption, which treatises have been always accepted throughout India as conclusive on questions relating to it, an adopted son takes by inheritance from the relatives of his adoptive mother.

The learned pleaders on behalf of the respondent relied upon the authority of the *Dayabhaga*, and on a certain gloss of Kulluka Bhatta on a particular passage of Menu, defining the rights of an adopted son. Exactly the same contention was raised before a Division Bench of this Court in the case of *Puddo Kumaree Debee v. Juggut Kishore Acharjee* (I. L. R., 5 Cal., 615), where a somewhat similar question was under consideration. In my judgment in that case I have fully given my reasons for overruling it. It is, therefore, unnecessary here to repeat the same grounds.

Therefore it is clear to me, that, upon the original works on Hindu Law, the weight of authority preponderates in favour of the contention that an adopted son succeeds to the estate of the relatives of the adoptive mother in the same way as a legitimate son.

Of the European text-writers, the opinion of Sir T. Strange and Mr. Sutherland are in favour of the adopted son's right. In Macnaghten's Hindu Law, page 78, Vol. I, the contrary view is expressed on the authority of the case of *Gunga Mya v. Kishen Kishore Chowdhry* (3 Sel. Rep., 128). But this decision, as I shall presently show, is not any authority upon the point under consideration.

There are very few decided cases bearing upon the question referred to us. The earliest case upon the subject is to be found in Macnaghten's Hindu Law, Vol. II, page 88. The decision there was in favour of the right of the adopted son. In a footnote to that case, Mr. Macnaghten apparently approved of the Pundit's opinion upon which the decision was based.

The case of *Gunga Mya v. Kishen Kishore Chowdhry* (3 Sel. Rep., 128), upon which the opinion of Mr. Macnaghten referred to above is based, is, as already stated, not a decision in point. There one of two brothers died, leaving him surviving a widow and a daughter. In respect of his share the daughter, after the death [266] of the widow, sued the surviving brother, who set up a gift made by the widow in accordance with an alleged direction left by the deceased. The daughter also alleged (most unnecessarily for the purposes of that case), that she had received from her husband authority to adopt, which she had not till then exercised. One of the questions referred to the Pundit was, whether, after the death of the daughter, her adopted son, should she leave one, would succeed to the property of her father. The Pundit answered

this question in the negative. But as, it did not actually arise in that case, and as the right of the daughter to succeed to her father's estate was unquestionable, the Court, on finding alleged gift not established, passed a decree in her favour without expressing any opinion on the question of the adopted son's right. Mr. Macnaghten was, therefore, mistaken in supposing that this case decided that an adopted son cannot succeed to the estate of his adoptive mother's relatives.

In *Gunga Pershad Roy v. Brijessuree Chowdhram* (S. D. A., 1859, p. 1091) the converse of the case before us arose. The question in that case was, whether the brother's son of the adoptive mother could succeed to the property left by his father's sister's adopted son. Upon the Pundit's opinion taken in that case, it was decided that he could. The case of *Gunga Mya* (3 Sel. Rep., 128) seems to have been cited, but it was considered to be not in point.

Then comes the case of *Morun Moe Debeah v. Bejoy Krishto Gossamee* (W. R., Sp. No., 121), upon which the respondent's pleaders strongly rely. There the very question, referred to us distinctly arose, and was decided against the right of the adopted son. The texts of the Dattaka Chandrika and the Dattaka Mimansa, extracted above, were not cited. The learned Judges were of opinion that the case of *Gunga Pershad Roy* (S. D. A., 1859, p. 1091) was not in point, and based their decisions mainly upon the authority of *Gunga Mya v. Kishen Kishore Chowdhry* (3 Sel. Rep., 128). This latter decision, as already shown, is not an authority upon the point, and it seems to me that although, in *Gunga Pershad Roy v. Brijessuree Chowdhram* (S. D. A., 1859 p. 1091), the converse question arose, that case virtually decided the point now under our consideration. If *A* is established to be the maternal grandfather of *B*, it follows as a matter of course that *B* is related to *A* as his daughter's son. The case of *Gunga Pershad Roy v. Brijessuree Chowdhram* (S. D. A., 1859, p. 1091) in effect established that an adopted son is related to the relatives of his adoptive mother as a son actually born of her. If the relationship is established, the rights and privileges which the law of inheritance attaches to it follow as a matter of course. The learned Judges in the case of *Morun Moe Debeah v. Bejoy Krishto Gossamee* (W. R., S. P. No., 121), (I say with due deference to their opinion), were wrong, both in relying upon *Gunga Mya v. Kishen Kishore Chowdhry* (3 Sel. R. E. P., 128) in support of their decision, as well as in distinguishing the case of *Gunga Pershad Roy v. Brijessuree Chowdhram* (S. D. A., 1859, p. 1091) from the one under their consideration. The Madras High Court, in the case of *Chinnarama Kristna Ayyar v. Minatchi Ammal* (7 Mad. H. C. R., 245) followed the ruling in *Morun Moe Debeah v. Bejoy Krishto Gossamee* (W. R., Sp. No. 121), although the learned Judges who decided that case were of opinion that that ruling was opposed to the law as laid down in the Dattaka Mimansa. On the other hand, a Full Bench of the Allahabad High Court, in the recent case of *Sham Kuar v. Gaya Din* (I. L. R., 1 All., 255), refused to follow it, and laid down the law in favour of the adopted son's rights. These are all the cases upon the point referred to us, and it seems to me that the weight of authority preponderates in favour of the proposition that an adopted son, according to the true interpretation of the Hindu Law prevailing in Bengal, takes by inheritance from the relatives of his adoptive mother.

The judgments of the lower Courts will, therefore, be reversed, and the plaintiff will be entitled to the share which he claims in the property mentioned in the plaint, with costs in all the Courts.

**Garth, C.J.**—I think that the weight of authority is strongly in favour of the views expressed by my brother, MITTER, in his [268] learned and exhaustive judgment; and I have great satisfaction in answering the question referred to us in conformity with what appears to me the manifest justice of the case.

**Jackson, Morris, and Tottenham, JJ.**—We concur.

#### NOTES.

[This case was affirmed by the Privy Council in (1883) 10 Cal. 232 P. C.=10 I. A. 138=13 C. L. R. 379. See the notes to that case in our "Law Reports" Reprints.]

[6 Cal. 268]

### APPELLATE CIVIL

*The 22nd June, 1880.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE.

Brajeshware Peshakar.....Plaintiff

*versus*

Budhanuddi and another.....Defendants.<sup>1</sup>

*Onus Probandi—Mortgage-Bond—Proof of Execution and Bona fides of Transaction—Evidence—Recital in Instrument.*

Where a claim is made under an alleged mortgage against a *bona fide* purchaser for value, and the defendant puts in issue the genuineness of the transaction, the onus is upon the plaintiff of proving *prima facie* the *bona fides*, as well as the actual execution of the mortgage; and if the Court discredits the plaintiff's witnesses as regards the *bona fides* of the transaction, it is at liberty to dismiss the suit, although the defendant gives no substantial evidence of fraud.

A recital in a deed or other instrument is in some cases conclusive, and in all cases evidence as against the parties who make it, and it is of more or less weight or more or less conclusive against them according to circumstances. It is a statement deliberately made by those parties, which, like any other statement, is always evidence against the persons who make it. But it is no more evidence as against third persons than any other statement would be.

*Chowdry Debj Persad v. Chowdry Dowlut Singh* (3 Moore's I. A., 347) explained.

*Radhanath Banerjee v. Jodoonath Singh* (7 W. R., 441) doubted.

THIS was a case referred to GARTH, C. J., as a third Judge, under s. 575 of the Civil Procedure Code, the two Judges who heard the special appeal having differed on a point of law. The facts sufficiently appear from the judgments.

[269] Baboo Umbica Churn Bose for the Appellant.

Baboo Kali Mohan Dass and Baboo Bhoobun Mohun Dass for the Respondents.

<sup>1</sup> Appeal from Appellate Decree, No. 1786 of 1878, against the decree of H. C. Sutherland, Esq., Judge of Backergunge, dated the 16th August 1878, reversing the decree of Baboo Bugwan Chunder Sein, Subordinate Judge of that district, dated the 18th of May 1878.

**Jackson, J.**—In this case I have the misfortune to differ in opinion from my learned colleague, and as the difference relates to a point of law, the appeal will have to be referred, under s. 575 of the Code of Civil Procedure, to one or more of the other Judges of the Court. My view of the case is this: The plaintiff, who is described as peshakar, which, I take it, means a woman of ill-fame, sues to recover the sum of Rs. 625 as principal, and Rs. 406-10 annas as interest, amounting in all to Rs. 1,031-10 annas, by the sale—firstly, of certain property which she alleges to have been mortgaged to her in a registered instrument by the defendant Hur Soonduri as collateral security, and which property has since been conveyed by Hur Soonduri to the other defendant Budhanuddi Chowdhry, who appears to be in possession of the same.

Hur Soonduri, the alleged borrower and mortgagor, put in no written statement, but she was examined as a witness in the cause on the plaintiff's side.

The plaintiff put in the instrument of mortgage, which purported to have been executed on the part of Hur Soonduri by one Nobin Chunder, who is admitted to be her son, and who appears to have acted under a general power of attorney on her behalf. The mortgage-bond was registered, and it recites the payment of the advance of Rs. 625 in full.

Hur Soonduri fully acknowledged, when examined as a witness, the payment of the money, and swore that she had mortgaged the property to the plaintiff. Nobin Chunder appears to have been cited both by the plaintiff and the defendant as a witness, at all events a summons on the side of the defendant was shown to us, and appears to have been served, and it is also shown that the plaintiff applied for and obtained from the Court an order for the prosecution of Nobin on account of his failure to attend upon summons.

It may be taken as admitted that the second defendant did [270] receive a conveyance of this property as from Hur Soonduri, and that conveyance, it appears, was also executed by the same Nobin Chunder, who likewise received the money.

In the written statement, which was put in by the Chowdhry defendant, he broadly asserted that the plaintiff's claim was wholly false, and that the bond upon which she relied was collusive and fraudulent; that there had been no payment or receipt of money under the bond, and that Nobin Chunder had got the bond executed *beforehand* for fraudulent purposes. He then set out the fact of his own purchase, and recited certain other mortgages previously made by Hur Soonduri, which debts, he said, had been paid off with the money taken from him. He urged that he had no notice of the alleged mortgage, that he had purchased the property in consequence of its being situated near his own house, and for that reason had paid a higher price than the market-value for it; and in conclusion he made certain allegations regarding an intrigue between Hur Soonduri's son, Nobin, and a person called Soudaminee, whose mother, he said, the plaintiff was.

I observe with great regret, regard being had to the circumstances of the case, that the Subordinate Judge should have permitted this written statement, containing most important allegations, and in the last paragraph containing statements of a scandalous nature, to be filed by the defendant under the verification of the *mokhtear*; and this fact becomes the more significant, when we see that this defendant in the sequel has abstained from coming into the witness box and giving an account of the facts within his knowledge relating to the purchase of this property.

The defendant does not say that the intrigue between Nobin and Soudaminee commenced before, or that his knowledge of that intrigue was subsequent to his purchase through Nobin's agency.

Now, at the trial of this case, it seems that the plaintiff swore to the execution of this instrument and to the advance of Rs. 625. The defendant, Hur Soonduri, also deposed to the like effect, and the witnesses, three in number, speak to the execution of the bond and the passing of consideration.

[271] It seems to me clear on general principles, and on the authority of the judgment of the Privy Council in *Chowdry Deby Persad v. Chowdry Dowlut Sing* (3 Moore's I. A., 347), and with reference to the case of *Radhanath Banerjee v. Jodoonath Singh* (7 W. R., 441), decided by Mr. Justice MARKBY and myself, that, under such circumstances, the plaintiff having put in a duly executed and registered mortgage-deed, containing a recital of payment, having also sworn herself to the payment of the money—and her testimony I do not find has been anywhere discredited—it lay upon the defendant, who pleaded that the mortgage was *mala fide*, to prove such *mala fides*. The Subordinate Judge appears to have disbelieved Hur Soonduri for some reason or other. He appears also to have given little credit to the witnesses who gave formal proof of the execution of the mortgage-deed and the passing of the consideration, but he says nothing of the testimony of the plaintiff herself. He remarks upon the absence of Nobin Chunder; but, on the authority of the cases to which I have referred, he considers, as I do, that it lay upon the defendant to give proof of the *mala fides* asserted, and he therefore felt himself bound to give judgment for the plaintiff.

The District Judge on appeal took the opposite view. His judgment is not very clear; but he says: "The question then to decide is whether on such evidence" (having previously spoken of the evidence) "it can be held that the bond was genuine, or that any consideration passed between the parties. I think it is impossible to uphold the genuineness of the bond." Now, the genuineness of the bond was not really in issue. "Even the lower Court," he goes on, "only finds on the first issue for plaintiff, relying on the rulings of the High Court and the Privy Council, but I do not think this ruling can be so interpreted. Such admissions and such recitals are only evidence when they are believed to be good. But when, as in the present instance, the lower Court discredits Hur Soonduri's evidence *in toto*, it is difficult to see how he can accept that evidence as proving the bond. I hold then that, on the Subordinate Judge's own argument, plaintiff's case cannot stand on the bond or on the plea of consideration having passed."

[272] Now, in order to examine how far that judgment is correct, I wish to consider what the plaintiff in this case could have done. The parties to the transaction are herself and Hur Soonduri. She has sworn that she had paid the money, and she has not been discredited. Hur Soonduri has also sworn to the like effect; but both the Judges appear to consider that she cannot be believed. But, in the first place, Hur Soonduri was a really superfluous witness, and in the next place, it is clear that the person with whom the transaction actually occurred was Nobin Chunder. The plaintiff does all she can to secure Nobin's evidence, but Nobin refuses to appear. It is clear there was no affirmative case on the other side on which the Courts below could rely, because the only witness referred to on the side of the defendant, in the judgment of the Court below, by name, is Radhanath Chukerbutty, and he, I find, is unable on oath to deny the *bona fides* of the disputed bond. There is nothing therefore to displace the affirmative evidence given on the side of the plaintiff, and as I have



already said the plaintiff herself gave her oath, and neither of the Courts says that oath is false. In that state of the case it seems to me there was no ground, no judicial basis, on which the Courts below could refuse the plaintiff a verdict. Of course, if a particular fact is in issue, and evidence is given on one side in the affirmative, and on the other side in the negative, it is open to the Court of first instance, and also to the Court of appeal, to accept the one version or the other; but here the evidence is all on one side, and where, as held by the Judicial Committee of the Privy Council, there is *prima facie* proof of the fact contained in the recital in the instrument, it appears to me that the Courts below are not justified, and the lower Appellate Court in this case was not warranted in throwing out the case of the plaintiff merely upon grounds of suspicion. Let us assume for a moment that the plaintiff's case was true. She has started it by her own oath. She then calls her vendor, Hur Soonduri. Hur Soonduri's interest is gone. Be it the plaintiff, or be it the other defendant, who has acquired it, Hur Soonduri has none. Either she herself or her son is clearly tainted with a fraud, and under these circumstances she gives evidence in support of the plaintiff's case, but in such a manner that the Courts below refuse [273] to believe in its truth. Is the plaintiff to be affected by this? Is the plaintiff's true case to be thrown out because of the misconduct of Hur Soonduri or of her son? It seems to me, it clearly cannot. But if the plaintiff's case is untrue, it must be shown to be untrue by positive evidence on the side of the defendant. It starts with a *prima facie* proof. There is the solemnly registered bond which contains the recital, and on that recital the plaintiff is entitled to rely. In addition to that she has given a quantity of other evidence and it would be extremely unjust, it seems to me, to throw out her case because of a taint in the evidence coming from the side of her vendor, who is undoubtedly affected in one direction or the other by fraud. I think, therefore, that, under the circumstances of this case, the lower Appellate Court had no judicial ground for reversing the judgment of the Court below, that judgment being given in accordance with the evidence, and in accordance with the authority of previous decisions.

I understand the difference between me and my brother McDONELL to refer merely to the powers of this Court in second appeal, his view being that the question here is a mere question of fact, with which we are not capable of dealing; but it appears to me that this is a definite question of law, which may be thus concisely stated:

The plaintiff having, in the circumstances stated, given not merely *prima facie* but substantial proof of the advance of which the receipt is acknowledged on the registered instrument of mortgage, and defendant having impugned that instrument on the ground of fraud, which he does not prove, was the lower Appellate Court at liberty to dispose of plaintiff's suit on the ground that she had not completely made out the *bona fides* of her own mortgage?

**McDonell, J.**—I regret to have to differ from my learned colleague, but I think in special appeal we cannot interfere with the lower Appellate Court. In this case undeniably the bond had been executed and registered, and if the plaintiff had left the case there, the onus, under the rulings cited by my learned brother, would have been on the defendant to prove the *mala fides* [274] of the bond. But the plaintiff was not satisfied to stop here. Besides showing that the bond had been executed, she adduced witnesses to prove the bond. These witnesses the Judge, for reasons given in his judgment, disbelieves; and can we say that he should have believed those witnesses, or that he has committed an error in law in disbelieving them, without

ourselves reading and weighing the evidence, which we have no right to do in special appeal, more especially as it has not been shown that the lower Appellate Court has misread or misinterpreted the evidence in any way. In this view, I think that the plaintiff is not entitled to a decree, and I should therefore dismiss the appeal with costs.

**Garth, C. J.**—The learned Judges of the Division Bench (Mr. Justice JACKSON and Mr. Justice McDONELL) having differed in opinion upon a point of law, it has become my duty as a third Judge (under s. 575 of the Civil Procedure Code) to decide this case.

The pleaders on both sides have been asked whether they wished to argue it again; but as they have declined to do so I proceed to decide the question from the paper-book with the advantage of having before me the judgments of my learned brothers.

The plaintiff appears to be a woman of ill-fame, and she sues to enforce a registered mortgage-bond against the property in question, which was given to her, as she alleges, by the defendant No. 1, on the 14th of Jeit 1282 B. S. (27th of May 1875). The sum said to have been the consideration for this bond was rupees 625, and the principle and interest due upon it amounted, when the suit was brought, to rupees 1,031-10.

The defendant No. 1 has put in no written statement, but has given evidence in the plaintiff's favour. The defendant No. 2 is the real defendant in the suit, having purchased the property from the defendant No. 1 under a kobala, dated the 7th of Bhadro 1283 B. S. (22nd August 1876), for a sum of rupees 4,300.

No attempt was made in the Courts below to contest the validity of the purchase by the defendant No. 2. There is no [275] doubt of his having honestly bought the property, and given a full price for it. The real and only question was, whether the mortgage to the plaintiff was a *bona fide* transaction, and valid as against the defendant No. 2.

The 1st issue was framed to raise this question, *viz.*—Is the bond in dispute a *bona fide* engagement or is it fraudulent?

The way in which this question has been dealt with in the Court below, and the way in which it ought to be dealt with as a matter of law, has formed the main ground of the difference of opinion between the Court below and the two learned Judges of this Court.

The Court of first instance found that the bond was duly executed and registered; and the bond itself contained a recital, that the consideration-money was duly paid. The Subordinate Judge appears to have considered, not only that there were circumstances which induced a grave suspicion as to the *bona fides* of the bond, but he mentions several facts, which, as it seems to me, ought to have weighed very strongly upon the mind of any reasonable man in deciding whether the transaction was a real and honest one.

One of these is, that Nobin, the son of the defendant No. 1, who is said to have acted for him under a power of attorney in the execution of the bond and carrying out the transaction, was not called as a witness. His absence was certainly a very pregnant circumstance. He had not only acted for his mother in this and other matters of business, but he also notably acted for her in effecting the sale to the defendant No. 2. At the time of that sale a list of the mortgages upon this very property was given by Nobin to the defendant No. 2, in which the mortgage in question did not appear. Nobin, therefore,

when the honesty of the transaction was called in question, was an all-important witness. If the money was really paid, he was the person who received it. If the transaction was *bona fide*, he could have proved it to be so ; and he was probably the only person who could and should have explained the fact that the mortgage in question was not entered in the list of mortgages given to the defendant No. 2.

Moreover, the Subordinate Judge finds that Nobin was a lover [276] of the plaintiff's daughter, and had been seen at the plaintiff's house since the institution of the suit ; and again, he is shown to have been named as a legatee under her will. Nobin, therefore, ought, undoubtedly, to have been called as a witness for the plaintiff, and Nobin did not make his appearance. But his mother, the defendant No. 1, was examined, and the Subordinate Judge says, that from the very tenor of her deposition, she spoke of *what she had been taught to speak for the benefit of the plaintiff*, and displayed utter ignorance or loss of memory on many other points upon which she was cross-examined. He evidently considers, that she had been tutored by Nobin, and that her evidence was unreliable.

From these and other circumstances which he mentions, the Subordinate Judge seems to have felt great doubt as to the *bona fides* of the transaction. But he found for the plaintiff apparently upon this ground.—The execution and due registration of the bond was proved, and the bond contained a recital that the consideration-money had been paid by the mortgagee to the mortgagor. This recital—according to two rulings of the Privy Council and this Court *Chowdry Deby Persad v. Chowdry Dowlut Singh* (3 Moore's I. A., 347) and *Radhanath Banerjee v. Jodoonath Sing* (7 W. R., 441)—the Subordinate Judge considered to be *prima facie* evidence of the money having been really paid, and coupled with the evidence of execution and registration, he thought it established a *prima facie* case for the plaintiff, and, as the defendant had given no counter-evidence of fraud to rebut this *prima facie* case, he considered himself bound (more especially having regard to the above rulings) to find for the plaintiff.

The District Judge took a different view. He considered that, as the *bona fides* of the bond was questioned, the onus of proving that it was a valid transaction as against the defendant No. 2, lay upon the plaintiff, and taking the whole of the plaintiff's evidence into consideration, he found that little or no weight ought to be attached to the recital in the bond. and he dismissed the suit upon the ground that the bond not being a *bona fide* transaction was void as against the defendant No. 2.

In this Court, Mr. Justice JACKSON has approved of the view [277] taken by the Court of first instance, considering that as the plaintiff had made out a *prima facie* case, which the defendant had not disproved, the lower Appellate Court was bound to give judgment for the plaintiff. On the other hand, Mr. Justice McDONELL thought the question to be one of fact, which it was open to the Court below to decide as it did, and that this Court had no right to interfere with the lower Court's decision.

It appears to me that the first question for consideration in point of law is, on whom the onus of proof lay ; and I think that, having regard to the case on both sides, and to the form of the first issue, the onus of proving *prima facie* that the transaction was valid as against the defendant No. 2 lay upon the plaintiff.

The due execution of the bond is one thing, the *bona fides* and validity of it as against subsequent purchasers is another. But when, as in this case, the

defendant puts the plaintiff to proof of the validity of the bond generally as against him (the defendant No. 2), the plaintiff is bound to prove *prima facie* both the due execution of the bond and the *bona fides* of the transaction.

But then it is said, that the execution being proved, the *bona fides* is also proved *prima facie* by the plaintiff's own evidence as well as by the recital in the bond ; and great weight has been attached (in deference to the authorities above cited) to the recital.

But it seems to me that the effect of the recital, as well as the decision of the Privy Council in *Chowdry Deby Pershad v. Chowdry Dowlut Singh* (3 Moore's I. A., 347) has been misunderstood.

A recital in a deed or other instrument is no doubt in some cases conclusive, and in all cases evidence *as against the parties who make it* ; and it is of more or less weight, or more or less conclusive, against them according to circumstances. It is a statement deliberately made by those parties, which, like any other statement, is always evidence against the persons who make it. But it is no more evidence as against third persons, than any other statement would be.

Now, in the Privy Council judgment referred to, the question [278] arose with regard to a recital made in a ruffanama, or deed of compromise, that a particular sum of money, which was the consideration for the compromise, had been paid by one of the parties to the other ; and the question whether that sum had really been paid, was raised in the suit *as between the parties to the instrument*. It was contended that the recital was conclusive evidence of payment, but it was held by the Privy Council that though not conclusive, it was undoubtedly some evidence of the payment, but evidence which might be explained and rebutted ; and it was accordingly proved and decided in that case, that the payment had not been made.

In the case of *Radhanath Banerjee v. Jodoonath Singh* (7 W. R. 441), the facts are not very accurately stated. It may be, that there were circumstances which made the recital evidence in that case, but it would certainly seem that the recital was admitted in evidence as against third parties, who were in no way privy to the deed ; and if so, the propriety of the decision seems to me extremely doubtful.

In this case, the only way in which, as far as I can see, the recital in the bond could possibly be made evidence against the defendant No. 2, was this : He no doubt claimed under the defendant No. 1, and he claimed the very property which was professedly mortgaged by his vendor, consequently the recital was a statement made with reference to that property by the person under whom he claimed, and therefore it was admissible in evidence as against him.

But then, in a case of this kind, the weight to be attributed to the recital would depend entirely upon the other evidence of the *bona fides* of the bond. If the plaintiff's evidence did not satisfy the Court that the transaction itself was honest and *bona fide*, the fact that the parties to the fraud had stated in the bond that the consideration was truly paid, would, as it seems to me, be entitled to little or to no weight.

It was contended on the part of the appellant, that if part of the plaintiff's evidence was sufficient to establish a *prima facie* case, it was incumbent upon the defendant to prove a substantive case of fraud by evidence of his own. But the answer to [279] this is, that though some of the plaintiff's evidence taken by itself, might have amounted to *prima facie* proof in her favour, still,

looking to the whole of her evidence, and to the circumstances of the case generally, there was ample ground to justify the lower Court in disbelieving her evidence and dismissing the suit.

If it were always necessary under such circumstances for creditors and others, impeaching transactions of this kind, to give substantive evidence of fraud, they would often be placed in a hopelessly unfair position. They, generally speaking, have no means of unravelling the fraud, or of enquiring into the nature of the transaction, until they came into Court, and they are then generally driven to rely upon the skill of their counsel and the astuteness and good sense of the Judge.

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In this case I consider that there were ample grounds in point of law to justify the finding of the Court below, and I therefore concur with Mr. Justice McDONELL in dismissing the appeal with costs.

*Appeal dismissed.*

#### NOTES.

##### [RECITALS—EVIDENTIARY VALUE—

As between the parties the recitals are evidence and throw the onus on him who denies their apparent tenor.—

(1884) 1. C. P. L. R. 59; 9 All. 713 P. C.; (1896) 23 Cal. 950; 3 All. 824; 27 All. 71; 22 All. 370 P. C.

The rule applies also to those that derive their title from the party.—(1888) 13 C.P.L.R.1.

But they are not evidence as against third parties and the party relying on them must prove them :—(1895) 17 All. 428 = 15 A. W. N. 93, though the deed was registered, (1900) 5 C. W. N. 403; onus of proving genuineness and freedom from taint of fraud as against an execution-purchaser, (1900) 5 C. W. N. 403; (1902) 5 O. C. 18, transfer from a Hindu widow, (1907) 5 C. L. J. 653; 6 C. L. J. 659; (1907) P. W. R. 8, (1907) P. L. R. 19; (1911) 17 C. L. J. 173 = 15 I. C. 698 (in Hibabilewaz.)]

[6 Cal. 279]

#### APPELLATE CRIMINAL.

*The 29th July, 1880.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE TOTTENHAM.

Noor Bux Kazi and others

*versus*

The Empress.\*

*Evidence Act (I of 1872) ss. 30, 138—Confession—Admission—Examination of witnesses—Judge—Penal Code (Act XLV, 1860), ss. 114, 149, and 302.*

A prisoner, charged together with others with being a member of an unlawful assembly, made a statement before the Committing Magistrate implicating his fellow prisoners and another person. He subsequently withdrew this statement and made another, in which he endeavoured to exculpate himself.

\* Criminal Reference, No. 39, on Appeal No. 362 of 1880, against the order of T. M. Kirkwood, Esq., Sessions Judge of Mymensing, dated the 21st May 1880.

*Held*, that this statement was not evidence against the other prisoners under s. 30\* of the Evidence Act. It was not a confession, nor did it amount to any admission by the prisoner that he was guilty in any degree of the offence charged, but it was simply an endeavour on his part to explain his own presence on the occasion in such a manner as to exculpate himself, [280] and any mention made by him in such a statement of other persons having been engaged in the riot, was altogether irrelevant, and not evidence against them.

At a trial before a Sessions Court, the Judge, on the examination-in-chief of the witnesses, for the prosecution being finished, questioned the witnesses at considerable length upon the points to which he must have known that the cross-examination would certainly and properly be directed.

*Held*, that such a course of procedure was irregular, and opposed to the provisions of s. 138 of the Evidence Act.

It is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions; and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in s. 138 of the Act.

FIVE persons, Jamir Mundle, Taiyab, Rabiullah, Noor Bux Kazi, and Daghu, were charged with being members of a body of men, some hundred in number, who, at the instigation of one Amiruddin Khan, on the 1st February 1880, armed with spears and clubs, went to take possession of certain lands in Mouza Kumarpur. It was alleged that one Kalu Shaikh (who was not before the Court) had speared one Kobin Sircar, who had opposed the entrance of the mob on his lands, and Jamir Mundle was charged with having struck him on the head with a *lati*, from which injuries Kobin died. It was further charged that, at the same time, Taiyab slightly wounded with a spear one Reza Mahomed, a cousin of Kobin, and that Noor Bux Kazi (unarmed) and Rabiullah, and Daghu (armed with deadly weapons) were all present at the time, as leaders of the rioters.

The four accused firstly mentioned pleaded an *alibi*. Daghu, who was arrested on the 5th February, stated before the Committing Magistrate that he went to Kamarpur with a body of armed men, and that Kalu, Jamir Mundle, Taiyab, and Noor Bux were amongst the party. On the 24th February, before the Sessions Judge, he, however, repudiated this statement and said that he was forced to accompany the other armed men, but that he only did so as far as Husbendi (a place adjoining Kumarpur), where he escaped, and that he did not see Noor Bux, Rabiullah or Jamir Mundle, as he did not go to Kumarpur.

The Sessions Judge, differing from the assessors, found that [281] Noor Bux, Jamir Mundle, and Taiyab "were members of an unlawful assembly in the prosecution of a common object, in which murder was committed

Consideration of proved confession affecting person making it and others jointly under trial for same offence.

\* [Sec. 30 —When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some others of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.]

Order of examinations.  
Direction of re-examination.

† [Sec. 138 :—Witnesses shall be first examined in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.]

by Kalu, which offence they knew to be likely to be committed, and the commission of which offence they, being present, actually abetted ;" and that they had, therefore, committed an offence under ss. 114\* and 149†, read with s. 302, of the Penal Code. But concurring with one assessor, he found that Daghu and Rabiullah were guilty of rioting armed with deadly weapons, and had committed an offence under s. 148 of the Penal Code.

He, therefore, sentenced the two latter to three years' rigorous imprisonment, and the three former to death.

The case was referred to the High Court in the usual way for confirmation of the sentence of death, and Noor Bux Kazi, Jamir Mundle, and Taiyab preferred an appeal from that sentence.

Mr. Jackson and Munshee Serajal Islam for the Appellants.—The statement made by Daghu before the Committing Magistrate cannot be said to be a confession such as is mentioned in s. 30 of the Evidence Act. In order to implicate the prisoners Daghu must have implicated himself. This he did not do. Daghu could not be convicted on his own statement alone, neither can the prisoners on Daghu's statement. Moreover, the statement was withdrawn at the Sessions Court. [GARTH, C. J.—It is surely evidence against them, if it amounts to a confession by him that he was a member of an unlawful assembly ; it is certainly a confession that he was present with Amiruddin's men.] To render the statement a confession under s. 30, it must appear that the confession implicates the confessing person substantially to the same extent as it implicates the person against whom it is used—*The Queen v. Belat Ali* (10 B. L. R., 453) ; see also *The Queen v. Mohesh Biswas* (10 B. L. R., 455). There is a difference between an admission and a confession. The confession must be something on which the Court could act without further evidence. [GARTH, C. J.—If the statement is admissible for the purpose of showing that Noor Bux was present, may we not connect [282] that with the other evidence ? If the Court were satisfied with the identity of the prisoners, would that not be sufficient ?] The case of *Regina v. Amrita Govinda* (10 Bom. H. C., 499) is a direct answer. It is there laid down that if an abettor of a crime is, on account of his presence at its commission, to be charged as a principal, his abetment must continue down to the time of the commission of the offence. At any time before that event he may change his mind, and withdraw from the abetment. What is the meaning to be attached to the words "the Court may take into consideration" in s. 30 ? There is no proof that the statement was not made behind the back of Noor Bux. It was made on the 6th February, and Noor Bux was only arrested on that day, and the witnesses for the prosecution are near relatives of the deceased. As to the case against Taiyab there is no suggestion that he was present and committed the murder. Section 149 of the Penal Code was never intended to refer to a charge of murder, see the case of *The Queen v. Sabed Ali*. (11 B. L. R., 347).

Abettor present when offence is committed.

such act or offence.]

\* [S. 114 :—Whenever any person, who, if absent, would be liable to be punished as an abettor, is present, when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed

Every member of an unlawful assembly to be deemed guilty of any offence committed in prosecution of common object.

† [S. 149 :—If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.]

No one appeared for the Crown.

The **Judgment** of the Court (GARTH, C. J., and TOTTENHAM, J.) was delivered by

**Garth, C. J.** (who, after stating the facts, proceeded to deal with the evidence against each prisoner individually, and with regard to the statement made by Daghu before the Committing Magistrate as affecting Noor Bux observed) :—

The Judge also attaches some weight to what he calls the original confession made by one of the prisoners named Daghu (who has been convicted under s. 148, Penal Code) to the Committing Magistrate, in which he mentions Noor Bux Kazi as present. It is our duty to point out to the Judge that this statement of Daghu's, which we have read, is no sort of evidence against Noor Bux even under s. 30 of the Evidence Act, for it is not a confession: it does not amount to any admission by Daghu himself, that he was guilty in any degree of the offence charged, but it is simply an endeavour on his part to explain his own presence on the occasion in such a manner as to exculpate [283] himself. Any mention made by him in such a statement of other persons having been engaged in the riot, is altogether irrelevant, and is not evidence against them either under s. 30 or otherwise.

(The learned Chief Justice then went into the further evidence, and finding, with regard to Noor Bux, that there was not sufficient evidence of his having been present at all, ordered the conviction as regards him to be set aside. With respect to the other two appellants, the Chief Justice found that they were members of the unlawful assembly, but there was not sufficient evidence to show that the object of the assembly was the murder of Kobin, nor that they, as leaders of the assembly, openly incited the others to cause his death, and therefore they ought not to be found guilty of murder, but only of rioting under s. 148 of the Penal Code. The learned Chief Justice then concluded as follows) —

We think it right to point out to the Sessions Judge, that the course which he adopted in the examination of the witnesses for the prosecution was irregular, opposed to the provisions of s. 138 of the Evidence Act, and not fair to the prisoners.

We find that, on the examination-in-chief being finished, the Judge questioned almost all the witnesses at considerable length upon the very points to which he must have known that the cross-examination would certainly and properly be directed. The result of this, of course, was to render the cross-examination by the prisoner's pleaders to a great extent ineffective, by assisting the witnesses to explain away, in anticipation, the points which might have afforded proper ground for useful cross-examination.

It is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions; and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in s. 138 of the Act. The Judge's power to put questions under s. 165 is certainly not intended to be used in the manner which we have had occasion to notice in the present case.

#### NOTES.

[A similar view has been taken of the value of self-exculpating or self-mitigating confessions :—2 All. 444; 2 All. 646; 6 Bom. 288; 7 All. 646, 2 A L. J. 59=2 Cr. L. J. 22.

See also 38 Cal. 559 as to the scope of sec. 30.]



[284] APPELLATE CIVIL.

*The 14th July, 1880.*

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Asman Singh.....Plaintiff

*versus*

Doorga Roy and others.....Defendants.

*Appeal in cases cognizable by a Small Cause Court—Civil Procedure Code—*

*(Act X of 1877). s. 586*

A was the proprietor of nine annas of a mouza, B and his family of one anna, and C and others of the remaining six annas. B and his family having occupied and enjoyed, to the exclusion of their co-shareholders, fifty-four bigas of the mouza, failed to pay any rent in respect of such occupation. A instituted a suit against them (making C and the other holders of the six-anna share defendants to the suit) to recover the sum of Rs. 412-8 as the sum justly due to him after making all proper deductions, including as well the share of the rent of the fifty-four bighas to which the six-anna shareholders were entitled, as also the share which B and his family were entitled to retain as proprietors of a one-anna share. *Held*, that the facts showed an implied contract on the part of B and his family to pay to their co-shareholders whatever, upon taking an account, should appear to be due to them; and that, inasmuch as the total amount sought to be recovered in the suit by A did not exceed 500 rupees, the suit was one which might have been brought in a Small Cause Court, and therefore the plaintiff had no right of second appeal to the High Court under s. 586 of the Code of Civil Procedure.

THE plaintiff in this suit was the owner of an undivided nine annas share of mouza Ishakpore, in Pergana Mulk, in the district of Bhagalpore. The nine first defendants, who in the pleadings were styled first party defendants, were members of a joint Hindu family, and the joint owners of an undivided one-anna share in the same property. The remaining defendants, styled the second party defendants, were the joint owners of the remaining six annas share. Mouza Ishakpore comprised upwards of three hundred bighas of land, out of which the proprietors kept by mutual arrangement thirty-two bighas as [286] *khoddkast* in their own hands. These thirty-two bighas were apportioned between the proprietors, according to their respective shares, the plaintiff taking eighteen bighas as a nine-anna shareholder, the first party defendants two bighas, and the second party defendants twelve bighas. The remainder of the mouza was let out to cultivating ryots, and the first party defendants, in addition to the two bighas kept in their hands as *khoddkast* under the above arrangement, separately as between them and the nine-anna and six-anna shareholders, but jointly as among themselves, occupied and cultivated fifty-four bighas on the mouza as ordinary tenants. The plaintiff, it appeared, had, for some time, with the consent of his co-proprietors, been collecting the rents on behalf of all concerned. Previous to the institution of the present suit, the plaintiff had instituted a suit against the first party defendants, on the basis of a *wasilbaki* account, to recover from them the rent due in respect of their

\* Appeal from Appellate Decree, No 867 of 1879, against the decree of Moulvie Hafiz Abdul Kurim Khan Bahadur, First Subordinate Judge of Bhagalpore, dated the 22nd February 1879, modifying the decree of Moulvie Mahomed Noral Hossein, Munsif of Begoocherai, dated the 19th December 1878.

occupation of the fifty-four bighas during the years 1281, 1282, 1283, and 1284 (1874—1877) and obtained a decree in the Court of first instance, which was afterwards reversed upon appeal, on the ground that the relation of landlord and tenant did not exist between the parties to the suit, and that the plaintiff was bound to frame his suit so as to claim whatever was due to him upon an account taken between him and his co-owners.

The plaintiff, accordingly, instituted the present suit against the first party defendants, making the second party defendants also parties, and asked for a decree for the sum of Rs. 412-8, against the first party defendants, as the sum due to him, on the footing that the fair rent of the land held by them was Rs. 3 per bigha, after deducting the share of the second party defendants in respect of the occupation by them of the said fifty-four bighas of land.

The first party defendants pleaded, *inter alia*, that the rate at which the plaintiff claimed to assess rent upon the land occupied by them was excessive.

The plaintiff obtained a decree in the Court of first instance, which, on appeal, was modified, on the ground that the plaintiff had not shown that Rs. 3 per bigha was the fair rent assessable [286] on the lands occupied by the first party defendants, and that therefore the plaintiff was only entitled to the amount which would have been due to him if those lands had been assessed at Re. 1 per bigha.

Against this decree the plaintiff appealed to the High Court.

Mr. M. L. Sandel for the Appellant.

Baboo Chunder Madhub Ghose for the Respondents.

Baboo Chander Madhub Ghose took a preliminary objection that the suit being to recover a sum not exceeding Rs. 500, and being also of a nature cognizable in a Court of Small Causes, and there having been an appeal already, a second appeal was barred by s. 586\* of Act X of 1877. Suits which are cognizable by Court of Small Causes are defined by s. 6† of Act XI of 1865. That a suit of this description is cognizable in a Court of Small Causes has been decided in the following cases:—*Huro Mohun Roy v. Khettro Monee Dossee* (12 W. R., 372), *Sunkur Lall Pattuck Gyawal v. Mussamut Ram Kalee Dhamin* (18 W. R., 104), *Joogul Kishore Roy v. Rughoonath Seal* (20 W. R., 4), and

\* [Sec 586.—No second appeal shall lie in any suit of the nature cognizable in Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees.]

† [Sec 6.—The following are the suits which shall be cognizable by Courts of Small Causes namely, claims for money due on bond or other contract, or for rent, or for personal property, or for the value of such property, or for damages, when the debt, damage, or demand does not exceed in amount or value the sum of five hundred Rupees, whether on balance of account or otherwise, provided that no action shall lie in any such Court—

(1) On a balance of partnership account, unless the balance shall have been struck by the parties or their agents.

(2) For a share or part of a share under an intestacy, or for a legacy or part of a legacy under a Will.

(3) For the recovery of damages on account of an alleged personal injury, unless actual pecuniary damage shall have resulted from the injury.

(4) For any claim for the rent of land or other claim for which a suit may now be brought before a Revenue Officer, unless, as regards arrears of rent for which such suit may be brought, the Judge of the Court of Small Causes shall have been expressly invested by the Local Government with jurisdiction over claims to such arrears.]

*Dipbukee Nundun Sen v. Mudhoo Mutty Goopta* (I.L.R., Cal., 123; s.c., 24 W.R., 478). In the last case, which was a suit to recover from the defendants a balance claimed to be due on account of rents of the plaintiff's zemindaries collected but not accounted for by the father of the defendants, MACPHERSON, J., expressed an opinion that such a suit "is none the less cognizable by the Small Cause Court, because it may have been necessary to go into the accounts of both parties to see whether the amount claimed is really due or not. Section 6 contemplates the possibility of having to examine accounts between the parties, for it says,—the following are the suits cognizable by Courts of Small Causes, namely, claims for money due on bond or other contract, when the debt does not exceed in amount or value the sum of five hundred rupees, *whether on balance of account or otherwise*: the only balance of account excepted being a balance of partnership account, unless the balance shall have been struck [287] by the parties or their agents." See also the case of *Buldeo Sing v. Ramsurun Lall* (25 W. R., 234).

Mr. *M. L. Sandel* for the appellant distinguished the cases cited for the respondents, and contended, that none of them supported the proposition that one of several co-partners, co-owners, or co-proprietors can bring a suit in a Court of Small Causes to adjust the account between him and his co-partners, co-owners, or co-proprietors, or to recover an amount to be found due to him upon the taking or adjustment of such account. A suit for an account is not a suit which can be entertained by a Small Cause Court: *Shurrut Chunder Kur v. Ram Sunkur Surmah* (10 W.R., 214), *Krishna Kinkur Roy v. Madhub Chunder Chuckerbutty* (21 W.R., 283). It is submitted that the only rule to be adopted is this: a suit for an account only, a suit between partners for an account, a suit between persons who have had mutual dealings for an account, and a suit between co-owners and co-proprietors for an account, cannot be brought in a Small Cause Court; but where a defendant has entered into a contract, express or implied, to pay to, or to hold to the use of the plaintiff, money received by him, then a Small Cause Court may entertain the suit, notwithstanding that it may be necessary to go into an account to ascertain the exact sum due.

The Judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

**Mitter, J.**—The plaintiff seeks to recover from the first party defendants the sum of Rs. 412-8 under the following circumstances.

The plaintiff is the owner of nine annas of Mouza Ishakpore, and the defendants, first and second parties, of one anna and six annas respectively. The plaintiff is in charge of the collection of the rent of the mouza from the tenants. There are thirty-two bighas of *khodkast* lands, which have been distributed amongst the proprietors in proportion of two bighas per anna, for which no rent is realisable.

[288] Over and above their proportionate share of the *khodkast* lands, the defendants first party cultivated fifty-four bighas in the years 1281, 1282, 1283, and 1284. The plaintiff brought a suit, under Beng. Act VIII of 1869, to recover rent for these years on account of these lands from the defendants first party, and obtained a decree in the Court of first instance. But on appeal the suit was dismissed on the ground that there did not exist the relationship of landlord and tenant between the parties, and that its frame was misconceived, inasmuch as the plaintiff could not recover anything without an adjustment of account between the shareholders regarding the profits of the mouza. The plaintiff has, accordingly, brought this suit, alleging that, on an

adjustment of accounts of the profits of the mouza, he is entitled to recover the sum claimed. This being the nature of the suit, a preliminary objection has been taken to the hearing of this second appeal, on the ground that the suit was one of a nature cognizable by a Court of Small Causes. The appellant's pleader, on the other hand, urges, first,—that a Court of Small Causes, under s. 6 of Act XI of 1865, has no jurisdiction to try a case in which accounts have to be taken; and secondly, that under the first proviso of the section in question, such a Court is not competent to take cognizance of the present suit. Several cases have been cited in support of their respective contentions:—*Shurrit Chunder Kur v. Ram Sunkur Surnah* (10 W. R., 214), *Huro Mohan Roy v. Khettro Monee Dossee* (12 W. R., 372), *Sunkur Lall Pattuck Gayawal v. Mussamut Ram Kalee Dhamin* (18 W. R., 104), *Krishna Kinkur Roy v. Madhub Chunder Chuckerbutty* (21 W. R., 283), *Jooquil Kishore Roy v. Rughoonath Seal* (20 W. R., 4), *Dyebukee Nundun Sen v. Mudhoo Mutty Goopla* (I. L. R., 1 Cal., 123; s. c., 24 W. R., 478), and *Buldeo Sing v. Ram Surin Lall* (25 W. R., 234).

Having regard to the provisions of s. 6, Act XI of 1865, and to the authorities cited before us, we think the preliminary objection taken must prevail. The suit is substantially one in which one of the joint owners of a mouza seeks to recover, to [289] the extent of his share, profits of the mouza from a co-sharer, who has appropriated the same in excess of his own share. Such a claim as this is evidently based upon an implied contract which exists between the joint owners of a zemindary or other landed property, and by which one co-sharer binds himself to make good to the others any profits which he may have appropriated in excess of his own proper share. *Sunkur Lall Pattuck Gayawal v. Mussamut Ram Kalee Dhamin* (18 W. R., 104)

The contention that a Court of Small Causes is not competent to take cognizance of any case in which an account is to be taken is, we think, untenable. If it were valid, there would have been no necessity for the proviso upon which the learned pleader for the appellant relies in the alternative. See also *Dyebukee Nundun Sen v. Mudhoo Mutty Goopla* (I. L. R., 1 Cal., 123, s. c., 24 W. R., 478). We are also of opinion that the present suit cannot be considered to be "on a balance of partnership account," in the sense in which these words have been used in the first proviso of s. 6 of Act XI of 1865. The word "partnership" here, it seems to us, refers to the relation which subsists between certain persons as defined in s. 239 of the Contract Act. The appeal must, therefore, be dismissed with costs.

*Appeal dismissed*

#### NOTES.

[Suit on implied contract held to be cognizable, see 15 Cal. 652.

See also 12 Mad. 349.]

[6 Cal. 289]

The 10th September, 1880.

PRESENT.

MR. JUSTICE MORRIS AND MR. JUSTICE PRINSEP.

Mokundo Lall Roy . . . . . Defendant

*versus*

Bykunt Nath Roy . . . . . Plaintiff.†

*Hindu Law Inheritance—Adopted Son.*

An adopted son is not precluded from inheriting the estate of one related lineally, although at a distance of more than three generations from the common ancestor

[290] THE plaintiff, who was the adopted son of one Brojo Nath Roy, sued to recover possession of certain properties as heir of one Gour Kishore Roy. It appeared that Brojo Nath's father was the third cousin of Gour Kishore Roy.

Baboo Sreenath Dass and Baboo Gurudas Banerjee for the Appellant

Baboo Mohun Mohun Roy and Baboo Rash Behary Ghose for the Respondent.

The **Judgment** of the Court (MORRIS and PRINSEP, JJ.) was delivered by

**Prinsep, J.**—The only point raised by the defendant, special appellant before us, is, that, by reason of his being an adopted, and not a naturally begotten, son of Brojo Nath Roy, the plaintiff is no heir to Gour Kishore under Hindu law, an adopted son not being recognized as a *sakulya* or *samanodaka*, nor is entitled to inherit if he be not a *supinda* or related within three degrees from the common ancestor.

The general principle is very clearly laid down in the Dattaka Mimamsa 6, para 53 :—

“Without difference, relation to the father and other sires of the adopter obtains in the same manner as relation to the general family, the family deity, and family rules of that person, the term ‘son’ is used without restriction in these and other passages”

Unless, therefore, we found some authority clearly restricting the rights of inheritance on the part of an adopted son, and declaring that they are something less than those of the naturally begotten son, we certainly should make no distinction between them. There is a distinction declared by Hindu law where a naturally begotten son inherits jointly with a son previously adopted, but we can find no express authority for limiting the rights of an adopted son to inherit to the estate of one related lineally by more than three generations from the common ancestor. The point seems never to have been raised before in our Courts, but we observe that the judgment of this Court in the case of *Tara Mohun Bhattacharjee v. [291] Kripa Moyee Debee* (9 W. R., 423) admits the rights of an adopted son to one more distantly related to him.

We, therefore, dismiss the appeal with costs.†

*Appeal dismissed.*

\* Appeal from Appellate Decree, No. 539 of 1879, against the decree of T. T. Allen, Esq., Judge of Rajshahye, dated the 17th December 1878, confirming the decree of Baboo Koyelash Chunder Mookerjee, Subordinate Judge of that district, dated the 11th September 1878.

† See *Roghibanand Dass v. Sadh Churn Dass*, I. L. R. 4 Calc., 425; *Puddo Kumaree Debee v. Juggut Kishore Acharjee*, I. L. R. 5 Calc., 615; and *Uma Sunker Montro v. Kali Komul Muzumdar*, ante p. 256.

NOTES.\*

[See the Notes to 8 Cal. 802 P. C. in the "Law Reports" Reprints where the rules of tance relating to adopted sons are stated.]

[6 Cal. 291]

The 13th September, 1880.

PRESENT :

MR. JUSTICE WHITE AND MR. JUSTICE FIELD.

Mutty Ram Sahoo.....Defendant

versus

Mohi Lall Roy .....Plaintiff.\*

*Jurisdiction—Right of Way—How far finding of Magistrate thereon binding on Civil Court—Code of Criminal Procedure (Act X of 1872), ss. 521, 523, 530—Estoppel.*

A Civil Court is not competent to set aside the order of a Magistrate made under s. 521,† of the Code of Criminal Procedure, on the ground that such order was made without jurisdiction because the land in respect of which the order was made is private property and not a thoroughfare, or public place. A Civil Court can, however, irrespective of an order made under s. 521 by a Magistrate, try the question, whether the land which formed the subject of such order is private property, and not a thoroughfare or public place, as between the parties to such suit and those who claim under them.

*Per.* FIELD, J.—A person who, on receipt of an order made by a Magistrate under s. 521 of the Code of Criminal Procedure, declaring the existence of a right of way over such person's lands, demands, under s. 523 of the same Code, the appointment of a jury to try whether such order was reasonable, is not by such action estopped from afterwards bringing a suit in a Civil Court, seeking to establish his right to the exclusive enjoyment of the same lands.

THIS was a suit in which the plaintiff sought for a declaration of his right to the exclusive enjoyment of two plots of land. In respect of the first plot, the plaintiff alleged that it was homestead land, which had long been in his exclusive possession; that the defendant, by falsely claiming a right of way over the said plot, had obtained an order to that effect from the Magistrate [292] under s. 521 of the Code of Criminal Procedure. The plaintiff prayed for a decree setting aside the Magistrate's order, and for his restoration to the exclusive possession of the land in dispute. At the time of the judicial enquiry instituted by the Magistrate, it was shown in the present suit that the plaintiff had availed himself of the opportunity given him under the Criminal Procedure Code to insist upon the appointment of a jury under s. 523 of that Code to consider whether the order made by the Magistrate was a reasonable and proper order, and that the jury had confirmed the order of the Magistrate in this respect.

The Court of the first instance found on the facts that the right of way claimed by the defendant had only been exercised upon sufferance on the part of the plaintiff, and was not of sufficiently ancient date to warrant the establishment of a prescriptive right; that the claim made by the defendant was in

\* Appeal from Appellate Decree, No. 1585 of 1879, against the decree of Baboo Sreenath Roy, Subordinate Judge of Hooghly, dated the 26th May 1879, affirming the decree of Baboo Sashibhusun Mookerjee, Second Munsif of Mohisrakha, dated the 3rd June 1878.

† [Under this section a Magistrate may order removal of nuisances.]

respect of a private, not a public, right of way; and that the Magistrate therefore was acting *ultra vires* in adjudicating upon the matter at all. For this reason, the Court set aside the order of the Magistrate as made without jurisdiction, and on the facts gave the plaintiff a decree, establishing his right to the exclusive enjoyment of the lands in suit.

The Subordinate Judge, for substantially the same reasons, confirmed the decision of the lower Court.

The defendant appealed to the High Court.

Baboo *Umbika Churn Bose* and Baboo *Bhowany Churn Dutt* for the Appellant.

Baboo *Joy Gobind Shome* and Baboo *Kally Churn Bonerjee* for the Respondent.

The Court (WHITE and FIELD, JJ.) delivered the following **Judgments** :—

**Field, J.**—In this case the plaintiff sued to recover possession of two plots of land. As to the second plot I see no reason to interfere with the decree of the Munsif, confirmed by the Subordinate Judge, which declares the plaintiff entitled to half this plot, and directs that the earth thrown upon such half, in [293] excavating defendant's tank, be removed. Clearly there is no ground of interference on second appeal.

The main contention is in respect of plot No. 1. It appears that, in respect of this plot, the defendant made an application to the Magistrate; and the Magistrate, dealing with this application as a case under s. 521 of the Code of Criminal Procedure, made an order directing the plaintiff, who had closed a certain path over this piece of land, to remove the fence put up for the purpose of barring the right of way, and to leave the path open.

The plaintiff now substantially contends that this order of the Magistrate was made without jurisdiction, inasmuch as the path or the land over which it runs was not a thoroughfare or public place within the meaning of s. 521, Code of Criminal Procedure; and the Magistrate had therefore no power to make the order just mentioned. He further contends that the land is his private property, and that the defendant has no right of way over it. He therefore asks that the order of the Magistrate may be set aside, and that he may be declared entitled to the unobstructed possession of this plot of land.

Two questions are thus raised for decision, *viz.* :—(i) Is it competent to a Civil Court to set aside the Magistrate's order made under s. 521, Code of Criminal Procedure, on the ground that such order was made without jurisdiction, inasmuch as the land is private property, and not a thoroughfare or public place? (ii) Is it competent to the Civil Court, irrespective of that order, to try the question whether the land is private property, and not a thoroughfare or public place, and to make a decree accordingly, which, if the land is found to be private property, will have the effect of barring any similar order by a Magistrate hereafter? It may be observed that the order made by the Magistrate has been obeyed, and may be said to be spent. There is no suggestion that that order took the form of a perpetual injunction.

It has been contended on the part of the defendant that both these questions are concluded by the authority of the case of *Pearl Lall Co. v. Rooke* (3 B. L. R., A. C., 305; S. C., 11 W. R., 434). In that case an order had been made apparently under s. 308 of the old Code of [294] Criminal Procedure; and JACKSON J., said :—“ It seems to me quite clear that the Civil Court has no jurisdiction to call directly in question the propriety of such an order.

The plaintiff may have civil rights which he may possibly be enabled to enforce in other ways ; but it seems to me quite clear that a Civil Court is not competent to declare a road, which has been opened by the order of the Magistrate, to be no public thoroughfare, and to direct that it be closed by the assistance of the officers of the Court." And MARKBY, J., said :—" In this case, however, an order has been made by the Civil Court, declaring that a road, which is claimed to be a public road, shall be stopped. That appears to me to be an order which, under any state of circumstances, the Civil Court has no power to make." I have referred to the original papers of this appeal, and I think that the question whether an order made under s. 308 of the old Code (which corresponds with s. 521 of the new Code), directing the removal of an obstruction or nuisance from a thoroughfare or public place, is conclusive as to the locus being a thoroughfare or public place, was not directly raised or decided in that case. The plaintiff there sued to have two roads closed, which he alleged that the defendant had made over his land in accordance with an order of a Magistrate. This order was, doubtless, made under s. 308 of the old Criminal Procedure Code. One of these roads was a cart-road, and the other a footpath. The Munsif raised and tried the issue whether these roads had been used by the public or not. He found substantially that the cart-road was not a public road, and the defendant had no right to use it, and that the footpath was a public thoroughfare used by the public, and defendant was, therefore, entitled to use it, and he made a decree accordingly. This decree was confirmed by the Subordinate Judge, who regarded the suit as a suit to set aside the orders of the Magistrate. In the grounds of appeal to the High Court no question was raised as to the jurisdiction of the Civil Court to entertain the suit, but at the hearing a question of jurisdiction did arise. JACKSON, J., said .—" The ground of special appeal, which seems to us to arise in this case, which has not been taken in the petition of special appeal, but which we have allowed to be taken, is, that the order made by the Civil Court in this case is one which it was not [295] competent to make. I think the order made is clearly beyond the competency of the Civil Court. The defendant, it seems, has obtained an order from the Magistrate, which I presume was under the 308th section of the Code of the Criminal Procedure, declaring the road in question to be a public thoroughfare, and ordering it to be kept open. It seems to me quite clear that the Civil Court has no jurisdiction to call directly in question the propriety of such an order." The language which follows appears to embrace a broader proposition ; but having regard to the facts of the case, to the view of the Subordinate Judge, and to the language just quoted, I think it clear that the suit was regarded as a suit brought for the purpose of " calling directly in question the Magistrate's order." Such a suit, no doubt, could not be entertained, if the application made to the Magistrate set forth a case within his jurisdiction under s. 308 of the old Code, and he had exercised jurisdiction accordingly. The cases of *Sham Dass v Bhola Dass* (1 W. R., 324) and *The Queen v Janokeenath Bhattacharye* (2 W. R., Cr. Rul., 36) show that a Magistrate is not entitled to interfere when a place is not a thoroughfare or public place, but is private ground.

It is quite possible to suppose a case in which there was a contention before the Magistrate as to whether the place was public or private. The Magistrate would have to decide this question in order to determine whether he ought or ought not to exercise jurisdiction. I take it that his *bona fide* decision of the point would be conclusive so far as regards an order made under s. 308 of the old, or s. 521 of the new, Code if that order were called directly in question in the Civil Court, on the ground that it was made without jurisdiction,



inasmuch as the place was not a thoroughfare or public place. It may be observed that what these sections give the Magistrate jurisdiction to do is to remove an obstruction or nuisance from a thoroughfare or public place. There is no jurisdiction to declare a place to be a thoroughfare or public, unless it be incidentally, for the purpose of the order, no jurisdiction to make such a declaration, which shall be binding for the future

In the case of *The Queen v. Bolton* (1 Q. B., 66) in which a rule for a [296] *certiorari* was made absolute, Lord DENMAN, C. J., said.—“Two points were made in support of the order: the *first*, that the proceedings all being regular on the face of them, and disclosing a case within the jurisdiction of the Magistrates, this Court could not look at affidavits for the purpose of impeaching their decision; the *second*, that even if those affidavits were looked at, the case would be found to be one of conflicting evidence, in which there was much to support the conclusion to which the Magistrates had come, and that this Court would not disturb that conclusion, even if it might have been disposed to have decided differently had the matter originally come before it

“The first of these is a point of much importance, because of very general application, but the principle upon which it turns is very simple, the difficulty is always found in applying it. The case to be supposed is one like the present, in which the Legislature has trusted the original, it may be (as here) the final, jurisdiction *on the merits* to the Magistrates below, in which this Court has no jurisdiction as to the merits, either originally or on appeal. All that we can then do, when their decision is complained of, is to see that the case was one within their jurisdiction, and that their proceedings on the face of them are regular and according to law. Even if their decision should upon the merits be unwise or unjust, on these grounds we cannot reverse it. So far, we believe, was not disputed, but as the inquiry is open, *ex concessis*, to see whether the case was within the jurisdiction of the Magistrates, it is contended that affidavits are receivable for the purpose of showing that they acted without jurisdiction, and this is, no doubt, true, taken literally the Magistrates cannot, as it is often said, give themselves jurisdiction merely by their own affirmation of it. But it is obvious that this may have two senses in the one it is true, in the other on sound principle, and on the best considered authority, it will be found untrue. Where the charge laid before the Magistrate, as stated in the information, does not amount in law to the offence over which the Statute gives him jurisdiction, his finding the party guilty by his conviction in the very terms of the Statute would not avail to give him jurisdiction. The conviction would be bad on the face of the proceedings, all being returned [297] before us. Or, if the charge being really insufficient, he had misstated it in drawing up the proceedings, so that they would appear to be regular, it would be clearly competent to the defendant to show to us by affidavits what the real charge was, and that appearing to have been insufficient, we should quash the conviction. In both these cases a charge has been presented to the Magistrate over which he had no jurisdiction, he had no right to entertain the question, or commence an inquiry into the merits, and his proceeding to a conclusion will not give him jurisdiction. But as in this latter case we cannot get at the want of jurisdiction but by affidavits, of necessity we must receive them. It will be observed, however, that here we receive them, not to show that the Magistrate has come to a wrong conclusion, but that he never ought to have begun the inquiry. In this sense, therefore, and for this purpose, it is true that affidavits are receivable.”

“But where a charge has been well laid before a Magistrate, on its face, bringing itself within his jurisdiction, he is bound to commence the inquiry:

in so doing he, undoubtedly, acts within his jurisdiction ; but in the course of the enquiry, evidence being offered for and against the charge, the proper, or it may be the irresistible, conclusion to be drawn may be, that the offence has not been committed, and so that the case in one sense was not within the jurisdiction. Now, to receive affidavits for the purpose of showing this, is clearly in effect to show that the Magistrate's decision was wrong if he affirms the charge, and not to show that he acted without jurisdiction : for they would admit that, in every stage of the inquiry up to the conclusion, he could not but have proceeded, and that if he had come to a different conclusion, his judgment of acquittal would have been a binding judgment, and barred another proceeding for the same offence. Upon principle, therefore, affidavits cannot be received under such circumstances. The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature ; it is determinable on the commencement, not at the conclusion, of the inquiry ; and affidavits, to be receivable, must be directed to what appears at the former stage, and not to the facts disclosed in the progress of the inquiry."

[298] " We will cite only two authorities in support of this reasoning. The former, that of *Brittain v. Kinnaird* (1 Brod. & Bing., 432) and the admirable judgment of RICHARDSON, J., at page 442 are too well known to make it necessary to state them at length. There, in the case of a conviction under the Bumboat Act, it was asked, shall the Magistrate, by calling a seventy-four gun ship a boat, give himself jurisdiction and preclude inquiry ? The learned Judge gave the answer—' whether the vessel were a boat or no was a fact on which the Magistrate was to decide ; and the fallacy lies in assuming that the fact which the Magistrate has to decide is that which constitutes his jurisdiction.' And it is obvious that if it were, whenever an action were brought against a Magistrate for issuing his warrant upon his conviction, in order to show his jurisdiction, without which he would have no defence, he would be bound to prove the facts on which his conviction proceeded. The second case is a recent decision in the Common Pleas of *Cave v. Mountain* (1 Man. & Gr., 257), which we cite only for the rule, which seems to us very clearly and satisfactorily laid down by the Lord Chief Justice :—' There can be no doubt but that if a Magistrate commit a party charged before him in a case where he has no jurisdiction, he is liable to an action of trespass. But if the charge be of an offence over which, if the offence charged be true in fact, the Magistrate has jurisdiction, the Magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts or upon the evidence being sufficient or insufficient to establish the corpus delicti brought under investigation. These cases were both of them actions of trespass against the Magistrate convicting, but they are authorities not on that account the less in point on the present occasion."

" We conclude, therefore, that the inquiry before us must be limited to this, whether the Magistrate had jurisdiction to inquire and determine, supposing the facts alleged in the information to be true ; for it has not been contended that there was any irregularity on the face of their proceedings."

The marginal note to *Brittain v. Kinnaird* (1 Brod. & Bing., 432) is :—" In trespass against a Magistrate for taking and detaining a vessel, a conviction by the defendants under the Bumboat Act, no defect [299] appearing on the face of the conviction, is conclusive evidence that the vessel in question is a boat within the meaning of the Act, and properly condemned. In an action against a Magistrate, a conviction by him, if no defect appear on the face of it, is conclusive evidence of the fact contained therein."

In the judgment of RICHARDSON, J., to which Lord DENMAN refers, it is said :—  
 “Whether the vessel in question were a boat or no, was a fact on which the Magistrate was to decide. If a fact, decided as this has been, might be questioned in a civil suit, the Magistrate would never be safe in his jurisdiction. Suppose a conviction under the Game Laws for having partridges in possession, could the Magistrate, in an action of trespass, be called on to show that the bird in question was really a partridge? and yet it might as well be urged in that case that the Magistrate had no jurisdiction unless the bird were a partridge, as it may be urged in the present case that he has none unless the machine be a boat. So in the case of a conviction for keeping dogs for the destruction of game, without being duly qualified to do so; after the conviction had found that the offender kept a dog of that description, could he in a civil action be allowed to dispute the truth of the conviction? In a question like the present we are not to look to the inconvenience, but the law; but surely, if the Magistrate acts *bona fide*, and comes to his conclusion as to matters of fact according to the best of his judgment, it would be highly unjust if he were to have to defend himself in a civil action. Upon the general principle, therefore, that where a Magistrate has jurisdiction, his conviction is conclusive evidence of the facts stated in it, I think, &c., &c.”

The present case is not brought against the Magistrate, who made the order under s. 521, Code of Criminal Procedure; but I think the above cases indicate the principle applicable and the extent to which the Magistrate's declaration or finding that the place is a thoroughfare or public place is conclusive. Such declaration or finding is conclusive so far as regards any attempt to call the order itself directly in question. It appears to me, therefore, that the answer to the first question ought to be that it is not competent to the Civil Court to set aside the order of the Magistrate made under s. 521, Code of Criminal Procedure, on [300] the ground that such order was made without jurisdiction, inasmuch as the land is private property, and not a thoroughfare or public place.

The second question is, however, a very different one. The contention that because a Magistrate has made an order for the removal of an obstruction or nuisance from a certain place, and for the purpose of such order has found or declared such place to be a thoroughfare or public place, therefore those persons who appeared before the Magistrate in those proceedings are for ever concluded from saying that such place is not a thoroughfare or public place, but private ground, appears to me to be untenable. The Code of Criminal Procedure does not require the Magistrate to take evidence or to proceed according to judicial forms before declaring a place to be a thoroughfare or public place. No appeal is allowed from the Magistrate's finding. It is very right that a Magistrate should have a summary power of removing an obstruction or nuisance from what appears to him to be a thoroughfare or public place; but it would be very unreasonable, and serious consequences would ensue, if a Magistrate could, in such summary fashion, without evidence, or the form of judicial proceedings, make an order declaring valuable land to be a thoroughfare or public place, which would have the effect of a judgment *inter partes* between all persons who appeared before him. Looking at the whole scope of the Code of Criminal Procedure, I am unable to gather that such was the intention of the Legislature.

In the cases to which s. 530 relates, and which are cases of private property merely, a Magistrate can interfere only when there is a probability of a breach of the peace; and such interference is limited to declaring one of the

two contending parties to be in possession, and entitled to retain possession until ousted by due course of law. The question of private right is left for the adjudication of the Civil Courts. So with respect to cases falling under s. 532.\*

It appears to me that the provisions of s. 521 were not intended to take away from the Civil Courts the right of deciding whether private rights exist in any particular immoveable property. The jurisdiction of the Magistrate has, for its imme-[301]diate objects, the removal of obstructions and nuisances from public places. In order to the exercise of this jurisdiction in particular cases, the Magistrate may have to decide summarily whether a certain piece of land is a public or a private place. But such decision of this question for an incidental purpose cannot, in my opinion, have the effect of an estoppel in another proceeding brought in the proper forum, for the purpose of obtaining an adjudication of a disputed right. This view is in accordance with a decision in *Gooroo Pershad Roy v. Proobhoc Ram Chatterjee* (19 W. R. 426).

If the plaintiff succeed in proving that the locus is not a thoroughfare or public place, but his private property, the Magistrate may be precluded in future (will certainly be precluded, upon any application made by the defendant in this suit), from dealing with the place under s. 521 of the Code of Criminal Procedure. But this is different from interfering with or setting aside the order already made by the Magistrate, and which has been obeyed.

It is next contended that the plaintiff in the present case, by submitting to the Magistrate's jurisdiction and asking for a jury has estopped himself from saying now that the place is not a thoroughfare or public place.

No doubt this is a matter which may be considered as evidence, but I think it would be going too far to say that, because, in ignorance of his right to for other cause, he asked for a jury for the decision of the question whether her Magistrate's order was reasonable and proper, he thereby admitted that the place was a thoroughfare or public place.

It is to be observed that the decision of the question whether the place is a thoroughfare or public place does not rest with the jury. The Magistrate has in the first place to decide that question for himself. If he decides it in the affirmative, he will then proceed to take action, but, if in the negative, he has no authority to act. In the majority of cases this preliminary decision of the Magistrate is not, and, as has been already observed, it is not required by law to be, based upon evidence judicially taken or recorded. The Magistrate may, and [302] probably ought to, consider any objection that the place was not public or private; but he usually proceeds upon a Police report, or some other information, or upon his general view of the whole matter. If the Magistrate decides to treat the place as a public place, I think the fact of the person concerned asking for a jury who shall decide the only question which

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\*[532.—If a dispute arise concerning the right of use of any land or water, or any right of way, such Magistrate, within whose jurisdiction the subject of dispute lies, may enquire into the matter; and if it appears to him that the subject of dispute is opened to the use of the public, or of any person or of any class of persons, such Magistrate may order that the possession thereof shall not, be taken or retained by any one to the exclusion of the public, or of such person or of such class of persons, as the case may be, until the person claiming such possession shall obtain the decision of a competent Civil Court adjudging him to be entitled to such exclusive possession.

Provided that such Magistrate shall not pass any such order, if the matter be such that the right of use is capable of being exercised at all times of the year, unless such right has been ordinarily exercised within three months from the date of the institution of the inquiry; or in cases where the right of use exists at particular seasons, unless such right has been exercised during the latest of such seasons before the complaint.]

the Code leaves to them, *i.e.*, whether the order for the removal of the obstruction or nuisance is reasonable and proper, cannot be treated as an admission that the place is a thoroughfare or public place.

I am, therefore, of opinion that the second question ought to be answered in the affirmative, and that it is competent to a Civil Court, irrespective of an order made under s. 521 of the Code of Criminal Procedure, to try the question whether the land which formed the subject of such order is private property, and not a thoroughfare or public place, as between the parties to such suit, and those who claim under them. In the present case I think it is clear that plot No. 1 is not a thoroughfare or public place, and that the defendant has no right of way over such plot. This has been found by both the lower Courts upon the evidence, and the finding cannot be impeached in second appeal.

I think, therefore, that we must dismiss this appeal as regards both plots; but so much of the decree of the lower Court as sets aside the order made by the Magistrate under s. 521, Code of Criminal Procedure, must be expunged.

**White, J.**—I agree with my brother FIELD that although the plaintiff is not entitled in this suit, or indeed, by any proceeding in a Civil Court, to set aside the order made by the Magistrate under s. 521, yet that he is entitled to have the question tried in a civil suit as to whether the defendant has a right of way or not over the land in dispute.

There is nothing in s. 521, or the following section, relating to orders made by Magistrates under s. 521, which gives the Magistrate exclusive jurisdiction, for the purpose of determining whether a place is a thoroughfare or public place, nor is there anything in these sections from which it may be inferred that the jurisdiction of Civil Court to determine that point is ousted.

*Appeal dismissed.*

#### NOTES.

[This case was followed in (1888) 15 Cal 460 F B. which overruled (1886) 14 Cal. 60 wherein this case was dissented from.

See also 6 Bom. 670, 672, 15 Cal. 564 ]

[303] *The 25th August, 1880.*

PRESENT :

MR. JUSTICE WHITE AND MR. JUSTICE FIELD.

In the matter of the Petition of Sheetanath Mookerjee.

Sheetanath Mookerjee.

*versus*

Promothonath Mookerjee and another.\*

*Certificate to collect debts, Right to—Act XXVII of 1860—Question of validity of alleged adoption—Title.*

A, alleging himself to be an adopted son, opposed the application for the grant of a certificate under Act XXVII of 1860 to B, who, irrespective of the alleged adoption, would be the legal lineal heir of the deceased. The Court before whom the application was made refused the grant of the certificate, on the ground that sufficient *prima facie* evidence existed

\* Appeal from Order, No. 126 of 1880, against the order of P. Dickens, Esq., Judge of Nuddea, dated the 8th March 1880.

establishing the validity of the adoption. On appeal *held*, that the Appellate Court, concurring with the opinion expressed by the Court of first instance in respect of the factum of the adoption, would not be justified in setting aside the decision, on the ground, that such Court was wrong in entering into and deciding the question as to the validity of the adoption.

On an application for the grant of a certificate under Act XXVII of 1860, which is opposed by a party, who alleges he has a preferable title to it, the Court should adjudicate the question of title, with a view to determine which party has the preferential right to the certificate.

In this case one Sheetanath Mookerjee applied for the grant of a certificate under Act XXVII of 1860 in respect of the debts of one Umasundari Debi, deceased. The applicant was admittedly the heir to the deceased in the ordinary course of succession, but it was alleged by the guardian of one Promothonath, a minor, who appeared to oppose the application of Sheetanath, that such minor was the validly adopted son of the deceased Umasundari Debi, and on that ground no certificate could be legally granted to Sheetanath.

The Court of first instance entertained the question as to the factum and validity of the adoption, and being of opinion that strong *prima facie* evidence existed as to the adoption, dismissed the application.

The petitioner appealed to the High Court.

Baboo *Srinath Das* (with him Baboo *Hurrender Nath Mookerjee*) for the appellant.—The Court below had no jurisdiction [304] to enter into, and decide, the question of adoption. The alleged adopted son has no *locus standi* at the hearing of an application of this sort, and should not have been heard. The certificate should have been granted, as a matter of course, to the applicant, he admittedly being the legal lineal heir of the deceased. See *Kali Coomar Chatterjee v Tara Prosunno Mookerjee* (5 C. L. R. 517).

Baboo *Nilmadhab Bose* and Baboo *Radhika Churn Mitter* for the Respondent.

The **Judgments** of the Court (WHITE and FIELD, JJ.,) were as follows:—

**White, J.**—I think that the Judge, Mr. DICKENS, was right in his view, both of the law and of the facts in this case.

Under Act XXVII of 1860 the Court is to determine the right to the certificate, subject to an appeal to this Court.

It appears to me, having regard both to the language and also to the authorities upon the construction of the Act, that when there are two claimants for the certificate, and they dispute between themselves as to the right to the certificate, the Judge ought to determine between those two claimants which of them has the preferential right to the certificate. So also, if one of them only claims the certificate, and the other merely opposes the grant, there is no difference made in the duty of the Judge by the fact, that the opponent alleges himself to be the adopted son of the deceased, and the claimant is the man who would be the heir of the deceased if the adoption had not been made. In the present case the certificate was applied for by the man who was the heir of the deceased failing the adoption, and its issue was opposed by the father and guardian of the adopted son, who is a minor. The Judge has held that so strong a *prima facie* case in favour of the adoption was made out, that he considered that he was entitled to refuse the application of the claimant. We see no reason to differ from the Judge.

We have been referred to the case of *Kali Coomar Chatterjee v. Tara Prosunno Mookerjee* (5 C. L. R., 517) in which the following law is laid [305] down:—“An adopted son not being, so to say, a natural heir, and the fact being disputed, we think the Judge was warranted in refusing to enter into that investigation, and the certificate was properly given to the nephew of the deceased, who was the next heir according to the Hindu law, in the absence of any nearer kinsmen and heirs.”

That case has been cited as an authority to show why the decision appealed against before us should be reversed, but it appears to me no authority for that purpose. In the case cited, the lower Court had refused to go into the question of adoption, and the High Court considered that the Judge was warranted in so refusing.

It is one thing to say that a Judge is warranted in refusing to go into a particular question, and another thing to say, when he has gone into that question, that his order must be set aside. When a case comes before us, in which the facts are identical with those which are accepted in *Kali Coomar Chatterjee v. Tara Prosunno Mookerjee* (5 C. L. R., 517), it will be necessary to consider whether the law there laid down is in accordance with the current of authorities on the subject. It is sufficient now to say that that decision does not stand in the way of our declining to interfere with Mr. Dickens's order.

The appeal is dismissed with costs.

**Field, J.**—The first ground taken in this appeal is, that the District Judge was wrong in entering into and deciding the question of the validity and factum of the alleged adoption.

I am of opinion that this objection to the decision of the lower Court cannot prevail.

The third section of Act XXVII of 1860 provides, “that the applicant in his petition, shall set forth his title,” and that the Court “shall determine the right to the certificate and grant the same accordingly.” I think this language clearly shows that it is the duty of the Court to enter into the question of title, when there are contending parties, and the title of the person who bases a preferential right thereupon is not admitted between them. Until this question has been decided, I do not see how [306] the Court can determine the right to the certificate, and grant the same accordingly.

It has been held in the Madras Presidency that the language of the section is not limited to heirs-at-law, and that a person claiming under a will (to which the Succession Act is not applicable), may obtain a certificate under the Act upon proof of the title based upon the will. In the case of *Mussamut Annundee Koer v. Bechoo Sing* (20 W. R., 476) Mr. Justice PHEAR observed as follows:—“No doubt the Judge is quite right in thinking that the proceedings initiated for the purpose of obtaining a certificate under this Act, are not civil proceedings in this qualified sense,—namely, that no title is judicially determined between the parties as the result of the enquiry; still the Court is bound, under the Act, to give the certificate to the person who makes out a title, and it is for that purpose necessary, when parties are not agreed upon the fact, that the Judge should try the issues in the ordinary way by the aid of the evidence put forward by the parties.” In *In re Oodoychurn Mitter* (I. L. R., 4 Cal., 411) the question of title was considered in order to the grant of a certificate under the Act. In another case, *Koonj Behary Chowdry v. Gocool Khunder Chowdhry* (I. L. R., 3 Cal., 616), the case of *Mussamut Annundee Koer v. Bachoo Sing*

(20 W. R., 476) was quoted as an authority for the proposition, that the Judge is bound to enquire which title has been made out for the purpose of the legal requirements of the Act,—a proposition in no way controverted or dissented from, although in that particular case the application for a certificate was rejected upon other grounds, one of which was that this application was made, not really for the purpose of obtaining a certificate to collect debt, but with the object of obtaining a decision on a question of title which could be definitively determined only in a regular civil suit.

In the case now before us, the question of title was raised with immediate reference to the grant of the certificate, and as the District Judge has decided this question carefully, grounding his judgment with the observation, that it shall have effect for the purposes of the Act XXVII only, I am of opinion that his deci-[307] sion ought not to be disturbed upon the first ground taken in the petition of appeal.

On the question of fact, I think that a strong *prima facie* case was made out before the District Judge, and that the order made by him in the case is supported on the evidence.

I concur in dismissing the appeal.

*Appeal dismissed.*

#### NOTES.

[A similar view was held in (1888) 15 Cal. 574 ; (1896) 23 Cal. 431.

See also 17 Mad. 437].

[6 Cal. 307]

#### APPELLATE CRIMINAL.

*The 17th September, 1880.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MACLEAN.

The Empress

*versus*

Sunker Gope.\*

*Criminal Procedure Code (Act X of 1872), s. 66—Dishonestly retaining in British Territory property stolen beyond British Territory.*

A Nepalese subject, having stolen cattle in Nepal, brought them into British territory, where he was arrested and sentenced to one year's rigorous imprisonment. *Held*, that he could not be tried for the theft itself, but that he might be convicted of dishonestly retaining the stolen property.

*Reg. v. Lakhya Govind* (I. L. R., 1 Bom., 50.) followed.

REFERENCE to the High Court under s. 296 of the Criminal Procedure Code.

A Nepalese subject had stolen two head of cattle from the homesteads of two separate individuals in Nepal, and had brought the cattle with him into

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\* Criminal Reference, No. 1324 of 1880, from F. H. Barrow, Esq., Officiating Magistrate of Durbhangah, dated the 31st August 1880.



British territory, where he was arrested and sentenced by the Officiating Joint Magistrate of Mohubarri to one year's rigorous imprisonment under s. 411\* of the Penal Code.

The Officiating Magistrate of Durbhangah was of opinion that the case was not cognizable in British territory, and referred the matter to the High Court.

No one appeared on the reference.

[308] The Opinion of the High Court (GARTH, C. J., and MACLEAN, J.) was as follows :—

**Garth, C. J.**—We are of opinion that the conviction of Shunker Gope, for an offence under s. 411 of the Penal Code, is legal, and that we should not interfere. Shunker Gope confessed to having stolen cattle in the kingdom of Nepal, and he was found in possession of them in British territory. Section 66 of the Criminal Procedure Code, illustration (b), lays down that “a charge of receiving or retaining stolen goods may be inquired into and tried, either in the district in which the goods were stolen or in any district in which any of them were at any time dishonestly received or retained.” Now the theft having occurred beyond British territory, the prisoner could not be tried for that offence in our Courts, see *Reg. v. Apivigadu* (I. L. R., 1 Mad., 171), but the present case seems to be very similar to one reported in the Indian Law Reports, *Reg. v. Lakkya Govind* (I. L. R., 1 Bom., 50) ; and therefore we think that the conviction may be sustained.

It is unnecessary for us to say anything on the question of extradition ; that matter will be dealt with by the local authorities under the orders of Government.

*Conviction upheld.*

#### NOTES.

##### [PROPERTY STOLEN OUT OF BRITISH INDIA.]

The view in this case that property stolen out of British India may fall within I. P. C. s. 411, was not followed in (1881) 5 Bom. 338. But the Legislature by Act VIII of 1882 sec. 9 has amended the definition of *stolen property* (s. 410) so as to include all such property whether the offence “has been committed *within or without* British India.”]

Dishonestly receiving  
stolen property.

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\* [Sec. 411.—Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine or with both.]

[6 Cal. 306]

The 7th October, 1880.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MACLEAN.

In the matter of Mutty Lall Ghose and others.\*

*Criminal Procedure Code (Act X of 1872), ss. 471, 467, 193—Institution of Criminal Prosecution, pending Appeal in Civil Court.*

If, in the course of a proceeding, either civil or criminal, a Judge or Magistrate finds clear ground for believing that either the parties to the proceeding or their witnesses have committed perjury or other offence against public justice, he is justified in directing criminal proceedings against such person under s. 471 of the Criminal Procedure Code without any further enquiry than that which he has already held in his own Court.

[309] As a matter of discretion and propriety, it is right for a Court, before committing a person on a charge of perjury upon his own uncontradicted statement, to await the hearing of the appeal, where an appeal is pending, in the case in which he is charged with such perjury.

IN this case the District Judge of Hooghly ordered a prosecution to be instituted against Mutty Lall Ghose, Kumar Mundle, Becharam Roy, and Heroo Lal Ghose for forgery and perjury in a civil suit, under ss. 467†, 471, 193‡ of the Criminal Procedure Code.

An application was made to the High Court on behalf of the accused, that the criminal proceedings might be stopped until the appeal in the civil suit was heard.

Baboo Juggut Chunder Banerjee, for the petitioner, contended that the order of the District Judge should be set aside, or at least stayed, and that the Judge should have issued a rule calling on the petitioners to show cause why they should not be prosecuted under s. 471, before the proceedings were actually instituted.—*The Queen v. Baijoo Lall* (I. L. R., 1 Cal., 450).

The **Judgment** of the Court (GARTH C. J., and MACLEAN, J.) was delivered by

**Garth, C. J.**—We think that there is no ground either for setting aside or for staying the criminal proceedings.

\* Criminal Motion, No. 19 of 1880, against the order of J. P. Grant, Esq., District Judge of Hooghly, dated the 5th August 1880.

†[Sec. 467.—A complaint of any offence described in chapter X of the Indian Penal Code, not falling within section four hundred and thirty-five or four hundred and thirty-six of this Act, shall not be entertained in any Criminal Court except with the sanction or on the complaint of the public servant concerned, or of his official superior.]

‡The prohibition contained in this section shall not apply to the offences described in sections one hundred and eighty-nine and one hundred and ninety of the Indian Penal Code.]

§[Sec. 193.—The Magistrate may, from time to time, at any stage of the inquiry and, without previously warning the accused person, examine him, and put such questions to him as he considers necessary.]

The accused person shall not render himself liable to punishment for refusal to answer such questions or for giving false answers to them, but the Magistrate shall draw such inference as may to him seem just from such refusal.

*Explanation.*—The answer given by an accused person may be put in evidence against him, not only in the case under inquiry, but also in trials for any other offences which his replies may tend to show he has committed.]

We consider that the Full Bench decision of this Court in *In the matter of the Petition of Ram Prasad Hazra* (B. L. R., Sup. Vol., 426; s.c., 5 W. R., Mis., 24) is a direct authority for the position, that where criminal proceedings have been instituted by a District Judge against the parties or their witnesses in course of a civil suit, the High Court has no power to stay those proceedings until the decision of the Judge in the civil suit has been heard upon appeal.

As regards the other point, we think that the ruling of the Court in the case of *The Queen v. Barjoo Lall* (I. L. R., 1 Cal., 450) has been somewhat misunderstood. It seems to be supposed from that ruling, that a Court, either civil or criminal, which has heard a case tried, has no right to institute proceedings under [310] s. 471 of the Criminal Procedure Code against any of the parties concerned in the suit, without first holding an enquiry, and calling upon those parties to show-cause why such proceedings should not be taken.

We think that this is clearly a mistake. If, in the course of a proceeding, either civil or criminal, a Judge or Magistrate finds clear ground for believing that either the parties to the proceeding or their witnesses have committed perjury, or any other offence against public justice, he is justified in directing criminal proceedings against such persons under s. 471, without any further enquiry than that which he has already held in his own Court.

Mr. Justice MACPHERSON in that very case says distinctly, "If in the course of the civil trial the Judge has before him clear and unmistakable proof of a criminal offence, and if, after the trial is over, he, on consideration, thinks it necessary to proceed at once, of course it may be right to do so."

There is, therefore, no ground, as far as we can see, for setting aside the proceedings in this case, upon the ground that the Judge should, before instituting them, have held any other enquiry than that which he had already held in the probate case.

At the same time we think that the Judge might well take warning from the very excellent advice which is given to Subordinate Courts by Mr. Justice MACPHERSON in the judgment which we have been quoting. We do not pretend of course to give any opinion as to the merits of this case, but it would certainly seem rather rash to institute criminal proceedings in case where the evidence is all one way, and where an appeal is now pending to this Court. We think that, as a matter of discretion and propriety, the Judge might have waited until the appeal had been heard before he ventured to commit the accused for perjury upon their own uncontradicted statements.

*Application dismissed.*

#### NOTES.

[That a preliminary inquiry is not imperative has been laid down also in (1901) 6 C. W. N. 295; *Ratanlal* 895; 5 All. 62. See also 20 Cal. 474; 19 Cal. 315; 7 Mad. 189.]

## [311] ORIGINAL CIVIL.

The 11th August, 1880.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE PONTIFEX.

Gobind Lall Seal and others.....Plaintiffs

versus

Debendronath Mullick and others.....Defendants.

*Limitation Act (XV of 1877), sched. ii, arts. 142 and 144—Possession—  
Permissive occupation—Discontinuance.*

A suit for the recovery of immoveable property against a person who had originally been in mere permissive occupation or possession accorded on the ground of charity or relationship, is governed by Act XV of 1877, sched. ii, art. 144, and not by art. 142 of the same schedule.

In such a case the owner of the property, who has accorded the permissive occupation, cannot be said to have "discontinued" the possession.

THIS was an appeal from a decision of Mr. Justice WILSON, dismissing the plaintiff's suit with costs. The facts of the case are set out in the judgment of the Court below, which will be found reported in the Indian Law Reports, 5 Cal., 679.

The *Advocate-General* (Mr. G. C. Paul), the *Standing Counsel* (Mr. J. D. Bell), and Mr. *Phillips* for the Appellants.

Mr. *Kennedy* and Mr. *Henderson* for the Respondents.

The *Standing Counsel*.—The learned Judge was wrong in holding that there was a discontinuance of possession in this case. The evidence is conclusive that the occupation was only permissive, inasmuch as the Seals repaired the house, paid the rates and taxes, and registered themselves as proprietors under the Registration Act of 1876. These acts are strongest evidence of permissive occupation. The possession of the defendants was,

[Art. 144 :—

Description of suit.	Period of Limitation.	Time from which period begins to run.
For possession of immoveable property or any interest therein not hereby otherwise specially provided for.	Twelve years.	When the possession of the defendant becomes adverse to the plaintiff.]

[Art 142 :—

Description of suit.	Period of Limitation.	Time from which period begins to run.
For possession of immoveable property, when the plaintiff while in possession of the property, has been dispossessed or has discontinued the possession.	Twelve years.	The date of the dispossession or discontinuance.]

admittedly, permissive at the commencement. It lies on them to show that its character has changed: *Ramdhun Satra v. Nobin Chunder Chowdhry* (12 W. R., 250). A tenancy-at-will must be determined by notice to quit—*Phillips v. Nund Coomar Banerjee* (8 W. R., 385), *Ram Narain Manjhee v. Mussamut Futema Sogra* (23 W. R., 399); or by some act on the tenant's part showing a desire to hold adversely: [312] *Khuruckdharee Singh v. Rewat Lall Sing* (12 W. R., 167). Here there is no evidence of that kind except the bare omission to pay rent, and that cannot constitute adverse possession: *Troylukho Tarnee Dassia v. Mohima Chunder Muttuck* (7 W. R., 400), and *K. v. Collet* (Russ. and Ry., C. C., 498). The case of *Radhabai v. Shama* (4 Bom. H. C. Rep. A. C., 155) is clearly in point here, and shows the suit is not barred. *Leigh v. Jack* (L. R., 5 Exch. D., 264, see p. 272; s.c., 49 L. J., C. P., 226) is a very similar case.

Mr. *Kennedy* for the respondents.—It is not necessary to show adverse possession here, but merely a *discontinuance* within the meaning of cl. 142 of the second schedule. As to what is a discontinuance, see Sugden's *Vendor and Purchasers*, p. 351. The Seals gave up this house to Shumbhoonath Mullick, and during the whole period of limitation ceased to have any control over it. They are, therefore, barred by limitation: *Jack v. Walsh* (4 Ir. C. L. R., 254) and *Ellis v. Crawford* (5 Ir. C. L. R., 402). Even if the possession of Shumbhoonath were originally that of a tenant-at-will, that determined at his death, and no new tenancy has been created.

Mr. *Henderson* (on the same side) cited *Smith v. Lloyd* (Exch., 562) and *Doed Bennett v. Turner* (7 M. & W., 226; 9 M. & W., 643).

The following **Judgments** were delivered:—

**Pontifex, J.**—There are two questions to be considered in this:—*1st* was the house in dispute an absolute gift from Muttu Lall Seal (who died in 1854) to Shumbhoonath Mullick? and *2nd*, if it was not an absolute gift, conveying the property, are the plaintiffs barred by limitation from recovering the house?

With respect to the first question there is no direct or contemporaneous evidence that can be relied on; and it must, consequently, be determined by the conduct of the parties and the probabilities of the case.

[313] The title-deeds of the house remained in the possession of the Seals; the property continued to stand in their names, when Beng. Act VIII of 1876 was passed, the Seals were registered as proprietors; the Seals have all along paid the rates, taxes, and assessments payable in respect of the house; the Seals have all along done the repairs when requested by the Mullicks; and when some five or six years ago, the defendants desired a poojah-dalan to be built, on account of their turn of worship of a certain idol having arrived, the Seals furnished the materials or the greater part of the materials, though they declined, for the reasons stated by the witnesses, to build the poojah-dalan; and lastly, when in consequence of this poojah-dalan having been erected a higher assessment was placed upon the premises, the Seals paid, and continued to pay, such higher assessment. Moreover, the Seals, for many years, made a charitable allowance to the Mullicks towards their maintenance. That allowance ceased some years ago, but the payment of the rates, &c., and the execution of the repairs by the Seals have continued.

The defendants explain these circumstances as being merely the continued bounty and charity of the Seal family, but to my mind these circumstances only convey the impression of continued acts of dominion by the Seals with respect to the property; and reflecting back on the original transaction, with

respect to which we have no reliable direct evidence, they persuade me that there was never any gift of the house, but only a charitable permission to occupy it. The constant requests by the Mullicks that the Seals should execute repairs, and their application to the Seals to build a poojah-dalan, appear to me to be recognitions on the part of the Mullicks that they were occupying only by permission of the Seals.

The second question then arises :—Are the Seals now barred by limitation ?

It is argued that art. 142 of the second schedule to the Limitation Act governs this case, and is conclusive in the defendants' favour. That article provides that the period of limitation for a suit for possession of immoveable property, when the plaintiff has "discontinued" the possession, shall be twelve years from the date of "discontinuance."

[314] If that article is to be construed so that "discontinuance" includes a permissive occupation on account of proved charity or relationship, very dangerous consequence would result in this country. For nothing is more common in a Hindu family than to permit members of it, having no legal claim upon it, such as married daughters and their husbands, to reside in part of the family property rent-free, and without written acknowledgment.

But the use of the word "discontinued" in art. 142 of the second schedule to the Limitation Act has evidently been copied from the third section of 3 and 4 Will. IV, c. 27. In that Act, however, the word "discontinued" cannot be taken to apply to a tenancy-at-will or an occupation of a like nature, because the limitation applicable to a tenancy-at-will is expressly provided for by another section of that Act.

Now, though an estate exactly corresponding to an English tenancy-at-will, with its precise incidents as to endurance and determination, may not exist in India, yet a permissive occupation, which has very considerable resemblance to a tenancy-at-will, is of extremely frequent occurrence in this country in consequence of the family habits and natures of its people.

I think, therefore, that as section 3 of the English Act does not apply to a tenancy-at-will, so it was not intended that the corresponding art. 142 of the second schedule to the Indian Act should apply to a permissive interest in India.

I am of opinion that a permissive possession or occupation accorded on the ground of proved charity (as in the present case) or relationship, was intended and must be held to be governed by art. 144, and not by art. 142 of the Limitation Act ; and, therefore, that limitation should operate in such cases from the time when possession first became adverse. And in this case the evidence shows that the possession never became adverse.

I am unable to construe "discontinuance" in art. 142 as an active putting into possession, by the owner, of some dependent by way of charity.

But even if art. 142 were applicable to cases of this nature, I am of opinion that it would not apply to the present case.

[315] As Lord Justice BRAMWELL said in *Leigh v. Jack* (L. R., 5 Exch. D., at p. 272) :—"After all, it is a question of fact, and the smallest act would be sufficient to show that there was no discontinuance." In the present case the repeated acts of entry by the Seals for the purpose of executing repairs indicate a continuance of dominion and ownership ; and the continued applications and requests by the Mullicks to the Seals seem to me, as Chief Justice COCKBURN says in the case quoted, acts of persons who did not intend to be trespassers

or to infringe upon another's rights. Upon the evidence, as it stands, therefore, I think, the plaintiffs are entitled to recover, and that the judgment of the lower Court should be overruled.

**Garth, C. J.**—I quite concur in this judgment; and I only desire to add, that I think the words "dispossession" and "discontinuance" (which are borrowed from the English Limitation Act of William the IVth) apply only to cases where the owner of land has, either by his own act, or that of another, been deprived altogether of his dominion over the land itself, or the receipt of its profits.

But where the owner, in the exercise of his own proprietary right, permits some other person to occupy his land, or to receive his rents, then, whether the relation of landlord and tenant exists between the parties or not, I consider that the possession of the owner is not discontinued, because, under such circumstances, the possession of the occupier is the possession of the owner.

The case then comes under art. 139\* of the Limitation Act, if the relation between the parties is that of landlord and tenant; or under art. 144, if there is no such relation; and in either case the plaintiffs in this suit are not barred.

It was contended by Mr. *Kennedy* for the respondents, that, assuming the possession of Sumbhoonath Mullick in the first instance to have been permissive, and that a tenancy-at-will was created in his favour, the will was determined on the death of Heeralall Seal, or at any rate on the death of Sumbhoonath Mullick; and that, upon such determination of the will, the possession of the Mullick family became adverse.

[316] But whether it was adverse or not, is a question to be determined by the evidence—see *Eyre v. Walsh* (10 Ir C. L. R., 346)—and probably it might have been considered adverse, according to the rule of English law, if nothing had afterwards happened to show that the Seals still retained their dominion over the property, and that the occupation of it by the Mullicks continued only permissive.

But the self-same state of circumstances which satisfies me that the occupation by Sumbhoonath Mullick was permissive in the first instance, has continued without intermission since the death of Heeralall Seal. The rates and taxes of the house have continued to be paid by the Seals; the Seals have all along been the registered owners; they have done the repairs when necessary; and that very remarkable piece of evidence, that the Mullicks requested the Seals to build them a dahan, and actually provided the materials for the building of it, occurred within the last five years.

We are not hampered here by the provision, which has raised so many nice points in England, under s. 5 of the Statute of William the IVth, with regard to tenancies-at-will ceasing at the end of the first year's occupancy. So long as the tenancy of the occupier does not become adverse to that of the owner, limitation does not begin to run; and an owner of land in this country seems in as favourable a position under the present Act

\*[Art. 139 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
By a landlord to recover possession from a tenant.	Twelve years	When the tenancy is determined.]

as he was under the former Act of 1859—see *Phillips v. Nund Coomar Banerjee* (8 W. R., 385) and *Khuruckdharee Singh v. Rewat Lall Singh* (12 W. R., 167). I think, therefore, that the defendants' possession being permissive only, the plaintiffs are not barred by limitation, and our judgment is, that they are entitled to a decree for the property in question, with costs on scale 2 in both Courts.

*Appeal allowed.*

Attorneys for the Appellants : Messrs. *Carruthers & Jennings*.

Attorneys for the Respondents : Messrs. *Beeby and Rutter*.

# NOTES.

## [I. PERMISSIVE OCCUPATION—

Does not come within the terms *dispossession*, or *discontinuance of possession* :—6 Cal. 311 ; (1893) P. R. 104 *Bobbett v. South-Eastern Ry. Co.* (1882) 9 Q. B. D. 424, *London and North-Western Ry. Co. v. Buckmaster* (1875) L. R. 10 Q. B. 444. Possession involves an *animus possidendi*—i.e. occupation with the intention of excluding the owner as well as other people. *Littledale v. Liverpool College* (1899) 1 Ch. 19 at 23, per *Lindley M. R.*

When possession or dispossession has to be inferred from equivocal acts, the intention with which they are done is all-important. *Ibid.* Time runs from the termination of permissive occupation :—(1898) 23 Bom. 283.

## II. DISCONTINUANCE OR DISPOSSESSION OF PROPERTY—

The definition here given was adopted in (1896) 1 C. W. N. 277. There must be both absence of possession by the person who has the right and possession by another, whether adverse or not to be protected, to bring the case within the statute"—per Baron PARKE in *Smith v. Lloyd* (1854) 9 Ex. 562, approved in *Trustees Agency Co. v. Short* (1888) 13 A. C. 799.

The difference between *dispossession* and *discontinuance of possession* may be expressed in this way—the one is where a person comes in and drives out the others from possession ; the other case is where the person in possession goes out, and is followed into possession by other persons"—per FRY, J., in *Rams v. Buxton* (1880) 14 Ch. D. 539.]

## [317] APPELLATE CIVIL.

*The 5th September, 1880.*

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MITTER.

Radha Pershad Misser .....Defendant

*versus*

Monohur Das.....Plaintiff.\*

*Mortgage Bond—Covenant not to lease—Lease of Property mortgaged—Suit to set aside lease.*

A mortgaged certain property to B, agreeing, amongst other things, not to grant in *zurpeshgi* or mortgage the property to any one so as to cause any difficulty in the realization of the money advanced under the mortgage bond. A subsequently leased in *zurpeshgi* part of the property to C. B obtained a sale-decree against A on his mortgage, and at the sale

\* Appeal from Original Decree, No. 173 of 1879, against the decree of Baboo Koylash Chunder Mookerjee, Roy Bahadur, Officiating Second Subordinate Judge of Tirhut, dated the 3rd April 1879.



himself became the purchaser of the property. He then brought a suit against *C* to set aside the zurpeshgi lease, and to obtain khas possession. *Held*, that the covenant in the mortgage-bond merely created a personal liability between *A* and *B*, and that the sale under *B*'s mortgage-decree did not put an end to the zurpeshgi lease or affect the interests of the zurpeshgidar; that *B*'s suit against *C* was wrong in form; and that his proper course was to sue to have his right declared to sell the property in satisfaction of his mortgage debt, so as to give the zurpeshgidar an opportunity of redeeming.

THIS was a suit brought by one Monohur Das against Radha Pershad Misser, to set aside a zurpeshgi lease of a certain village, which had been mortgaged to the plaintiff by one Syed Zahurul Haq, and to recover khas possession of the property under mortgage.

Zahurul Haq, on the 23rd December 1867, borrowed a sum of Rs. 3,500 at 2 per cent., from the plaintiff, giving as security, amongst other properties, the village above referred to, one of the terms of the mortgage being that he, the mortgagor, "would not sell absolutely or conditionally, grant in zurpeshgi lease, or make gift of, or mortgage, the said properties to any one, or execute any deed in any way by which any difficulty might arise in the realization of the money covered by the deed."

[318] In July 1871 Zahurul Haq granted a zurpeshgi lease to the defendant of part of the properties included in the mortgage to the plaintiff.

On the 27th February 1873 the plaintiff brought a suit on his mortgage-bond, and obtained a decree for the sale of the mortgaged property, and at the auction-sale himself became the purchaser. The defendant, however, refused to give up possession to the plaintiff, contending that his zurpeshgi lease could not be set aside, nor he himself ousted from possession, inasmuch as he was not made a party to the mortgage-suit.

The Subordinate Judge held, that Zahurul Haq had no right to grant the zurpeshgi lease to the defendant in direct contradiction to the terms of the mortgage-bond, and that it was unnecessary that the defendant should have been made a party to the mortgage suit, inasmuch as he had only a limited interest in the property, and did not stand in the place of his lessor. He therefore ordered the plaintiff to be put in possession of the property claimed, and set aside the defendant's ticca lease.

The defendant appealed to the High Court.

Baboo *Aubinash Chunder Banerjee* and Baboo *Hem Chunder Banerjee* for the Appellant.

Baboo *Chunder Madhub Ghose* and Mr. *Sandel* for the Respondent.

The Judgment of the Court (GARTH, C.J., and MITTER, J.) was delivered by

**Garth, C. J.**—We think that, having regard to the rule laid down by the Full Bench in *Emam Momtazooddeen Mahomed v. Rajcoomar Das* (14 B. L. R., 408; s.c., 23 W. R., 187), and to subsequent decisions of this Court, amongst which we may specially notice the cases of *Byjnath Singh v. Goberdhun Lall Mohasohree* (24 W. R., 210) and *Chiet Narain Singh v. Gunga Pershad* (25 W. R., 216), we cannot do otherwise than allow the appeal, and dismiss the plaintiff's suit.

It is clear that the covenant entered into by the mortgagor in the mortgage-bond of 1867 did not render invalid the zur-[319]peshgi lease which was subsequently granted. We have held in other cases that such a covenant only creates a personal liability as between the mortgagor and the mortgagee.

Then it is also clear, that the subsequent sale under the decree of 1873 did not put an end to the zurpeshgi lease, or affect the interests of the zurpeshgidar.

The plaintiff has, therefore, no right to sue for khas possession of the property as against the zurpeshgidar. His only course would be to bring a suit against the zurpeshgidar to have his right declared to sell the property to satisfy his mortgage-debt, so as to give the zurpeshgidar an opportunity of redeeming.

This suit is one of a totally different character. The plaintiff has all along contended that he is entitled to khas possession, and that the zurpeshgi lease is void : and we should be entirely changing the nature of his claim if we were to allow him to frame and try it on the other basis.

The judgment of the lower Court must, therefore, be reversed, and the plaintiff's suit dismissed with costs in both Courts.

*Appeal allowed.*

## NOTES.

### I. WHO MAY REDEEM—

Any one who has acquired an interest in the equity of redemption either *in the whole* or *in a part* of the estate may—(1880) 6 Cal. 317 at 319, (1881) 8 Cal. 79, (1883) 9 Cal. 643; (1892) 21 Cal. 116; (1895) 19 Mad. 151. *Tarn v. Turner* (1888) 39 Ch. D. 456 (lessee); (1905) 27 All. 472 (*sub-mortgagee*); (1907) 29 All 679 (*perpetual lessee*). See (1900) 5 C. W. N. 83, where a contrary ruling was given in respect of the holder of a *ryati* lease.

### II. RIGHT OF OWNER OF EQUITY OF REDEMPTION WHEN NOT MADE A PARTY—

The purchaser as assignee of the mortgage, may, if he chooses, proceed *de novo* to foreclose those who were not represented in the suit. Dr. Rash Behary Ghose in his *Mortgages*, V. I (1911), p. 621, citing this case, states—The purchaser as assignee of the lien can require the lessee to redeem him, and on the latter's failure to do so, he may call for a sale of the property. And this would seem to be the only course open to him, if the mortgage security was impaired by the creation of the term. On such sale, he would be entitled to a first charge on the proceeds to the extent to which the purchase-money was applied in payment of the mortgage-debt, (1899) 22 All. 90 being distinguishable as a lease created *pendente lite*.

Similarly the puisne mortgagee is not bound by the sale without his being a party, (1882) 5 Mad. 184.

The non-joinder of holders of subsequently derived interest is not fatal to the suit. (1892) 17 Mad. 17.

As regards the priority of title under sales in respect of successive mortgages, see the cases collected at (1902) 7 C. W. N. 11, at 19.

### III. COVENANT BY MORTGAGOR AGAINST ALIENATION—

As to the effect of an alienation in spite of such a covenant, see besides 6 Cal. 317, (1882) 5 Mad. 184; (1899) 22 All 90 (the lease in this case was however made *pendente lite*).

### IV. CONVERSION OF A SUIT FOR POSSESSION INTO ONE FOR REDEMPTION—

See as to when this is permitted and when not, the cases collected in (1901) 5 C. L. J. 527; Dr. Rash Behari Ghose, *Mortgage*, Vol. I (1911), p. 614.]

[6 Cal. 319]  
FULL BENCH.

The 14th September, 1880.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE PONTIFEX,  
MR. JUSTICE MORRIS, MR. JUSTICE MITTER, AND MR. JUSTICE PRINSEP.

Niamut Khan and others.....Plaintiffs

*versus*

Phadu Buldia.....Defendant.\*

Res judicata—*Suit for Enhancement of Rent—Finding in Judgment not embodied in Decree—*  
*Civil Procedure Code (Act X of 1877), s. 13.*

N brought a suit against P for enhancement of rent. P's defence was first, that no notice of enhancement had been given, *secondly*, that the rent was not enhanceable, as he and his predecessors in title had held it at a fixed rent from the date of the Permanent Settlement. The suit was dismissed on the ground that no notice had been given, but the Munsif stated in his judg-[320]ment, that he considered the rent enhanceable, because he did not believe in the genuineness of the documentary evidence produced by P. The decree merely ordered that the suit should be dismissed, the portion of the judgment as to the enhanceability of the rent not being embodied in the decree P, therefore, had no right of appeal against that portion of the judgment. In a subsequent suit by N against P, for enhancement of rent of the same tenure, *Held*, that, on the rule laid down by the Privy Council in *Soorjeemonee Dayee v. Suddanund Mohapatter* (12 B. L. R., 304; S. C., 20 W. R., 377) and *Krishna Behari Roy v. Bunwar Lall Roy* (I. L. R., 1 Cal., 144, S. C., 25 W. R., 1, L. R., 2 I. A., 283), P was precluded, by the decision in the former suit, from denying that the rent of the tenure was enhanceable, although the decision on that point was not embodied in the decree.

The material findings in each case should be embodied in the decree, and if they are not, it is incumbent on the parties, to avoid their being bound by decision against which they have no right of appeal, to apply to amend the decree in accordance with the judgment.

THIS case was referred to a Full Bench by GARTH, C. J., and MITTER, J., on the 1st September 1880, with the following remarks:—

"This was a suit by a landlord to enhance the rent of a tenure after notice. The defendant's case was, that he and his predecessors in title had held the tenure at a fixed rent from the time of the Permanent Settlement, and consequently that the rent was not enhanceable. The plaintiff contended that the defendant was estopped from setting up this defence, because in a former suit, No. 1193 of 1875, between the same parties, it had been decided that the rent of the tenure was enhanceable.

"Now the facts of that previous case were these:—It was a suit like the present to enhance the rent of a tenure after notice. The defence set up to it was, *firstly*, that no notice had been given; and *secondly*, that the rent could not be enhanced for the reasons alleged in the present suit. The Munsif in that case dismissed the suit upon the ground that no notice had been given; but

\* Reference to a Full Bench in Appeal under s. 15 of the Letters Patent, from the decree of Mr. Justice Tottenham, dated 30th January 1880, made in appeal from Appellate decree, No. 1082 of 1879, from the decree of A. T. Maclean, Esq., Judge of Zillah 24-Parganas, dated 31st March 1879, reversing the decree of Baboo Okhoy Coomar Chatterjee, Second Munsif of Diamond Harbour, dated 23rd September 1878.

he stated in his judgment that he considered the rent enhanceable, because he did not believe the potta and dakhilas produced by the defendants. The decree made in that suit, however, made no mention of this last point, but merely ordered that the suit should be dismissed with costs.

[321] "In the present suit the Munsif considered that the former judgment operated as a *res judicata*, precluding the defendant from denying that the rent was enhanceable. The Appellate Court, however, held otherwise, and remanded the case to the Munsif to try that question. On a second appeal to this Court the only point raised was, whether the judgment in the former suit operated as a *res judicata*, and the learned Judge held that it did not.

"An appeal was then preferred to this Court under s. 15 of the Letters Patent, and we think that the question raised is one of so much difficulty and importance, that it ought to be referred to a Full Bench.

"The learned Judge of this Court decided in favour of the defendant, upon the ground that, although in the previous suit the Munsif found that the rent was enhanceable, that finding formed no part of the decree, and as the event of the suit was in favour of the defendant upon the ground that no notice had been given, the latter had no opportunity of appealing.

"On the other hand it is contended by the appellant, that whether the finding of the Munsif was appealable or not, its effect was the same as a *res judicata*, and that although no declaration of the plaintiff's right to enhance was, in fact, made in the former suit, still, as the plaintiff would have been entitled to such a declaration if he had asked for it, the mere finding of the issue in his favour was equivalent to a declaration.

"In the case of *Sheikh Enactoolla v. Sheikh Ameer Buksh* (25 W. R., 225), decided by MARKBY and MITTER, JJ., the circumstances were very similar to those of the present case, and the learned Judges there held, that the finding in the former case was conclusive, although the suit was dismissed generally, and no declaration in favour of the plaintiff's right was made. This decision appears to have been based, in great measure, upon a judgment of the Privy Council in the case of *Soorjeemonee Dayee v. Suddanund Mohapatter* (12 B. L. R., 304, s.c., 20 W. R., 377), and see also *Krishna Behari Roy v. Bunwari Lal Roy* (I. L. R., 1 Cal., 144, s.c., 25 W. R., 1, L. R., 2 I A, 283) and *Kriparam v. Bhagawan Dass* (1 B. L. R., A. C., 68).

[322] Under the provisions of the Civil Procedure Code, 1877, an appeal lies only from the decree of the lower Court (see *Koylash Chunder Koosari v. Ram Lall Nag*, ante, p. 206) and the question seems to be whether any finding of the lower Court can be made the subject of appeal, which neither expressly nor by implication is embodied in the decree; and if the finding of that Court is not embodied in the decree, whether it can be considered as a *res judicata* in any future suit.

"The question, therefore, which we desire to refer for the opinion of the Full Bench is, whether the decision of the learned Judge of this Court should be confirmed?"

Baboo Mohiny Mohun Roy for the Appellants.

Baboo Kali Mohun Dass for the Respondent.

The following Judgments were delivered by the Full Bench :—

Garth, C. J. (PONTIFEX and MITTER, JJ., concurring).—We think we are bound to follow, in its integrity, the rule which has been laid down by their Lordships of the Privy Council in the cases referred to, and adopted by the

lislature of this country in the 13th section of the new Code,—namely, that when a material question has been substantially tried and decided in a former suit, and in a competent Court, it cannot be tried again in any other suit between the same parties.

The question which is raised in this suit, namely—whether the tenure was liable to enhancement,—was undoubtedly tried and determined by the Munsif in the former suit; and although no declaration was made of the plaintiff's right in that respect, and although the decision was not embodied in the decree, so as to give the defendant a right of appealing against it, still it was a decision within the meaning of the rule laid down by the Privy Council, and we think that the defendant is bound by it.

It was argued at the bar, that where, as in this case, the decision in the former suit became immaterial for the purposes of that suit, and the defendant (as the decree was framed), had no opportunity of appealing against it, it is hard that it should be binding upon him.

[323] There is no doubt, that the application of the rule to case like the present may, occasionally, be productive of hardship, especially until the effect of the rule is more generally understood. Parties are very naturally unwilling to appeal against adverse decisions in cases where they are in the main successful, and where, for the purposes of the suit appeal is unnecessary. But, nevertheless, they must appeal, unless they are content to be bound by those decisions. It is most important that suitors should understand their position in that respect; and it obviously becomes necessary, in order to give parties a proper opportunity of appealing, *that the material findings in each case should, in future, be embodied in the decree.*

Unless the finding is thus embodied in the decree, the party against whom the issue is decided will have no right to appeal against it. Appeals can only be preferred *against the decrees, not against the judgments* of the lower Courts (see ss. 540 and 584 of the Civil Procedure Code), and therefore, if a party wishes to appeal against the decision of a particular issue, which does not appear in the decrees, he must first apply to the Court to amend the decree by embodying the decision in it.

This will render it necessary for the lower Courts to draw up decrees with much greater particularity than has hitherto been observed.

\* The effect of our decision in this case will be, that the judgment of this Court and of the District Judge will be set aside, and the judgment of the Munsif restored. The appellants will have his own costs in all the Courts.

**Morris, J.**—In my opinion this case falls within the rule laid down by the Judicial Committee of the Privy Council in the case of *Soorjeemonee Dayee v. Suddanund Mohapatter* (12 B. L. R., 304; s.c., 20 W. R., 377). In their

\* [Sec. 584 :—Unless when otherwise provided in this Code or by any other law, from all decrees passed in appeal by any Court subordinate to a High Court, an appeal shall lie to the High Court on any of the following grounds (namely).

Grounds of second appeal. (a) The decision being contrary to some specified law or usage having the force of law.

(b) the decision having failed to determine some material issue of law or usage having the force of law.

(c) a substantial error or defect in the procedure as prescribed by this Code or any other law, which may have produced error or defect in the decision of the case upon the merits.]

judgment in that case, their Lordships say:—

“If both parties invoked the opinion of the Court upon this question, if it was raised by the pleadings and argued, their Lordships are unable to come to the conclusion that, merely because an issue was not framed, which, strictly construed, embraced the whole of it, therefore the judgment upon it was *ultra* [324] *vires*. Their Lordships are of opinion that the term ‘cause of action’ (s. 2 Act VII of 1859) is to be construed with reference rather to the substance than to the form of action. But even if this interpretation were not correct, their Lordships are of opinion that this clause in the Code of Civil Procedure would by no means prevent the operation of the general law relating to *res judicata* on the principle ‘*nemo debet bis vexari pro eadem causa*.’

It is not unlikely, as has been suggested in the course of the argument, that the case before the Munsif having been dismissed, the defendant did not think it necessary to appeal against the judgment that his tenure was liable to enhancement, and was misled by the omission of that finding in the decree itself; but, to use the words of their Lordships of the Privy Council, “both parties invoked the opinion of the Court upon this question and it was raised by the pleadings and argued.” The omission of this finding in the decree is not material, because, as pointed out by Mr. Justice MARKBY in the case of *Sheik Enaetoolla v. Sheik Ameer Zuksh* (25 W. R., 225), their Lordships, when they delivered their judgment in the case of *Soorjeemonee Dayee* (12 B. L. R., 304; s.c., 20 W. R., 377), had not the decree before them, and neither in that case, nor in another very similar case, *Krishna Behari Roy v. Bunwari Lal Roy* (I. L. R., 1 Cal., 144; s.c., 25 W. R., 1; L. R., 2 I. A., 283), did they think it necessary to have the decree before them. As a matter of fact, in neither case was the finding relied on embodied in the decree. It is true that, under s. 540 of the present Code of Civil Procedure, which corresponds with s. 23, Act XXIII of 1861 of the old Code, “unless when otherwise expressly provided in this Code, or by any other law for the time being in force, an appeal shall lie from decrees or from any part of decrees only.” If, therefore, in this case the defendant desired to avoid the finding which was adverse to himself, he should have taken proper steps to have the decree amended, and so put himself in a position to appeal against it. It is a well-known practice in our Courts to give the decree, after it is drawn up and before it is signed by the Court, to the pleaders of both parties for their examination and signature. An opportunity is thus afforded them of [325] comparing the decree with the judgment, and of correcting the former, if necessary, where it appears to be at variance with the latter. The failure, however, on their part to avail themselves of this, and to amend the decree so as to open the door to an appeal, cannot render a finding of no effect or less binding upon the parties.

In this view, so long as the opinion of the Court has been given on a question which has been raised by the pleadings and argued, that opinion must be considered as *res judicata*, even though it may not have been embodied in the decree. I would answer the reference which has been made to this Bench accordingly.

**Prinsep, J.**—I concur in the judgment delivered by Mr. Justice MORRIS.

#### NOTES.

#### [1. THE AUTHORITY OF THIS CASE—

This case is not received now as an authority on *res judicata* and is treated as having been impliedly overruled by the Privy Council in 11 Cal. 301.

## II. RES JUDICATA—

Only such findings as are the bases of the decrees operate as *res judicata*, and not others:—

The leading case is *Run Bahadur v. Luchu Koer* (1884) 11 Cal. 301=12 I.A., 23 P.C.

*Allahabad*: (1895) 17 All., 174.

*Bombay*: (1893) 18 Bom., 597.

*Madras*: 7 Mad., 145.

*Calcutta*: (1887) 13 Cal., 17; (1891) 18 Cal., 647; (1904) 9 C.W.N., 60; (1907) 9 C.L.J., 498. See also 6 Cal., 206.

*Punjab*: (1889) P.R., 157; (1898) P.R., 31; (1904) P.R., 56=(1904) P.L.R., 84.

The basis of the decree need not be the decision on any single issue, where it is based on several issues, though any one would have been sufficient, all would be final and *res judicata*: (1897) 24 Cal., 900.

See also 7 M.L.J., 274.

The findings need not be embodied in the decree: (1888) 16 Cal., 173 P.C. at 192, 193; (1891) 19 Cal. 159 P.C. at 172. This is against the view in this case and in cases like (1881) 4 Mad., 134; (1883) 7 Bom., 464 etc., Where, however, there is a variance between judgment and decree, the decree would prevail —(1892) 15 All., 3.

Nor would the mere fact of having been embodied in the decree give the finding a wider operation: (1893) 18 Bom., 597 at 602, and the cases above cited.]

[ 6 Cal. 325]

*The 6th September, 1880.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE PONTIFEX,  
MR. JUSTICE MORRIS, MR. JUSTICE MITTER, AND MR. JUSTICE PRINSEP.

Kashikant Bhattacharji.....Defendant

*versus*

Rohinikant Bhattacharji and others.....Plaintiffs

*Limitation—Suit for Arrears of Rent—Beng. Act VIII of 1869.*

The last day on which a suit for the recovery of arrears of rent can be instituted under s. 29, Beng. Act VIII of 1869, is the last day of the third year from the close of the year in which the rent became payable.

The word "arrear" in that section means "rent in arrear."

*Woomesh Chuunder Bose v. Surjee Kanto Roy Chowdhry* (I. L. R., 5 Cal. 713) overruled.

THIS case was referred to a Full Bench by MORRIS and PRINSEP, JJ. with the following remarks:—

"We are called upon to decide, in this Special Appeal, whether a suit for arrears of rent of 1280, or of any portion of it, brought on the 30th Assar 1284 (corresponding with July 13, 1877) is [326] not barred by limitation under the terms of s. 29 of the Beng. Rent Law (Beng. Act VIII of 1869) ?

"The plaintiffs' (respondents') pleader, relying on the judgment of a Division Bench of this Court in the case of *Woomesh Chuunder Bose v. Surjee Kanto Roy Chowdhry* (I. L. R., 5 Cal., 713), at first contended, that the

\* Full Bench Reference in Special Appeal, No. 361 of 1879, against the decree of Baboo Nobin Chuunder Ghose, First Subordinate Judge of Mymensing, dated 24th September 1878, modifying the decree of Baboo Anuntoram Ghose, Munsif of Attia, dated 31st May 1878.

present suit, so far as it relates to rent of 1280, could be brought at any time within 1284. But on its being pointed out that in this case, the defendant was under a contract to pay the rent by instalments in the months of Assar, Assin Pous, and Cheyt, he admitted that this judgment did not support him so far as this suit related to the rent payable in the three first-named months; but he argues, that it is strictly applicable in respect of the rent payable in Cheyt.

"On reference to the judgment in question, it appears to us to be undoubtedly an authority for the proposition that a suit for the rent of Cheyt 1280 can be brought at any time before the close of 1284. But with all deference to the learned Judges who delivered that judgment, we cannot concur in the construction which they put upon the terms of s. 29 of the Rent Law.

"It appears to us that, following the construction placed both by the Courts in England and by the Imperial Legislature on terms similar to those used in s. 29, Act VIII of 1869 of the Bengal Code, a suit for arrears of rent of the entire year 1280, or of the last instalment of that year, cannot be brought after three years calculated from the last day of 1280.

"We do not agree with the learned Judges who decided the case of *Woomesh Chunder Bose v Surjee Kant Roy Chowdry* (I. L. R., 5 Cal., 713) that the rent of 1280, supposing it to be payable in one payment, would not be due until the 1st Bysak 1281. It would, in our opinions, be due or payable on the last day of 1280—i.e., on the last day of Cheyt of that year. The correct rule for interpreting the terms used in s. 29 seems to us to be that which is contained in the Limitation Acts of 1871 and 1877 and in cls 2 and 3, s. 3 of the General Clauses Act (I of 1868), viz., that, in calculating limitation, or determining a particular period, the first day of that period should be excluded and the last day [327] included. Moreover, it has been held by the Courts in England (see *Maxwell on Statutes*, page 310), where the particular period was one month, that 'the day corresponding with that from which the computation began is excluded, so that two days of the same number are not comprised in it.'

"It is true that the Acts of the Imperial Legislature to which we have referred, do not apply to the Bengal Rent Act, but there is nothing in that Rent Act which is opposed to such a construction, and in our opinion, the general principles which regulate the interpretation of expressions similar to those contained in s. 29, should be applied also to that special law. There is nothing in the Rent Law which makes it exceptional in this respect.

"In the present case, therefore, we are of opinion that limitation commenced to run from the last day of Cheyt 1280, when the instalment payable on that date became due. but that, in calculating the term of three years, that day must be excluded. A suit for that instalment could not be brought until the 1st Bysak 1281, and might be brought not later than the last day of the period of three years from the last day of Cheyt 1280, calculated according to the Gregorian era.

"This question, as affecting the period within which suits for arrears of rent may be instituted, is of great importance, and calls for immediate decision. We desire, therefore, the authoritative ruling of a Full Bench on the following point:—

"What is the last day on which a suit for the recovery of ordinary arrears of rent—that is, rent payable yearly at the close of the year to which it relates, can be instituted under s. 29, Beng. Act VIII of 1869?"

*Baboo Golap Chunder Sircar* for the Appellant.



Baboo Issur Chunder Chuckerbutty, Baboo Mohiny Mohun Roy, and Baboo Kishory Mohun Roy for the Respondents.

The Judgment of the Full Bench was delivered by .

**Garth, C.J.**—We think it clear that the last day on which a suit for the recovery of arrears of rent can be instituted under the section referred to, is the last day of the third year from the [328] close of the year in which the rent became payable; and as in this case the rent was payable in the month of Cheyt 1280, and the defendant was bound to pay it before the close of the last day of that month, the plaintiff must have brought his suit within three years from that day.

We do not quite understand the reasons upon which the cases of *Woomesh Chunder Bose v. Surjee Kanto Roy Chowdhry* (I. L. R., 5 Cal., 713) proceeded. It seems to have been considered by the learned Judges in that case, that an arrear of rent does not become due until the day after that on which by the terms of the holding the rent is payable. But this, we think, is a fallacy. The rent becomes due at the last moment of the time which is allowed to the tenant for payment. If it is not paid within that time, it becomes an arrear, and continues an arrear until it is paid.

The word "arrear" in s. 29 of the Rent Act means "rent in arrear;" and that rent in arrear would, undoubtedly, become due on the last day of the year in which it is payable.

The judgment, therefore, of the lower Appellate Court will be modified by limiting the sum which the plaintiffs are entitled to recover, to the rent which became due in the years 1281 and 1282.

We think that the appellant should only have his proportionate costs of the hearing before Mr. Justice MORRIS and Mr. Justice PRINSEP, but that he is entitled to the full costs of the hearing.

#### NOTES.

[See also, as regards computation of time 13 C L.R. 153 generally, (1906) 7 C L J. 106, with reference to *rent*, under the Bengal Tenancy Act

#### SUIT FOR THE RECOVERY OF IMMOVEABLE PROPERTY—

It has been similarly held that a suit for recovery of a mortgage debt with a prayer for sale in the alternative is not such a suit (1890) 14 Mad., 284 ]

[5 Cal. 328]

#### ORIGINAL CIVIL.

*The 11th August, 1880.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE PONTIFEX.

G. M. Cutts and another ..... Defendants

. *versus*

T. F. Brown and others ..... Plaintiffs.

*Specific Performance—Evidence—Admissibility of Parol Evidence—Evidence Act (I of 1872) s. 92, provisoes 1 and 6—Practice—Joinder of Causes of Action—Civil Procedure Code (Act X of 1877) s. 44, rule (a)—Specific Relief Act ss. 17, 22, 26.*

The plaintiffs sued for specific performance of an agreement in writing, which set forth *inter alia*, that the defendants had agreed to sell, &c., under "certain conditions as agreed

upon." The defendants alleged, that the written agree-[329]ment did not contain the whole of the agreement between the parties, and offered parol evidence in support of their contention.

*Held* (reversing the judgment of WILSON, J.), that the parol evidence was admissible to show what was meant by the clause "certain conditions as agreed upon."

*Per* PONTIFEX, J. (GARTH, C.J., *dissenting*).—The evidence was admissible under proviso 1, s. 92 of the Evidence Act (I of 1872).

Discussion as to the meaning of s. 92\* of the Evidence Act, and of ss. 17†, 22‡, and 26§ of the Specific Relief Act.

*Per* PONTIFEX, J.—It is of the essence of specific performance that part only of an agreement should not be performed.

Part of the purchase-money had been advanced by the plaintiffs to the defendants, for which the defendants had given their promissory notes; and the plaint contained a prayer that the defendants be ordered to pay over the amount of the notes.

\*[Sec. 92 :—When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a

Exclusion of evidence of oral agreement.

document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms

*Proviso* (1).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto ; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact or law.]

Bar in other cases of specific performance of part of contract

†[Sec. 17.—The Court shall not direct the specific performance of a part of a contract except in cases coming under one or other of the three last preceding sections.]

‡[Sec. 22.—The jurisdiction to decree specific performance is discretionary, and the Court

Discretion as to decreeing specific performance.

is not bound to grant such relief merely because it is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal.

The following are cases in which the Court may properly exercise a discretion not to decree specific performance :—

I. Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part.

II. Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.

III Where the plaintiff has done no substantial acts or suffered losses in consequence of a contract capable of specific performance.]

§ [Sec. 26 :— Where a plaintiff seeks specific performance of a contract in writing, to which

Non-enforcement except with variation.

the defendant sets up a variation, the plaintiff cannot obtain the performance sought, except with the variation so set up, in the following cases (namely).—

- (a) Where by fraud or mistake of fact the contract of which performance is sought is in terms different from that which the defendant supposed it to be when he entered into it ;
- (b) Where by fraud, mistake of fact, or surprise the defendant entered into the contract under a reasonable misapprehension as to its effect as between himself and the plaintiff ;
- (c) Where the defendant, knowing the terms of the contract and understanding its effect, has entered into it relying upon some misrepresentation by the plaintiff, or upon some stipulation on the plaintiff's part, which adds to the contract, but which he refuses to fulfil ;
- (d) Where the object of the parties was to produce a certain legal result, which the contract as framed is not calculated to produce ;
- (e) Where the parties have, subsequently to the execution of the contract, contracted to vary it.]

*Held* (affirming the decision of WILSON, J.), that there was no misjoinder of causes of action within the meaning of s. 44, rule (a) of the Code of Civil Procedure (Act X of 1877).

THE plaintiffs in this case sued one George Malcolm Cutts and Rosly Eliza, his wife, for the specific performance of an agreement for the sale of a share of a certain house. It appeared that, on the 1st of October 1877, the defendants, being under the impression that they were entitled to a third share of the house in question, entered into an agreement in writing with the plaintiffs to sell the share to them for Rs. 6,200, "under certain conditions as agreed upon." The plaint stated that, "it being subsequently discovered that the defendants had only a one-fourth share in the said house, a verbal agreement was, by consent of the plaintiffs and defendants, entered into, whereby the defendants agreed to sell their share in the said house and premises to the plaintiffs for Rs. 5,000. A portion of the purchase-money was paid by the plaintiffs. On three several occasions the defendants gave the plaintiffs promissory notes for various sums, amounting in all to Rs. 3,000, advanced by the plaintiffs to them. The plaint prayed, that the defendants might be ordered to specifically perform the agreement of the 1st October 1877, and to repay the sum of Rs. 3,000 due upon the promissory notes.

The defendants George Malcolm Cutts alone filed a written statement. He contended that, as the plaintiffs had not, previ-[330]ously to the institution of the suit, obtained the leave of the Court to join his alleged cause of action in respect of the promissory notes mentioned in the plaint with his alleged cause of action in respect of the immoveable property, he was not at liberty to maintain the suit. This defendant stated that he and his wife agreed to sell the share in the house to the plaintiffs, subject to certain terms and conditions as agreed to between them, for the sum of Rs. 6,200. These terms and conditions were, that, upon the execution of the conveyance of the share by the defendants in favour of the plaintiffs, the plaintiffs should execute a lease of the share in favour of the defendants for the period of three years, at the yearly rent of Rs. 720; that the defendants should remain in occupation of the share for the period mentioned; and that, at the expiration thereof, the plaintiffs should sell back the share to the defendants for the same sum of Rs. 6,200 if they wished them to do so. The reason why these conditions were agreed upon was, the first defendant stated, that he and his wife had no intention to sell the share, but only to mortgage it, that they were advised that they had no power to mortgage; and that, therefore, the sale, lease, and re-purchase was arranged. The first defendant then stated the agreement to sell the one-fourth share for Rs. 5,000, and that the terms and conditions mentioned had not been performed; and contended that the plaintiffs were not entitled to specific performance of the agreement without themselves carrying out their part of the contract.

Mr. Phillips and Mr. Trevelyan for the Plaintiffs.

Mr. Branson and Mr. Bonnerjee for the Defendants.

Mr. Phillips.—It was not necessary to obtain the leave of the Court under s. 44, rule (a) of the Civil Procedure Code, to join the different causes of action upon which the plaintiffs rely. A suit for the specific performance of an agreement to sell a share in a house is not a "suit for the recovery of immoveable property" within the meaning of that section. Possibly this might be held to be a "suit for land or other im-[331]moveable property" within s. 12 of the Charter, but those words are more comprehensive than the words used in

s. 44, rule (a). The defendants contend that the plaintiffs cannot obtain specific performance of the agreement until they have performed certain terms and conditions which are not stated in the agreement. Those terms and conditions would have to be proved by parol evidence, and the case of *Dasmoodde Park v. Kam Taridar* (I. L. R., 5 Cal. 300) is an authority to show that parol evidence cannot be given to vary the terms of the written agreement.

Mr Bonnerjee for the defendants.—The causes of action have been wrongly joined, and the suit must be dismissed. The Court has no jurisdiction to entertain a suit in this form—*Pilcher v. Hine* [24 W. R. (Eng.), 619] and *Delhi and London Bank v Wordie* (I. L. R., 1 Cal., 249). Clause (c) of s. 44 can only refer to foreclosure. [WILSON, J.—Could you call a suit to compel registration a suit for land?] No, because the title passes by the conveyance. [Mr. Phillips called attention to Act III of 1877, s. 49, as showing that the conveyance had no effect without registration.] Then such a suit would be for the recovery of land. The plaintiffs rely upon and seek performance of a verbal agreement. There must have been some agreement for a lease. "Certain conditions as agreed upon" cannot refer to the condition in the document. These words were inserted by the defendants themselves in the draft. [WILSON, J.—Suppose you are right in saying you can give evidence of the terms you set up; is that any answer to the suit?] The transaction would not be a mortgage. The plaintiffs' agreement to re-sell is as much a part of the agreement as their paying the price. We say they must covenant to re-sell. [WILSON, J.—I suppose I may take it that the words "under certain conditions" refer to the document annexed to the plaint?] Yes.

Wilson, J.—As between the plaintiffs and Mr. Bonnerjee's client it appears to me that no issue of fact has to be decided.

The suit is for the specific performance of a contract for sale [332] of land. The objections are two-fold. The first is an objection to procedure, the other goes to the substance of the suit.

It is said the suit cannot be entertained in its present form by reason of s. 44, rule (a) of the Civil Procedure Code. That section says:—"No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property, or to obtain a declaration of title to immoveable property, except—(a) claims in respect of mesne profits or arrears of rent in respect of the property claimed: (b) damages for breach of any contract under which the property or any part thereof is held; and (c) claims by a mortgagee to enforce any of his remedies under the mortgage."

Mr. Bonnerjee has cited the case of the *Delhi and London Bank v. Wordie* (I. L. R., 1 Cal., 249), which probably would be sufficient to justify him in saying that this is a suit for land within the meaning of the words of the Charter. The terms of the section are narrower. It seems to me that a suit for "the recovery of immoveable property" is a suit founded upon an existing title in which the plaintiff seeks to get possession of the property itself. The words "to obtain a declaration of title to immoveable property" seem to me to apply to a case where a title exists, and the plaintiff asks to have that fact declared, not to a case where he seeks to have something done, which, when done, will give him a title.

I think the first objection of the defendants fails. If it were otherwise, I think there would be power under s. 53 to amend the plaint by striking out the part which is not properly joined.

The other ground of defence goes to the substance of the case. The defendants say the contract alleged by the plaintiffs was not the real contract; but that there were other terms which had to be fulfilled before they could obtain specific performance.

The plaint sets up a written contract for sale of a share in the premises in question, the parties assuming that the share of the female defendant was a one-third share. Accordingly, the contract was for sale of a one-third share. The plaint (para. 3) says—"It being subsequently discovered that the defendants had only a one-fourth share in the said house, a verbal agree-[333] ment was by consent of the plaintiffs and defendants entered into, whereby the defendants agreed to sell their shares in the said house and premises to the plaintiffs for Rs. 5,000." I think the true meaning of that paragraph is, that the written agreement for sale of the one-third share continued intact, except that when the mistake was discovered, the written agreement was varied by one-fourth being sold instead of one-third, and the price being Rs. 5,000 instead of the larger sum. And that is the view taken by the defendants themselves in their written statement.

Then we have to come to the written document to see what the original contract was. That must be determined on the words of the document itself. The written document seems to me to be a complete contract of sale. Mr. Bonnerjee has called attention to the words "under certain terms and conditions as agreed upon." But these words do not, in my opinion, refer to anything outside the document, but to terms therein contained. They are an indication that there are conditions which are to be attended to, and the latter part of the deed sets out these terms. It would be entirely contradictory of the document if evidence were now to be given that the contract was subject to terms or conditions not set out in the document. The case of *Daimoddee Park v. Karm Tarider* (I. L. R., 5 Cal., 300) seems to be an authority that evidence cannot be given to vary what in a case like this is expressed in the document, and I should have come to the same conclusion in the absence of such an authority.

Even if the evidence were given, it is by no means clear that the defendants have any defence to the action. It is by no means clear that the existence of such a term entitled the defendants to the covenant they suggest. A man may be entitled under a contract to have a thing done; but it does not of necessity follow that he is entitled to have a covenant about it inserted in a deed. As between the plaintiffs and the first defendant no question of fact in my opinion arises.

From this decision the defendants appealed.

Mr. Hill for the Appellants.

[334] Mr. Phillips and Mr. Trevelyan for Respondents.

Mr. Hill.—Leave should have been obtained to join the cause of action on the promissory notes, as this is in reality a suit for land—*Delhi and London Bank v. Wordie* (I. L. R., 1 Cal., 249). The plaintiffs sue the whole agreement between the parties and in such a case the defendant is always allowed to give parol evidence to defeat the plaintiff's suit: Specific Relief Act, s. 26; *Dart on Vendors and Purchasers*, p. 1039; *Marquis of Townshend v. Stan-groom* (6 Vesey, 328); *Woollam v. Hearn* (7 Vesey, 211. See s. c., 2 W. and T. L. C., 481n). The evidence offered does not contradict the writing, and s. 92 of the Evidence Act does not apply.

**Mr. Phillips.**—Admitting that we agreed to re-sell to the defendants at the end of three years, the defendants are not entitled to have a covenant to that effect inserted in the deed of sale. They never asked this, and it would be unreasonable to grant it now. The evidence was properly rejected, as no case of fraud was shown—*Marquis of Townshend v. Stangroom* (6 Vesey, 328). [PONTIFEX, J., referred to *Clarke v. Grant* (14 Vesey, 519).] The evidence offered would turn the writing, which appears to be an absolute sale, into a mortgage, and could not therefore be received—Evidence Act, s. 92.

**Mr. Trevelyan** on the same side.

The following **Judgments** were delivered :—

**Pontifex, J.**—The plaintiffs in this case sue for specific performance of a written agreement by the defendants to sell a share in a house. The defendants, in their written statement, allege that, in addition to the written agreement, there was a further parol agreement, that the plaintiffs should let the property to the defendants for three years, and should give them a right to purchase at the end of the three years.

The defendants also claimed that the suit should be dismissed, because, in contravention of s. 44, rule (a) of the Procedure [335] Code, the plaintiffs had, without the leave of the Court, improperly joined a separate cause of action with their suit for immoveable property. But I agree with the Court below that this objection cannot prevail, because there is in fact no joinder of separate causes of action, but only a demand for alternative relief.

The written agreement which the plaintiffs seek to enforce commences its witnessing part as follows :—

“Witnesseth that the said defendants do sell under certain conditions as agreed upon to the plaintiffs all that, &c.” The learned Judge has held that, upon the proper construction of the document, the words above mentioned only apply to the terms subsequently contained in the document itself. Probably this would be the ordinary construction ; but I think that, under proviso 6\* to the 92nd section of the Evidence Act, the defendants are entitled to go into evidence to prove the contrary.

But the learned Judge has further held, that, under s. 92 of the Evidence Act, the defendants are not entitled to go into evidence to prove the case set up in their written statement, on the ground, that to allow them so to do would be to allow them to contradict, vary, add to, or subtract from the terms of the written agreements. I am, however, unable to agree with him for two reasons. In the first place, I think that the agreement set up in the written statement falls within proviso 1 to s. 92. For, if the plaintiffs really agreed verbally to the conditions alleged by the defendants, it would be a fraud on their part to insist on performance of the written agreement without at the same time securing to the defendants the performance of the other conditions which they had promised. In the words of the Masters of the Rolls, in *Clarke v. Grant* (14 Vesey, 519, at p. 524)—“but for the promise there would, probably, never have been any agreement at all. It would then be against equity, and a fraud on the defendant, to insist upon his performance of an agreement which he only signed on the faith” of certain additions.

*Secondly*, I think that, according to the authorities at least, the agreement set up in the written statement falls within proviso 2 to s. 92 ; that, if true,

\* [Sec. 92 :—q. v. *supra*, I. L. R. 6 Cal. 329.

*Proviso (6).*—Any fact may be proved which shows in what manner the language of a document is related to existing facts.]

the oral agreements alleged are separate [336] agreements, collateral to and not inconsistent with the terms of the written agreement, just in the same way as I think it would still be open to prove that what is ostensibly a conveyance was in fact intended to be a mortgage. The cases of *Morgan v. Griffith* (L. R., 6 Exch., 70) and *Erskine v. Adeane* (L. R., 8 Ch. App., 756) seem to me very strong illustrations of this proposition.

Moreover, it is of the essence of specific performance that, except under special circumstances, part only of an agreement ought not to be decreed to be performed. So strong is this influence, that it has been held that, even when the defendant does not allege a parol variation, but it comes out in the evidence, the Court will direct an enquiry in regard to it before disposing of the case—*Parken v. Whitby* (T. and R., 366), *London and Birmingham Railway Co. v. Winter* (Cr. and Ph., 57), *Helsham v. Langley* (1 Y. and C., C. C., 175); and indeed the Court will direct an enquiry when the variation is alleged by the defendant, but only so far proved as to raise a suspicion of the existence, and yet not to satisfy the Court—*Van v. Corpe* (3 M. and K., 269). So careful is the Court in decreeing specific performance. The 17th section of the Specific Relief Act recognises this principle; and the 22nd section gives the Court complete discretion. Indeed, the 26th section of the Specific Relief Act was, in my opinion, enacted to meet this very case, which, as I read it, falls within cl. (e) to that section. It is true that the words "upon some stipulation on the plaintiff's part which adds to the contract, but which he refuses to fulfil," are not (according to the ordinary untechnical meaning of the word stipulation) very apt words to express what was intended, namely, some condition "in favour of the defendant agreed to by the plaintiff which he refuses to fulfil." But cls. (a), (b) and (c) have been pitchforked verbatim into the Act from Mr. Dart's book on Vendors and Purchasers, p. 1039, Edn. 5. I can but suppose that they are intended to have the same effect as Mr. Dart ascribes to them.

Upon the whole, therefore, I am of opinion that the defendants in this case ought at least to have been allowed to go into evi-[337]dence, and the case must, therefore, be returned to the lower Court for that purpose. Whether the defendants, supposing them to prove their case, will be entitled to have a power or proviso for repurchase inserted in the conveyance to the plaintiffs, is a question for the lower Court to decide. I can only express my opinion now, that if the defendants prove their case, the plaintiffs are seeking by their plaint performance of only part of an agreement, to which they are not entitled; and that they can be entitled to specific performance of the terms in their own favour of the whole agreement proved, only upon the terms in the defendants' favour being properly secured to them. If the defendants succeed in the lower Court in proving the case set up by them, they must, I think, have the costs of the appeal; otherwise the plaintiffs will be entitled to such costs. The Court below ought to deal with the costs of the original hearing in that Court.

**Garth, C. J.**—I agree with my brother PONTIFEX upon both points, as well as in the form of the decree which he proposes to make.

But I would decide the second point, as to the admissibility of the oral evidence, upon this one ground only.

I think the defendant ought to be allowed to show, if he can, that the words in the contract "under certain conditions" refer to conditions outside the contract, and not to those contained in it. There is nothing in the contract

itself to show that the conditions so referred to are those which are mentioned in it, and if the conditions were in fact made orally, and the contract was expressly made subject to those conditions, it seems clear to me that they are not inconsistent with it. It is not necessary that the whole agreement should be in writing; and if, upon the face of that part of it which is in writing, it appears that there are other conditions, oral or otherwise, which go to make up the entire contract, there is no reason why those conditions, if made orally, should not be orally proved. The rule laid down in s. 92 of the Evidence Act applies only, as I consider, where, upon the face of it, the written instrument appears to contain the whole contract.

[338] I quite agree with my brother PONTIFEX that s. 26 of the Specific Relief Act is intended to provide for just such a case as the present.

But I do not think that proviso 1 of s. 92 is applicable here. That proviso seems to me to apply to cases where evidence is admitted to show that a contract is void, or voidable, or subject to re-formation, upon the ground of fraud, duress, illegality, &c., in its inception, and not to cases where the agreement being in itself perfectly valid and free from any taint of that kind, one of the parties attempts to make a fraudulent use of it as against the other. It will be found that the rule laid down in s. 92 of the Evidence Act is taken almost verbatim from Taylor on Evidence (1st Edn.), s. 813, and the exceptions which follow in the several provisoes are discussed in ss. 816 to 841 of the same work. That being so, I think it is quite legitimate to refer to those sections, as one means of ascertaining the true meaning of the provisoes. The substance of the proviso, and the examples showing the meaning of that proviso, are contained and explained in ss. 816 to 819, and it will be found that they all relate to the reception of evidence for the purpose of invalidating contracts, by reason either of fraud, illegality, &c., in their inception, or of some subsequent failure of consideration.

For this reason, as well as from the language of the proviso itself, I think that it is not intended to apply to a case where the contract itself being valid, one of the parties wishes to make an improper use of it.

Then again, I cannot think that the additional terms relied upon by the defendants are admissible under proviso 2, as being a "separate oral agreement not inconsistent with the terms of the principal contract."

It seems to me, that an absolute sale of a property, such as the plaintiffs ask us to enforce against the defendants, is a totally different thing from a sale, which is subject in the first place to an obligation on the part of the purchaser to let the property to the vendor for three years from the time of the sale, and in the next place, to the additional obligation to re-sell to the vendor at the end of the three years at a specified price.

[339] The interest which the purchaser would take in the one case would be a very different thing, and worth a very different price, from what he would take in the other; and I, therefore, think that the additional terms do vary and are inconsistent with the principal contract.

The case of *Morgan v. Griffith* (L. R. 6 Exch., 70), which is referred to by my brother PONTIFEX, seems to me entirely different from this. In that case an action was brought by a tenant against his landlord for damage done to his land by rabbits. The lease, which was in the usual form, reserved all the game and rights of shooting to the landlord; but as the tenant, who had entered upon the property before the lease was executed, found the land completely overrun with rabbits, he refused to sign the lease, until the landlord had orally promised that



he would have the rabbits destroyed. Upon the promise being made, the tenant signed the lease; but the rabbits were not destroyed, and consequently the tenant's crops were seriously injured. It was held that he had a right to sue for that damage, the oral agreement being collateral to the lease, and not inconsistent with it. The oral agreement there seems to me perfectly consistent with the landlord having all the game to himself, and the exclusive right to shoot it.

The case of *Erskine v. Adeane* (L. R., 8 Ch. App., 756) was very similar to *Morgan v. Griffith* (L. R., 6 Exch., 70); and the oral agreement there, so far as it was sought to be enforced against the landlord, was for the same reason, which I have explained in *Morgan v. Griffith* (L. R., 6 Exch., 70), consistent with the terms of the lease.

Subject to these observations, I agree with the Judgment which has just been delivered.

*Appeal allowed and case remanded.*

Attorney for the Appellants: Mr. H. H. Remfry.

Attorney for the Respondents: Mr. Leslie.

### NOTES.

#### [I SPECIFIC PERFORMANCE WHERE THE DEFENDANT SETS UP A VARIATION.

This defence may operate in two ways; the variation may serve to show that the parties were not *ad idem* and that there was no real contract.

Where a contract with those terms is proved, the following courses will be adopted according to the circumstances of the case.

- i. if the plaintiff insists on his original contention to the end, the claim will be thrown out; whether there can be another suit allowed for specific performance in such case, see *Preston v. Luck*, 27 Ch. D. 497, *Marshall v. Berridge*, 19 Ch D 233, *Smith v. Wheatcroft*, 9 Ch. D. 233.
- ii. if the defendant insists on his suit the Court will do so; or if the defendant insists on decree for specific performance with the variation, the Court may act accordingly.—*Joynt v. Statham* 3 Atk. 388; *Fife v. Clayton* 13 Ves. 546
- iii. If the defendant does not object, the plaintiff may be given the choice of having his action dismissed or getting a decree with the variation.—*Clarke v. Grant*, 14 Ves. 519; *Ramsbottom v. Gosdon*, 1 V. and B. 165.

In a suit for specific performance, when the additional term set up established a case of hardship due to some mistake, the Court may refuse specific performance—not always where the mistake is unilateral.—*Tamplin v. James* 15 Ch D 215, *Goddard v. Jeffreys* 30 (Eng.) W. R. 269.

#### II ADMISSIBILITY OF ORAL EVIDENCE WITH REFERENCE TO WRITTEN CONTRACTS.

See as to this subject (1899) 22 All. 149, (1904) 32 Cal 93 (doubted); (1901) P. L. R. 114

The oral terms must not be inconsistent with the written instrument;—(1887) 11 Bom. 644; (1888) 12 Bom. 355; 15 M.L.J. 225. (1885) 11 Cal. 486; (1882) 12 C. L. R. 163; (1892) 19 Mad. 238.

#### III JOINDER OF RELIEFS TO ENFORCE AN AGREEMENT AND DAMAGES FOR THE BREACH.

See (1885) L. B. R. (1882-1891) 355.]

## [340] APPELLATE CIVIL.

*The 15th June, 1880.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MACLEAN.

Mohesh Lal.....Plaintiff

versus

Busunt Kumaree.....one of the Defendants.\*

*Limitation Act (IX of 1871), s. 20—Acknowledgment—Repeal of Act—Revival of Right to sue—Authorized Agent—Signature—Civil Procedure Code Act (VIII of 1859,) s. 4.*

The law of limitation governing a suit for a debt, is that law which is in force at the date of its institution.

As far as regards debts, the Indian laws of limitation merely bar the remedy, but do not extinguish the right.

*Krishna Mohun Bose v. Okhlmoni Dossee* (I. L. R., 3 Cal., 333), *Nocoor Chunder Bose v. Kally Coomar Ghose* (I. L. R., 1 Cal., 328), and *Ram Chunder Ghosaul v. Juggutmonmohiney Dabee* (I. L. R., 4 Cal., 283), overruled.

*Gunga Gobind Mundul v. The Collector of the 24-Pergunnas* (11 Moore's I. A., 345) explained. *Valla Tamburati v. Vira Rayan* (I. L. R., 1 Mad., 228) and *Madhavan v. Achuda* (I. L. R., 1 Mad., 301) followed.

Acknowledgments which under Act XIV of 1859 were insufficient to keep alive a cause of action, because they were signed only by an agent, held to be sufficient to sustain a suit on the same cause of action under Act IX of 1871.

Where a series of acknowledgments of a debt have been made, each within three years of the one next preceding, and the first of the series has been made within three years of the date on which the debt was contracted, a suit for the recovery thereof is, under Act IX of 1871, in time, if instituted, within three years from the date of the last acknowledgment.

Discussion as to who is an authorized agent, what is a sufficient signature, and what amounts to sufficient acknowledgment, within the meaning of s. 20 of Act IX of 1871.

Under s. 20 of Act IX of 1871, the authorized agent may sign either his own name or that of his principal.

THIS was a suit brought on 14th September 1877 by one Mohesh Lal Sahu, a banker, to recover from the widows of one [341] Kali Pershad Singh (whose estates came under the charge of the Court of Wards in August 1877) sums amounting to Rs. 59,286, being money advanced to Kali Pershad, and, after his death in Assar 1281, to his widow, with interest on such sums, to enable them to make payment of the Government revenue and rents of Kali Pershad's estate as they became due.

The plaintiff stated, that both Kali Pershad, and, after his death his widows, had received advances from him; and that, at the end of each year, an account was drawn up and entered in the books of the ensuing year, but the signatures to such accounts were affixed at intervals extending over several years, Kali Pershad having affixed his signature to such accounts in Assin 1271, and in Assin 1274, on which date he had admitted a sum of Rs. 13,611-2-6 to be due up to the end of the commercial year 1274; and that, after his death,

\*Appeal from Original Decree, No. 124 of 1878, against the decree of Hafez Abdul Karim Khan Bahadur, First Subordinate Judge of Bhagalpore, dated the 6th March 1878.

Sampat Koeri, one of his widows, on 13th Bhadro 1282 F. (30th August 1875) signed the account on behalf of herself and the other widow, and according to that account Rs. 36,797 was then due to the plaintiff up to the end of the commercial year 1281; that further advances were made up to 1284, but no accounts had since been signed. The plaintiff further relied on certain letters said to have been written at the instance of Sampat Koeri, by the hand of her agents, as acknowledgments of the debt due, and as such renewing their liability to pay the sums sued for, all which letters, except the two following are sufficiently set out in the judgment of MACLEAN, J. Those relied on which are not there set out were, one dated 28th Bhador 1281, written by one Shital Lal, a dewan of Sampat Koer :—

“To Baboo Mohesh Lal—Compliments of the Debi of Lagwan . . . . . I request that you will be kind enough to cause the Government revenue to be paid; after the Deshera-I will send you the malguzari, after the vacation I will settle the previous account.”

And one dated 16th Assar 1283, written by Shital Lal to Mohesh Lal Sahu:—

“Compliments of Sampat Koeri to Baboo Mohesh Lal Sahu. You have sent to realize the money, but nothing has been settled regarding the dispute arisen amongst ourselves, hence the delay [342] in paying the money. But after settlement is made with you I will pay all your money.”

Neither of these letters were, however, signed by Shital Lal.

The Court of Wards, on behalf of the defendants, did not dispute the sum of Rs. 13,611-2-6 admitted by Kali Pershad; but contended that no such accounts as were mentioned had been ever shown to, explained to, or signed by Sampat Koeri, that, even admitting they were so signed, the signature of Sampat Koeri could not bind Banjiet Koeri (the other widow); that the letters put forward were not such an acknowledgment of the debt alleged to be due as would, under Act IX of 1871, revive the debt due from Kali Pershad; and that all sums, including the sum admitted by Kali Pershad, remaining unpaid up to within three years from the date of suit, were barred by limitation

The Subordinate Judge found that it had not been satisfactorily proved that Sampat Koeri had signed the accounts in 1875, and that the letters put forward were not signed by either of the widows; and that, therefore, all sums claimed as being due previous to three years from the date of the institution of the suit were barred by limitation; but gave a decree for Rs. 9,334, with interest at 6 per cent. on the sums claimed after that date.

The plaintiff appealed to the High Court.

Mr. *Phillips* (Baboo *Mohesh Chunder Chowdhry* and Baboo *Abinash Chunder Banerjee* with him) for the appellant.—The account stated was signed on 30th August 1875, and the suit was brought in September 1877. Sections 25 and 29 of the Contract Act will be sufficient to support a promise to pay a barred debt; but apart from the question of the promise to pay a barred debt, I contend (i) that the case is out of the Limitation Act; (ii) that a new contract has been made under s. 25 of the Contract Act, (iii) that there is a new contract on new consideration,—viz., our abstaining from pressing for payment. With reference to the accounts and letters acknowledging the debt, I say, that while the debt was still unbarred, I obtained an acknowledgment, which carried me on for a further period, and that each letter after the first gave me further freedom from the [343] law of limitation, each several letter forming one of a

continuous chain of acknowledgments up to the date of suit. Section 25 of the Contract Act gives express power to constitute a new contract. [GARTH, C. J.—The debt or legacy mentioned in that section must be specific, and the section does not apply to an unascertained amount; here no account is stated, as it was not known what was exactly due]. In England, under the Statute of Limitation, it is not necessary that the account should be stated, but there must be an acknowledgment which implies a promise.—*Sidwell v. Mason* (2 H. & N., 306). If a letter contains an acknowledgment that some debt is due, then that will be sufficient to take the case out of the Statute.—*Shearman v. Fleming* (5 B. L. R., 619). A general promise to pay an amount of an account, of which the party does not know the amount, is equivalent to saying “I will pay when the amount is ascertained.” A general admission of some debt seems sufficient. In *Dickenson v. Hatfield* (5 C. & P., 46) a letter admitting a balance due, without stating the amount, was held sufficient. In *Cheslyn v. Dalby* (4 Y. and C., Exch., 238) the amount had not been ascertained by either party, but a promise was given to pay when the amount should be ascertained; and this also was held sufficient to carry the case out of the Statute. That case is very similar to the present. [GARTH, C. J.—The case of *Baird v. Gammon* (3 Bing., N. C., 883) is very similar to the present case, and the promise there was held to be sufficient.] In *Harrison v. Hope* (9 B. L. R., App., 43) the acknowledgment of the debt was only gathered by implication from the letter between the parties, the amount was claimed by the plaintiff in their letters, but the defendant mentioned no amount in his acknowledgment. This was held sufficient. [Mr. O’Kinealy.—Until Kali Pershad died in 1874, the parties say that they did not know how much was owing] In *Rendal v. Carpenter* (2 Y. & J., 484) a letter acknowledging a debt due, but asking for the exact amount, was held sufficient. In [344] the present case the defendant must have known the amount, as the loans were made for the purpose of paying the Government revenue and that was payable by fixed kists. In *Colledge v. Horn* (3 Bing., 119) the defendant, although knowing what was claimed, did not know what was due, but was ready to come to a settlement. This was held sufficient to carry the case out of the Statute. [GARTH, C. J.—Is a promise to pay without a knowledge of the amount sufficient?] Yes; it has been so held in *Lechmere v. Fletcher* (1 C. & M., 623).

Mr. P. O’Kinealy (Baboo Annoda Pershad Banerjee with him) for the respondents.—It has been contended on the point of limitation (i) that there is a distinct contract in writing under s. 25 of the Contract Act, and (ii) if there be not a sufficient contract, then the letters are a sufficient promise to pay under s. 20 of the Limitation Act. Mr. Phillips says that if he can show an acknowledgment within three years before limitation ran, and subsequent acknowledgments afterwards up to suit, this will be sufficient. That, however, is not the meaning of the section, which is intended to introduce a double restriction. Before the Act an acknowledgment might be made fifty years after the debt was incurred; it was only necessary to be made within three years of suit. Now it must be made within three years of suit, and within three years of incurring the debt. Besides, there must be one principal letter to be relied on as an acknowledgment by itself, and not a series of letters, otherwise where is limitation to start from?—*Rogers v. Montrou* (6 B. L. R., 550). Under Act IX of 1871, s. 20, the acknowledgment must be contained in a writing signed before the expiration of the prescribed period; if that is so, the only letters that can be used against us are the letters after 1874. If Mr. Phillips’ construction of s. 20 is correct viz., that an acknowledgment on an acknowledgment gives a continuous train of fresh starting points for limitation, then s. 21 must have the same construction put upon it, and

it has been held that part-payment does not take a case out of the Act.—*Pershad Singh v. Mohes Lal* [Reg. App., 179 of 1874 (unreported)] [GARTH, C. J.—Part-payment is not the [345] ground of that decision, but the reciprocity of demand.] The letters do not amount to a new contract in writing within the meaning of s. 25 of the Contract Act. The agreement to be binding must be a contract in writing, and as to what is sufficient to charge a person under such a contract, see *Stanley v. Dowdeswell* (L. R., 10 C. P., 102). As to whether the letters amount to a sufficient acknowledgment, when there is a conditional recognition of the debt the acknowledgment is not sufficient—*Hales v. Stevenson* (9 Jur., N. S., 300). An unqualified acknowledgment of the debt must be shown, or if the promise to pay is conditional, the performance of the condition must be shown.—*Hart v. Prendergast* (14 M. & W., 741). Here we agree to pay on a settlement being come to, and no settlement ever appears to have been made. The letter must contain a distinct admission of a debt, and contain no doubtful expressions.—*Gash v. Maclean* (2 All. H. C. Rep., 403). Now, both the Contract Act and the Limitation Act require that the letters relied on should be signed by the person to be charged, or by his authorized agent. On the face of the letters put in, there is neither the signature of Kali Pershad nor of his agent duly authorized. [GARTH, C. J.—No issue has been tried as to whether these letters were the letters of Kali Pershad; but apart from the technical objection that the letters are not signed according to the section, there is the fact that the letters were written, and a very small fact will be enough to give authority.] There was no necessity for the issue to be raised, as the point was not relied on in the Court below. [GARTH, C. J.—There are two cases in which the names of persons charged have been printed, not written, and these have been held sufficient.—*Schneider v. Norris* (2 M. & S., 286) and *Saunderson v. Jackson* (2 B. & P., 238). [The ground of decision in these cases was, that the person charged had written sufficient in the body of the contract to bind himself by the printed signature. [GARTH, C. J.—If print is enough, the question is, whether the writing by an agent of his principal's name is not equivalent to the writing by the principal of his own name?] Further the letters, if relied on as a contract, [346] should have been stamped. [GARTH, C. J.—The objection was not taken in the Court below, and as the letters have been admitted in evidence, the objection cannot be taken on appeal.] There are cases to that effect; but they are cases in which the letters or documents were used for the simple purpose of being a contract. Next, as to the form of decree, if the decree of the lower Court is reversed, the decree for so much as the widow has not received can only hold her liable as representative, and then comes the question, whether an acknowledgment by a Hindu widow can bind her husband's estate. I submit not, and it has been so decided in *Sitaram Bhat v. Sitaram Ganesh* (6 Bom. H. C., A. C. J., 250).

The following **Judgments** were delivered:—

**Maclean, J.** (after shortly stating the nature of the suit and defence, continued):—The first point in the defence filed by the Collector on behalf of the defendants is a denial of the alleged statement of account by the defendant on the 13th Bhadro 1282 (30th August 1875), and the Subordinate Judge embodied this plea in the third issue, and decided against the plaintiff, in favor of the defence. The first nine paragraphs of the petition of appeal attack this finding. We propose to dispose of this part of the case before entering upon a consideration of the intricate questions raised in the other grounds of appeal and in the able arguments which have been addressed to us. [His Lordship then went into the evidence on this portion of the case, and as to that affirmed the judgment of the Court below.]

But then comes the question (assuming this account of 1875 not to be proved), whether so much of the plaintiff's claim as became due more than three years before suit, is barred by limitation? The lower Court has held that it is so barred. But it has been contended here, on behalf of the appellant, that, whilst the account was running, Baboo Kali Pershad, in his life-time, and the defendants since his death, have made such acknowledgments, from time to time of the existence of the debt, as will take the case out of the operation of the Limitation Act. [347] This question does not appear to have been adequately brought to the notice of the Court below; and as it is one of some nicety, it is necessary to go carefully into the facts as well as the law for the purpose of deciding it.

We start then with an account, which was admittedly adjusted and signed by Kali Pershad himself, showing a balance due from him to the plaintiff's firm, at the close of the Mahajani year 1274, of Rs. 13,611-2-6. It is obvious that the account must have been adjusted up to the end of the Mahajani, and not the Fusli year 1274, because the Fusli year begins on the 1st of Assin, whilst the Mahajani year begins 24 days later,—viz., on the 25th of Assin; and this account, which purports to be for the three years, 1272, 1273, and 1274, runs from the 25th of Assin to the 24th of the following Assin in each year, and brings the account down to the close of the year 1274, so that the 24th of Assin, which is the last day of the Mahajani year 1274, must needs be the 24th of Assin 1275 of the Fusli year; and as the account would hardly have been prepared until after the close of the year, and could not have been brought to the notice of Kali Pershad until after it had been completed, it follows that Kali Pershad could not have signed and settled it until at least two or three days after the 24th of Assin 1275 Fusli.

Assuming then that the account was signed on or after the 26th of Assin 1275 Fusli, we have in evidence three letters, which purport to have been written by Kali Pershad to the plaintiff's firm within three years after that date, which are said to be sufficient acknowledgments of the debt to prevent its being barred by limitation.

As the suit was brought in September 1877, the Limitation Act by which it is governed is Act IX of 1871, the Act of 1877 not having come into force till the first of October in that year. But here the question arises whether, although the Limitation Act which was in force at the time when the suit was brought is the one to which we must look in order to ascertain the proper period of limitation, still if, under the former Act of 1859, the right to bring this suit was barred, that right can be revived by any promise or acknowledgment made [348] before the Act passed, which would be sufficient to keep alive the debt under the Act of 1871, but insufficient under the Act of 1859. This point, no doubt, presents some difficulty; but we think its solution must depend upon, whether, in the case of a debt, the Act of 1859 merely barred the remedy or extinguished the obligation. Assuming the debt in this instance to have originated with the statement of account in 1867, which gave rise to a new and substantive cause of action, if the remedy was barred at the end of three years from that time, then the debt itself was in force at the time of the passing of the Act of 1871, and that Act *repealed entirely* the Act of 1859, making new provisions both with regard to limitation and also as to the means by which limitation might be prevented.

The first apparent difficulty which has presented itself upon this point is, that, in two cases it has been held by Division Benches of this Court, that, under the Limitation Act of 1859, it is not only the remedy that is barred after

the expiration of the statutory period, but the debt. The first of these cases is *Krishna Mohun Bose v. Okhilmoni Dossee* (I. L. R., 3 Cal., 333), decided by MARKBY and PRINSEP, JJ. That was a suit for arrears of maintenance, and it was held, partly upon the authority of a case decided by Mr. Justice PONTIFEX, *Nokoor Chunder Bose v. Kally Coomar Ghose* (I. L. R., 1 Cal., 328), and partly upon the doctrine supposed to have been laid down by the Privy Council in *Gunga Gobind Mundul's case* (11 Moore's I. A., 345), that the suit having been barred under the Act of 1859, the debt as well as the remedy was extinguished.

The other case was *Ram Chunder Ghosaul v. Jugyutmonmohiney Dabee* (I. L. R., 4 Cal. 283). In that case the same question came before the present Chief Justice and Mr. Justice MARKBY, with regard to a mortgage-debt, and although the Chief Justice expressed great doubt as to the propriety of the judgment in the case of *Krishna Mohun Bose* (I. L. R., 3 Cal., 333), still, as that case had been decided by a Division Bench of two Judges, of whom Mr. Justice MARKBY was one, and as that learned Judge adhered to his opinion, the Chief Justice considered himself bound to follow their judgment.

[349] In this case we have again considered the question very carefully, and our attention has been directed to two cases decided by the High Court of Madras, in which a contrary view has been taken. *Valia Tamburati v. Vira Rayan* (I. L. R., 1 Mad., 228) and *Madhavan v. Achuda* (I. L. R., 1 Mad. 301). The result is, that we are satisfied that the Madras Court is right. We have had some doubt whether we ought not to refer the point to a Full Bench, but as, upon consulting Mr. Justice PRINSEP, we find that he agreed with Mr. Justice MARKBY in the above case with some hesitation, and that he is now of opinion that the debt is not extinguished by limitation, and as we find that, in a late case, Mr. Justice PONTIFEX has expressed a similar opinion, we consider that we are justified in deciding the point at once.

But then a further question has suggested itself under s. 20a of the Act of 1871—viz., whether the provisions of that section as regards acknowledgments were retrospective; or, in other words, whether an acknowledgment given before the Act of 1871, which would be sufficient under that Act, but insufficient under the Act of 1859, would prevent a debt from being barred by the Act of 1871. This question appears to us to be answered, and correctly answered, by the Madras case of *Teagaraya Mudali v. Mariappa Pillai* (I. L. R., 1 Mad. 264). The question there arose whether payments of interest made before the Act of 1871 prevented the debt from being barred, under the Act of 1859 such payments would have been of no avail, under the Act of 1871 they would keep the remedy upon the debt alive; and it was held, that this provision as to payments of interest was retrospective. We think that the same principle applies to acknowledgment under s. 20. If the acknowledgment fulfils the terms of that section, it would prevent the debt from being barred, whether it was given before or after the passing of the Act of 1871, and it must be borne in mind that, having regard to the repealing clause in the Act of 1871, if the acknowledgments which have been made in this case, would not be available under the Act of 1871, it would seem that they would not be available at all.

[350] It, therefore, remains to be seen, whether the acknowledgments given in this case are sufficient under the Act of 1871.

By s. 20a of the Act of 1871 any promise or acknowledgment to take the case out of the operation of the Statute must be "contained in some writing signed before the expiration of the prescribed period by the party to be charged therewith, or by his agent generally or specially authorised in that behalf."

And when such writing exists, then a "new period of limitation according to the nature of the original liability is to be computed from the time when the promise or acknowledgments were signed."

The time prescribed in this case is three years, and the three letters written in Kali Pershad's name to the plaintiff's firm within three years from the 26th of Assin of 1275 Fusli, are as follows:—*1st*, the letter marked T 10, dated the 6th of Pous 1276; *2ndly*, that marked T 11, dated the 15th of Assar 1276; and *3rdly*, that marked T 12, dated the 25th of Assin 1278. These letters are all addressed to the plaintiff, and are written in the same form, commencing, compliments of "Baboo Kali Pershad Singh." They appear to be answers to applications by the plaintiff's firm for the settlement of the account or for the payment of money in part liquidation of it; and they certainly do appear to admit a debt due to the plaintiff, although no mention is made of the amount of it.

But it is argued by the respondent, *1st*, that these letters are not proved to have been written either by Kali Pershad himself, or by his agent generally or specially authorized on that behalf, *2ndly*, that they are not signed by Kali Pershad or his authorized agent; and *3rdly*, that they do not contain a sufficient acknowledgment of the debt within the meaning of s. 20 of the Act.

Now, as to the first of these points, the defendants' dewan, Shital Lal, is called as a witness by the plaintiff. He and his father before him have been the dewans of Kali Pershad for many years, and since Kali Pershad's death he has been the dewan of the defendants, and he is in their service now, so that we may presume that his evidence would rather be in favour of the defendants than otherwise. He says that, after the [351] account up to the end of the year 1274 had been signed by Kali Pershad, the business went on in the same way as before; and that the letters which Kali Pershad during his life, and the defendants after his death, used to write to the plaintiff upon the subject of the account matters, were either written by himself as dewan when he happened to be present, or, in his absence, by some one else. He says further, that the letters T 10 and T 11 were written by Bharosi Lal, the mohurir of Kali Pershad, and that the letter T 12 was written by his (Shital Lal's) father, who was at that time the dewan of Kali Pershad; and he also says, that the form in which these letters were written, was the same as was always adopted in the correspondence between Kali Pershad and the plaintiff.

Upon this evidence it seems to us that, as Kali Pershad never wrote letters to the plaintiff himself, but authorized them to be written by his dewan, whose ordinary duty it would be to carry on a correspondence of that kind, we are bound to hold that, at any rate, the letter No. 12 which was written by Shital Lal's father, as the dewan of Kali Pershad, was written by him *as his agent generally authorized for that purpose*.

We have more doubt with regard to the authority of the mohurir, Bharosi Lal, to sign the letters T 10 and T 11; but as in the absence of the dewan the mohurir would be the proper person to write such letters, we should have been disposed to hold, if it were necessary, that, even as regards these letters, the mohurir had authority to write them. As, however, we think we must assume that the letter No. T 12 was written within three years from the time when Kali Pershad signed the account for Rs. 13,611-2-6 at the end of 1274, and as the letters T 12, T 13, and T 15, which follow, all admit more or less clearly the existence of debt, and are all written by Shital Lal as the dewan of the family; it is not necessary for our present purpose to resort to the letters T 10



and T 11, which were written by the mohurir, provided that, in other respects, the letters written by the dewan are sufficient to satisfy the provisions of s. 20.

The next point is, whether the letter was sufficiently signed by Kali Pershad.

[352] The Subordinate Judge seems to think that a formal signature at the end of the letter is necessary for this purpose; but here we think he is in error. As long as the document is signed with Kali Pershad's name by his duly authorized agent in such a way as to make it appear that the letter is his, and that he is the real author of it, we do not think it matters what the form of the instrument is, or in what part of it the signature occurs.

It seems to us that the acknowledgment is quite as effectually signed whether it runs thus—

DEAR SIR,—I beg to acknowledge the correctness of your account.

Yours, A. B.

or thus:—

A. B. presents his compliments to C. D., and begs to acknowledge the correctness of his account.

By the 17th section of the English Statute of Frauds, the note or memorandum of the bargain which is necessary in the case of a sale of goods must be signed (in a similar way to an acknowledgment under the Indian Limitation Act) by the party to be charged therewith or his agent thereunto lawfully authorized; and it has been held, under that section, that where a party to a contract signs his name in any part of it in such a way as to acknowledge that he is the party contracting, that is a sufficient signature within the Statute, as for instance, the words "I, James Crockford, agree," "Mr. Stanley agrees," "Sold to John Dodgson," have been held to be sufficient signature by those parties; see *Knight v. Crockford* (1 Esp., 190) *Lobb v. Stanley* (5 Q. B., 574), *Johnson v. Dodgson* (2 M. & W., 653), and see also *Darrell v. Evans* (1 H. & C., 174). Indeed, if this were not so, having regard to the peculiar form of letter usually adopted in this country, few acknowledgments of debts, however complete they might be, would be binding under s. 20, if it were necessary that they should be signed at the foot like an English letter.

And as to the name of the principal being written by the agent, it seems clear, that if the agent is authorized to write the letter, it matters not whether he signs the name of the principal or his own name. Thus, under the 17th section of [353] the Statute of Frauds, it has been held that where goods were sold at auction, and the purchaser authorized the auctioneer's clerk to put down his name as having purchased certain lots, and the clerk accordingly did so, the entry of the purchaser's name so made by the clerk was a sufficient signature under the Statute to bind the purchasers: see *Bird v. Boulter* (4 B., and Ad., 443). This case has been since always considered and acted upon in England as good law—*Durrell v. Evans* (1 H. & C., 174).

The only remaining question is, whether the letter of the 25th Assin 1278 (Ex. T 12) amounts to a sufficient acknowledgment of the debt to take the case out of the Statute.

Now it is not necessary, according to the provisions of explanation 1 of s. 20 of the Limitation Act, that the acknowledgment should specify the amount of the debt; and according to the authority of many English cases, it is sufficient that the acknowledgment should contain an admission that the debt is due, the amount in such case being proved by parol evidence: see *Tanner v. Smart* (6

B. and C., 603), *Quincey v. Sharpe* (L. R., 1 Exch. D., 72), *Skeet v. Lindsay* (L. R., 2 Exch. D., 314). The letter of 25th Assin 1278 was evidently written in answer to a demand made by the plaintiff, for payment of money in part liquidation at least of a debt due to the plaintiff's firm. It states: "Next year I will pay all your money out of the collections which will be made according to the jammabandi, because I cannot be free from your debt; when you are master of the raj how can I be free from your debt; but according to your account it may be liquidated from this year to the next year. Now I have got all the mouzas in direct possession, and I have increased the jammabandi, now it will not be much difficult to liquidate it. You have written for adjustment of account; I too am willing to it. In the course of a month or two everything will be settled in the villages, and then I will positively send the mohurir to you for adjustment of account." The letter surely contains a clear acknowledgment of a debt being due by Kali Pershad to the plaintiff, and a promise that, in the course of a month or two, the writer will send a mohurir to adjust the account.

[354] We consider, therefore, that this letter was a sufficient acknowledgment within s. 20 of the Act of 1871, and that it gave to the plaintiff a fresh period of limitation of three years from the time when it was written.

Then follow three other letters, one T 13, dated 22nd Kartick 1279; T 14, dated 18th Bhadro 1280; and T 15, dated 7th Pous 1281. The letters T 13 and T 15, Shital Lal says, were written by himself as the dewan, and by the authority of Kali Pershad; and we think that they (especially that of the 7th Pous 1281) contain direct admissions of a debt being due from Kali Pershad. In the last letter it is said: "all the debts of other persons have been paid off through your kindness; now I am only anxious for your money, of which also, through your kindness, I will pay this year as much as I can, and then make settlement."

These letters would also give the plaintiff a further period of three years from the time when they were written.

Kali Pershad died in June 1874 (Assar 1281); and we have then a letter, G 17, dated the 18th of Aughran 1282 (11th of December 1874), from the defendants to the plaintiff, written, as Shital Lal says by the direct authority of the defendants. The defendants say in that letter, "you have written that you will now take steps to recover your money, so that we will not blame you afterwards. We do not disagree with you. As you have always been kind to the Baboo, you should now be more kind to us; therefore, we give you this trouble, that as you have waited so long, you will be pleased to wait for a short time more, then we will settle your account."

That again is a direct acknowledgment of the plaintiff's debt, which gave him another three years to sue for it; and this suit is brought within that period.

We are of opinion, therefore, that so far as the plea of limitation is concerned, the plaintiff's suit is not barred, and that it is only a question of evidence what amount is now due upon the account. As that question has not been considered by the Court below, except as regards the accounts for the three years next preceding this suit, and as the defendants' counsel informs us that, in the interest of his clients, he desires that those [355] accounts should be investigated, it is necessary that we should remand the case to the Court below for that purpose. That Court will report to us what amount is found to be due upon the investigation, and we will then dispose finally of the case.

**Garth, C. J.**—I only desire to add that, as regards myself, I have felt some difficulty, in consequence of the decision, to which I was a party with Mr. Justice MARKBY, in the case of *Ram Chunder Ghosaul v. Juggutmon-mohiney Dabee* (I. L. R., 4 Cal., 283), where we held that the Limitation Act in this country extinguished the debt as well as barred the remedy.

I was by no means satisfied, as I stated at the time, of the correctness of that decision; but as the point had been directly decided by a Division Bench of this Court, consisting of Mr. Justice MARKBY and Mr. Justice PRINSEP, in the case of *Krishna Mohun Bose v. Okhilmoni Dossee* (I. L. R., 3 Cal., 333), and as my brother MARKBY did not see the propriety of referring the question to a Full Bench, I felt bound, according to our usual practice in this Court, to follow the previous decision.

I confess, that it has been a great satisfaction to me to find that, since that judgment was delivered, not only Mr. Justice PRINSEP, but several other Judges of this Court, have arrived at the conclusion that our decision was wrong.

The High Court of Madras has also, in several cases, expressed a similar view; and as this appears, so far as I am aware, to be the general opinion of the Court as at present constituted, we have considered that it is not necessary to submit the question now to a Full Bench.

I believe that the erroneous view which prevailed here for a time was due mainly to a misunderstanding of the observations of the Privy Council in the case of *Gunga Gobind Mundul* (11 Moore's I. A., 345). It seems clear that those observations were only intended to apply to suits for the recovery of immoveable property.

*Case remanded.*

#### NOTES.

#### [I. NATURE AND FORM OF ACKNOWLEDGMENT REQUIRED—

The prescribed period is the period prescribed by the *statute* and not by the *contract*, and there may be a series of extension of period: (1887) 11 Mad. 218; (1886) 11 Bom. 282; 6 Cal. 340.

But the acknowledgment must be within the prescribed period, even though the institution of suit may be saved owing to holidays, etc.—25 Bom. 330=2 Bom. L. R. 1086.

Touching a pen in token of consent and handing it over to another to put one's mark is sufficient execution. (1896) 6 M. L. J. 209. See also 1 All. 683, 5 Bom. 88, 7 Bom. 518; 7 Mad. 55; 76; 15 Mad. 261; (1891) P. R. 16, 18 Bom. 586.

#### II. AUTHORITY OF AGENT TO ACKNOWLEDGE DEBT—

An agent for the purposes of the Act need not derive his authority from contract. 26 Bom. 221 F. B. following 11 H. L. C. 115 and disapproving of 20 Bom. 7; 26 Cal. 51; 1 All. 683. See also 17 All. 198; 7 Bom. 515.

#### III. REVIVAL OF DEBT WHEN NEW ACT RESTORES REMEDY—

See sec. 6 of the General Clauses Act of 1897.

This case has been adversely criticised by Mitra in his *Limitation* (1911) Vol. I, pp. 291 and 292. See also 8 Bom. 99; 1 Bom. 286; 1 Bom. 295, 15 Bom. 299; 27 Cal. 1004; 31 Cal. 314.

#### IV. CONSEQUENCES OF THE RIGHT BEING ALIVE WHILE THE REMEDY IS BARRED—

- (a) Though the debt cannot be recovered by action if the debtor pleads the statute, it remains an existing debt and can be made available whenever the creditor has it in his power to set it up without resorting to an action (*Lightwood's Time Limit of Actions*).

- (b) Thus a lien upon goods or papers until payment can be exercised : (1800) 3 Esp. 81 ; *Re Broomhead* (1845) 5 D. and L. 52 ; 27 Mad. 28 (overruled on another point in 29 Mad. 305) ; (1887) P. R. 3.
- (c) Executor or administrator may deduct time-barred debt against legatee or next of kin : (1881) 7 Cal. 644 ; (1844) 3 Hare 539 (1871) 7 Ch. 17 [but not where the debtor is sole residuary legatee : *Re Bruce* W. N. (1908) 209] ; *Re Cordwell's estate* (1875) 20 Eq. 644 , *Re Akerman* (1691) 3 Ch. 212 ; not applied to specific legacy ; (1880) 14 Ch. D. 374.
- (d) They may pay time-barred debt :—*Re Rounson* (1885) 29 Ch. D. 962 ; (1895) 1 Ch. 202 ; but not when judicially declared, (1893) 3 Ch. 282 ; (1901) 1 Ch. 233.
- (e) As to debts barred by foreign law, *see* (1869) L. R. 4 Q. B. 653 ; (1876) 45 L. J. Ch. 816 ; *Re Low* (1894) 1 Ch. 147.
- (f) A minor joint decree-holder can execute *whole* decree when execution is time-barred against the majors : (1886) 14 Cal. 50.
- (g) Omission to sue the principal debtor within the statutory period was held no discharge of the surety, as the debt was not discharged . (1909) 33 Mad. 308.
- (h) Right to unliquidated damages also within the rule in 6 Cal 340 14 Cal. 50.
- (i) The effect of revival of remedy when a new statute restores it is noted above.]

## [356] ORIGINAL CIVIL.

*The 10th September, 1880.*

PRESENT .

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE PONTIFEX.

Dorab Ally Khan.....Plaintiff

*versus*

Abdool Azeez.....Defendant

and

Abdool Azeez.....Defendant

*versus*

Dorab Ally Khan.....Plaintiff.

*Sale by Sheriff in Execution of Decree—Payments of Purchase-Money on agreement as to possession between Purchaser and Execution-Creditor—Sale subsequently set aside—Suit for Money had and received—Accord and Satisfaction—Novation—Limitation.*

On the 9th of October 1866, the Sheriff of Calcutta executed a bill of sale to A of a certain taluk situated in Oudh, of which A afterwards obtained possession. In consequence of an impression that the sale was illegal, A directed the Sheriff not to pay the money to B, the execution-creditor, and the money remained in the hands of the Sheriff until the 24th October 1867, when A directed the payment of the money to B, in consequence of an arrangement then come to between A and B, to the effect that, if A should be ousted from the possession of the property within a year, B should take measures to reinstate him at his (B's) expense. A died without heirs in July 1868, and the Government of Oudh, not being aware that A had left a will, took possession of the taluk, partly as on an escheat, and partly because there were arrears of revenue due on the property. On the 2nd of October 1868, an order was passed by the Collector of the district in which the taluk was situate, declaring the sale by the Sheriff illegal, and directing the return of the taluk to its former owners, which was done in April

1869. In a suit brought by A's executors against B in September 1872 to recover the purchase-money, as money had and received, as upon a total failure of consideration :

*Held*, that the agreement of the 24th of October 1867 operated as an accord and satisfaction of all rights which A might have had to a return of the purchase-money or to damages, and that the only remedy which A had, was an action on the agreement.

*Held* also, that no breach of the agreement of the 24th of October 1867 had in fact occurred, and that, even if the agreement had been broken, the suit was barred by limitation. APPEAL and cross appeal from a decision of WILSON, J., dated 9th March 1880, dismissing the suit.

The plaint in this case was filed by the executor of a purchaser at a Sheriff's execution-sale, who claimed from the execution-[357]creditor a return of the purchase-money, alleging that it was money had and received to the use of the plaintiff's testator, as upon a total failure of consideration. The suit was instituted in September 1872, and came on for hearing before Mr. Justice PHEAR, who dismissed it, on the ground that the plaint disclosed no cause of action, and this decision was affirmed on appeal (*see* I. L. R., 1 Cal., 55). The plaintiff appealed to Her Majesty in Council, who reversed the concurrent decisions of the High Court and remanded the suit for trial on the merits (*see* L. R., 5 I. A., 116 ; s. c., I. L. R., 3 Cal., 806).

On the trial of the case before Mr. Justice WILSON, it appeared that Moheroddeen, whom the defendants represent, held a judgment of the Supreme Court against certain persons. On the 18th of June 1866, a writ of *perī facias* issued to the Sheriff of Calcutta in the form then usual, directing him to levy the amount of the judgment. Moheroddeen, directed the Sheriff to seize lands belonging to the judgment-debtors at Lucknow. On the 9th of October 1866, the Sheriff, by bill of sale, sold the lands which had been seized to Deanut-ud-Dowlah, whom the plaintiff represents, for Rs. 26,000. The purchase-money was paid to the Sheriff, and Deanut-ud-Dowlah obtained possession of lands.

Shortly afterwards, it appears that the question of the validity of the sale came before the Commissioner and the Judicial Commissioner of Lucknow, and they held the sale to be invalid. Deanut-ud-Dowlah took the opinion of the then Advocate-General, who advised him to the same effect. Thereupon, on the 18th of February 1867, he gave notice to the Sheriff not to pay over the money to Moheroddeen, and the Sheriff, who at this time had Rs. 21,000 of the purchase-money in his hands, Rs. 5,000 having been paid over on the 29th October 1866, obeyed the notice and retained the money. On the 22nd October 1867, Mr. Goodall, as attorney for Deanut-ud-Dowlah, wrote to the Sheriff as follows :—

"I am instructed by my client, Deanut-ud-Dowlah, Bahadoor, to request you to pay the amount of purchase-money to the party claiming it ; my client reserves to himself all right to dispute the sale and claim the purchase-money."

[358] On the 24th of October 1867, Mr. Goodall again wrote to the Sheriff, saying :—

"I am instructed by my client, Deanut-ud-Dowlah, Bahadoor, to request you to pay the purchase-money in your hands to Khajah Moheroddeen, inasmuch as there has been an arrangement entered into between the parties, that, should my client be ousted from the property at Lucknow within the space of one year, Khajah Moheroddeen undertakes to adopt the necessary steps to reinstate my client at his own costs and expenses. My client further states that this arrangement was entered into in your presence, and at your office in Radha Bazar."

The Sheriff confirmed the correctness of the statements contained in that letter, and, in accordance with its directions, paid over the money. Deanut-ud-

Dowlah remained in possession till his death, which took place in July 1868. He was an Arabian eunuch in the service of the King of Oudh, and inasmuch as he had apparently died without heirs, the officers of Government immediately took possession of all his property, both here and at Lucknow, upon an escheat. The lands in question were seized under an order of the Officiating Deputy Commissioner, dated the 8th August 1868, "on account of arrears of revenue by reason of there being no heirs of the deceased numberdar, Deanut-ud-Dowlah." The deceased, however, left a will, by which he appointed the plaintiff executor. That will was put in evidence at the hearing of the cause.

It appeared from the documentary evidence, that at the time of Deanut-ud-Dowlah's death, some proceedings, the exact nature of which does not appear, were pending at Lucknow with reference to the property and the validity of the sale. On the 1st of May 1868, Deanut-ud-Dowlah presented a petition of appeal in the Commissioner's Court "against an order of Mr. Capper, officiating Commissioner of Lucknow, directing a certain issue to be tried." This appeal was dismissed on the 7th of September 1868, the Commissioner declaring "that the Judicial Commissioner, having in his letter, No. 868, dated 16th ultimo, pronounced the sale of the land in suit by the Sheriff's officer null and void, the purchaser, Deanut-ud-Dowlah, takes nothing under that sale and has not any *locus standi* in this Court. This [359] appeal is accordingly hereby dismissed." Nothing is shown to have followed upon that order.

A subsequent order of the Deputy Commissioner was produced, bearing no date, instituted in the matter of the seizure already referred to. It recites that, by a letter of the 26th of August 1868, the Judicial Commissioner had stated that the sale had been held invalid, and that the property was to be restored to those from whom it had been taken, and the order directs further particulars to be furnished. That order is followed by another, dated 6th April 1869, ordering the property to be made over to certain persons named.

Mr. Justice WILSON held that the agreement, shown in the correspondence of October 1867, amounted to a waiver by Deanut-ud-Dowlah of all the rights which he then had against Khajah Moheroddeen; and that that agreement had not been broken. He dismissed the plaintiff's suit with costs, and ordered each party to bear his own costs of the appeal to Her Majesty in Council.

The plaintiff appealed, and the defendant filed a cross appeal on the ground that the learned Judge was wrong in not directing the plaintiff to pay the costs of the appeal to the Privy Council.

The *Advocate-General* (Mr. G. C. Paul) and Mr. Kennedy for the Appellant.

Mr. Bonnerjee and Mr. O'Kinealy for the Respondent.

The *Advocate-General*.—We are entitled to recover the purchase-money or damages. Now, the money which we paid to the Sheriff, must be taken to have all been paid to the execution-creditor, for, though we notified the Sheriff not to pay it over, yet he was bound to disobey our order, and to hand over the money to the execution-creditor, even though the sale was a nullity. In Archbald's Practice, Vol. I., p. 586; it is laid down that "the Sheriff is liable to the plaintiff for the amount of the levy. If *fieri fac* be returned, the plaintiff may proceed against him for the money by rule of Court, or by action of debt, account or assumpsit which will lie against him or his executors for the [360] amount levied, though no return has been made; for, though there is no actual contract between the Sheriff and the plaintiff yet the levying of the money creates a contract between them. Such action is maintainable, though there has

been demand for the payment of the money.' [GARTH, C.J.:—The mistake arose from the fact that the Sheriff had no jurisdiction to sell property in the province of Oudh. That was a mistake of law. Must not the plaintiff be taken to know that the Sheriff had no authority to sell? He took his chance.] No. The plaintiff would not be bound to know the extent of the Sheriff's jurisdiction—*Cooper v. Phibbs* (L. R., 2 H. L., 149). Then the fact of our taking a conveyance and entering into possession does not bar our suit—*In re Turner* (L. R., 13 Ch. D., 130), and the consideration has wholly failed as we were liable to account to the judgment-debtors. We are not bound by the agreement of the 24th of October 1867. That was only a withdrawal of our opposition to paying over the money, and was intended for the Sheriff alone. The letters taken together show that the plaintiff reserved his rights against the execution-creditor. Even were the agreement binding on us, it has been broken by the defendants, because the plaintiff was evicted by the order of the 2nd September 1868, within one year from the date of the agreement.

Mr. *Kennedy* on the same side, cited *Warlow v. Harrison* (1 El., and El., 295).

Mr. *Bonnerjee* for the respondent.—The only question really here is, was the agreement of the 24th of October 1867 broken by the defendants? for it is clear that at that time the plaintiff's testator, with a full knowledge of all his rights, entered into a binding agreement with the execution-creditor. This agreement was not broken within a year from its date, because, when the Government entered into possession in July 1868, they entered as heirs of Deantud-Dowlah, the Plaintiff's testator, and continued in possession in that capacity until the 4th of April 1869. The proceedings in the Oudh Courts are no evidence against us, as it does not appear we were parties thereto, and the documents are so imperfect, that no conclusion can be drawn from them. [361] As to costs, I submit that the learned Judge was wrong in not allowing us the costs of the appeal to the Privy Council. Their Lordships, in their judgment, say that the costs of the appeal are to be "hereafter dealt with by the High Court as costs in the cause."

Mr. *P. O'Kinealy*, on the same side.—The effect of the judgment of the Privy Council is that the defendant is, on the face of the plaint, liable, as the Sheriff's principal, to an action for damages for breach of warranty of authority. The damages must be limited to the amount lost to the plaintiff by reason of the breach alone, and that is only the Rs. 5,000 paid over on the 29th of October 1866, as the remaining Rs. 21,000 were, in obedience to the plaintiff's orders, retained by the Sheriff, and only paid over by him when directed by the plaintiff to do so, in October 1867; and at that time the plaintiff had full knowledge of all the facts. As against that sum of Rs. 5,000, the plaintiffs admit they collected Rs. 11,000 as rent from the taluk, so that plaintiffs have sustained no damage whatever, and the suit should be dismissed with costs, even if we suppose that the agreement of the 24th of October 1867 is of no effect. As regards that agreement, I submit, the plaintiff is not entitled to rely on it, as he has avoided all mention of it in his plaint. Even if he is allowed to rest his case on that agreement, the suit is barred by limitation under cl. 9, s. 1 of Act XIV of 1859, as the cause of action arose more than three years before the plaint was filed in September 1872.

The following Judgments were delivered :—

**Garth, C. J.**—The facts, which have been disclosed at the trial before Mr. Justice WILSON, present this case to us in a very different aspect from that which it assumed in the plaint.

The sale by the Sheriff to Deanut-ud-Dowlah took place on the 9th of October 1866. The purchase-money, Rs. 26,000, was then paid to the Sheriff, and the purchasers obtained possession of the property.

It then appears that the Judicial Commissioner of Lucknow expressed an opinion, that the sale was invalid ; and Deanut-ud-Dowlah, having taken the opinion of the then Advocate-General, gave notice to the Sheriff, through Messrs. Goodall and Leslie, his [362] attorneys, that the sale was irregular, and required him not to part with the purchase-money.

It is clear, therefore, at this time Deanut-ud-Dowlah and his advisers had ample notice of the alleged invalidity of the sale ; and that he might have then taken steps, if he had thought proper, to set the sale aside, and obtain a return of his purchase-money, which was still in the Sheriff's hands.

If he had taken this course, the parties might have been placed in their original position without difficulty. The purchaser would have obtained his purchase-money, the execution-debtor would have had his property restored to him, and the execution-creditor might have proceeded at once, by issuing process from Calcutta, to the Civil Courts in Oudh, to re-sell the property again within the Oudh jurisdiction.

Instead of this, Deanut-ud-Dowlah, as far as appears, took no further steps in the matter, beyond writing again, through his attorneys, to the Sheriff in the same month of February 1867, requesting him again not to part with the purchase-money under pain of being held personally liable for it.

Eight months after this, and upwards of a year from the date of the sale, Mr. Goodall, as Deanut-ud-Dowlah's attorney, again wrote to the Sheriff, requesting him to pay the purchase-money to the execution-creditor ; but at the same time reserving himself a right to dispute the sale, and to claim a return of the purchase-money.

It is obvious that this letter involved much inconsistency, and was calculated, if acceded to, to place the Sheriff in a very unfair position.

He had complied with the requirements of the purchaser not to part with the purchase-money. He had waited eight months to give him an opportunity of taking steps to annul the sale, and to obtain a return of his money ; but no such steps had been taken.

By this letter, he desired the Sheriff to pay over the money to the execution-creditor, thereby, of course, confirming the sale, but at the same time reserving to himself the right to dispute the sale, and to claim a return of the purchase-money from the Sheriff. It was not likely that the Sheriff would have consented to [363] place himself in such a dangerous position ; and consequently, we find, from a letter written by Mr. Goodall two days afterwards, that arrangement was come to by the parties to this effect, that, in consideration of the purchase-money being paid over by the Sheriff to the execution-creditor, the latter agreed, that if Deanut-ud-Dowlah should be ousted from the property within a year from the 24th October 1867, he (the execution-creditor) would adopt the necessary steps to reinstate him at his own costs and expenses.

This arrangement appears to have been made between the parties at the Sheriff's office in Calcutta, and the Sheriff wrote a letter to Mr. Goodall confirming the arrangement, and paid over the purchase-money to the execution-creditor accordingly.

From the time until his death which happened in July 1868, Deanut-ud-Dowlah remained in possession of the property. It then appears to have been taken possession of by the Government officers by order of the



officiating Deputy Commissioner, partly on account of there being an arrear of revenue due upon it, and partly because Deanut-ud-Dowlah being a eunuch, and consequently having no heirs, the property was supposed to have escheated to the Crown.

Now, I entirely agree with the lower Court, that, whatever rights Deanut-ud-Dowlah might have had originally as against the Sheriff, or the execution-creditor, those rights were superseded, and put an end to by the arrangement which was come to between the parties.

It is plain that Deanut-ud-Dowlah was anxious to keep the property if he could. It is also pretty plain, that neither he nor the execution-debtor was anxious to take proceedings to invalidate the sale ; and it is very probable, that in October 1867, when the arrangement was made, Deanut-ud-Dowlah, who had already had the property in his hands for upwards of a year, might have considered with some reason, that he would be pretty safe, if his possession were not disturbed for another twelve months.

The arrangement, therefore, was a reasonable one for all parties , and the conditions under which it was made, appear to me perfectly inconsistent with the purchaser's retaining his original [364] right to treat the sale as a nullity, and to obtain back his purchase-money. He had parted with the purchase-money voluntarily , he had placed it out of the power of the execution-creditor to proceed against the execution-debtor to realize his judgment-debt ; and, in lieu of the rights which he originally had, to obtain back his purchase-money and give up the property, he had obtained what he evidently valued much more, his present right to retain possession and an undertaking by the execution-creditor to take steps to reinstate him in that possession, in the event of his being ousted from it within the space of a year.

He thus secured a remedy very different from that which he originally had, and a remedy which he thought would secure him in the possession of the property. I, therefore, am quite unable to agree with the Advocate-General, who contended that, after the arrangement was made, Deanut-ud-Dowlah retained his original rights, or that those rights revived, upon his being turned out of possession after the expiration of the year.

His rights, as it seems, to me must now be confined to the agreement.

It remains then to be seen whether there was any breach of that agreement , and, if so, whether the present plaintiff who claims as executor under Deanut-ud-Dowlah's will, can avail himself of it in this suit.

A question has been raised by the defendant whether the will of Deanut-ud-Dowlah has been duly established. Of course without this will the plaintiff would have no ground of action , but the Court below has held that the evidence is sufficient to establish the will, and I quite concur in that opinion.

It is then contended by the Advocate-General that there was a breach of the agreement of the 24th of October 1867, and that within the meaning of that agreement, Deanut-ud-Dowlah or the plaintiff who represented him was ousted from the property before the 24th of October 1868.

There was a proceeding offered in evidence by the plaintiff which took place before Mr. Wood, the Deputy Commissioner, dated the 2nd September 1868. It seems that the Deputy Commissioner, acting upon some letter of the Judicial Commissioner, [365] dated 2nd January 1867, of which we know nothing, considered that the property in question, which was supposed at that time to have escheated to the Crown, ought to be restored to the party from whom it had been taken ; but, as it was not known who that party was, and

as it was necessary to enquire into the particulars of the property, before the Court could properly decide anything in the matter, an enquiry was ordered, as to who was the recorded proprietor, and who purchased the property, and other particulars.

From that time until the 6th of April 1869, it does not appear that anything further was done. But it was on that day reported to the same Court, that the original debtor, Mahomed Wazir Khan, had died, and that two persons, Hossein Ali Khan, the son, and Mussamut Khorshed Begum, the widow of Wazir Khan, ought to be recognised as the parties from whom the property had been taken. There is no evidence whatever that from the time when the property was taken possession of by the Collector, upon the ground that it had escheated to the Crown in default of heirs of Deanut-ud-Dowlah, any change was made either in the mode of possession or of the management.

Nothing seems to have been done as regards the property, in pursuance of the order of 2nd September; and it is clear that possession was never given to the representatives of the judgment-debtor until after the 6th of April 1869.

The Advocate-General contends, on behalf of the plaintiff, that he has a right to use the order of 2nd September in this way. At the time that order was made, the property was in the hands of the Collector in right of Deanut-ud-Dowlah; but, from the time when that order was made, the Advocate-General contends that it was held by the Government officers, not as an escheat, but on behalf of the persons, whoever they might turn out to be who were deprived of it at the time of the sale by the Sheriff.

Mr. Bonnerjee, on the other hand, contends in the first place, that this order of the 2nd September, which was objected to at the trial, was not admissible in evidence as against his client; and that, even if it were, it does not appear that anything followed upon it except an enquiry, which did not change in any way the nature of the possession or management of the property.

[386] I confess I am unable to see how the order of the 2nd September *per se* can be made evidence against the defendant. If it had been accompanied by any actual change in the possession of the property, or the reception of the rents, it might perhaps be made evidence; but, as nothing of that kind was proved, and, as the defendant was no party to the proceedings, I do not see how the order can properly be made to affect him.

That being so, it seems to me, that there was no evidence of the ouster of the possession of Deanut-ud-Dowlah, or of the persons who represented him in interest, until the 6th of April 1869, which was more than a year after the making of the agreement of October 1867; and I agree with the Court below that no breach of the agreement has been proved.

But even supposing that the order of the 7th September 1867 were admissible in evidence, and could be considered as having in any way been the means of custing Deanut-ud-Dowlah's representatives, then the further question would arise, whether the plaintiff has any right to avail himself of the agreement of 1867 in this suit.

He entirely ignored the agreement in his plaint, and his suit is founded entirely upon his original rights which have been superseded; and, if I thought that any breach of the agreement had taken place, and that the plaintiff was entitled to avail himself of it in this suit, I certainly should not be disposed, considering that he has carefully kept out of sight this agreement, of which of course he must have been well aware, to allow him any costs of suit.

But then, another and a far more serious difficulty in the plaintiff's way has occurred to us in the course of the argument, *viz.*, that, assuming the plaintiff to have any cause of suit upon the agreement, it is clearly barred by limitation. And probably it was for this reason that he brought his suit for money had and received, instead of relying upon the agreement. The Limitation Act which governs this case is Act XIV of 1859. The plaint was filed on the 14th of December 1872; and the Limitation Act of 1871 did not apply to suits instituted before 1st of April 1873.

This case is, therefore, governed by s. 1, cl. 9 of the Act of [367] 1859, which allows the plaintiff three years only from the time when the breach of contract took place.

Now the breach of contract here, if any, occurred when the defendants neglected to take steps to reinstate the plaintiff in the property; and the time when that occurred, was either on the 2nd September 1868, when the order, upon which the Advocate-General relies, was made, or at what would have been a reasonable time for the defendants to have taken steps to reinstate the plaintiff.

Now, even if we were to allow six months, which appears to me much more than a reasonable time for such a purpose, that would only carry the plaintiff up to the 2nd March 1869; and this suit, not having been brought until December 1872, is clearly out of time.

The real truth is, that there was no attempt on the plaintiff's part to obtain from the defendant any performance of the agreement; and it is pretty clear, from the plaint being entirely silent as to the agreement, that the plaintiff had no thought of being entitled to proceed upon it.

The cause of action, as put forward in his plaint, was of a totally different character; and it was not until he found himself driven to rely upon the agreement, that his counsel attempted to shift his ground, and base his claim upon it. I am of opinion that the appeal should be dismissed, with costs, on scale 2.

But Mr. Bonnerjee contends that, besides the costs of the trial, which have been awarded to his client in the Court below, the defendant is entitled to the costs of the appeal to the Privy Council.

He relies upon the fact that the Privy Council directed that the costs of both sides should be taxed, in order that the lower Court should deal with them as costs in the cause. He contends that it was the obvious intention of the Privy Council that the costs in that Court should go to the successful party, as part of the general costs of the cause.

But it appears to me that this was not their Lordships' intention.

I think they intended to leave the costs in the Privy Council to be dealt with by the Judge who tried the cause at his discre-[368]tion; and I think Mr. Justice WILSON exercised a wise discretion in making each party bear their own costs of that appeal.

**Pontifex, J.**—I also think the judgment of the lower Court should be affirmed.

The *Fa Fa* was executed on the 4th October 1866, and the bill of sale to the plaintiff's testator was executed on the 9th October 1866; but the purchase-money remained in the hands of the Sheriff (who had by that time

quitted office), till the 24th October 1867, the plaintiff's testator having warned the Sheriff not to hand over to the execution-creditor.

Under these circumstances, the plaintiff's solicitors wrote to the ex-Sheriff on the 24th of October 1867 as follows : (reads letter set out, *ante*, p. 358).

Upon that the money was paid over to the execution-creditor (the plaintiff's testator having already been in possession one year) and, under the circumstances, I am of opinion that this arrangement must be treated as a substituted agreement, forming a complete accord and satisfaction of the original cause of action.

And I am further of opinion that the ouster, contemplated by the substituted agreement, was an ouster by the judgment-debtor or his representatives ; and that, if a covenant for title had been settled under the agreement, such covenant would not have been general against the acts of the whole world, but would have been confined to acts by the judgment-debtor or his representatives.

The plaintiff's testator died on the 26th of June 1868, while in possession, and thereupon Government, by its officers, entered into possession. It is doubtful whether such entry was made as for an escheat, the plaintiff's testator having been a eunuch, or for non-payment of Government revenue. But, whichever may be the case, while in such possession, the Collector, in September 1868, on the alleged authority of a letter from the Commissioner, which letter is not produced, declared the sale under the *Fi Fa* inoperative ; and directed an enquiry to be made for the judgment-debtor or his representatives. The possession of the Collector, however, continued until April 1869, when he made an order that possession should be restored to the representatives of the judgment-debtor. The representatives of the judgment-[369]debtor do not appear to have been parties to the proceeding in which such order was made, and, until they took possession under the order of April 1869, being more than one year after the date of the agreement, I fail to see that there was any ouster by them protected by the terms of the agreement. Indeed, but for the death of the plaintiff's testator without heirs, and the consequent entry and unauthorised action of the Collector, I see no reason to believe that the possession of the plaintiff's testator would have been disturbed.

In my opinion, therefore, the ouster was no breach of the agreement referred to in the letter of the 24th October 1867.

The plaintiff has not furnished us with the proceedings before the Commissioner, and excuses himself by alleging that these proceedings have been lost or destroyed, or, from lapse of time, were not procurable. But this is really no excuse ; for, in April 1869, they could have been easily obtained ; and it was his own negligence not to obtain them ; yet he now asks us to grope in the dark, and give him a decree in ignorance of what was the real nature of the proceedings. Moreover, he does not institute his suit until the 2nd September 1872. He proves no intermediate notice, calling on the defendant to fulfil the agreement of 24th October 1868 ; and, even if we could treat his suit as a suit for breach of that agreement of the 24th October, he would, in my opinion, be barred by limitation under the Act of 1859, which allowed a period of three years for a suit upon such an agreement. If the plaintiff had duly called on the defendant in reasonable time, the latter might have exercised pressure on the representatives of the judgment-debtor, while his judgment was still alive and capable, by proper process, of being executed against this very property. I

think, therefore, the plaintiff fails altogether, and I see no reason to interfere with the discretion exercised by the lower Court as to costs.

*Appeal dismissed.*

*Cross-appeal dismissed.*

Attorney for the Appellant : Mr. *Dover*.

Attorney for the Respondents : Mr. *Paliologus*.

# NOTES.

## [CONTRACT—LIMITATION.

When no time is specified for performance, a reasonable time is understood.—(1895) 20 Bom. 8 ; (1899) 23 Mad. 41.

Covenant for right to convey is broken if a defect of title exists at the time, and the time begins to run against the promisee, it is not a continuing breach—*Turner v. Moon* (1901) 2 Ch. 828 ; *Spoor v. Green* (1874) L. R. 9 Ex. 99.

A covenant for quiet enjoyment is broken when there is a disturbance and from that point time runs :—*Spoor v. Green* (1874) L. R. 9 Ex. 99.

On the other hand, a covenant to repair is a continuing breach—*Ibid*.

See also Notes to 3 Cal. 394.]

[370] *The 29th August, 1879.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE PONTIFEX.

Chunder Coomar Roy and another..... Defendants

*versus*

Gocool Chunder Bhattacharjee.....Plaintiff.\*

*Civil Procedure Code (Act X of 1877), s. 32—Adding Parties as Plaintiffs—  
Act XXVII of 1860, s. 2—Holder of Certificate of Administration.*

A sued as only son and heir of his father B. C, the widow of B, having, with the concurrence of A, taken out letters of administration to B's estate, was, on the application of A at the hearing of the suit, made a co-plaintiff under s. 32, of the Civil Procedure Code.†

\* This case was inadvertently omitted, but being important is now inserted.

Court may dismiss or add parties. †[Sec. 32 :—The Court may, on or before the first hearing, upon the application of either party and on such terms as the Court thinks just, order that the name of any party whether as plaintiff or as defendant improperly joined, be struck out ;

and the Court may at any time, either upon or without such application, and on such terms as the Court thinks just order that any plaintiff be made, a defendant, or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be

*Held*, that C ought not to have been joined as a plaintiff in the suit, inasmuch as A had no right at all to sue.

Section 32, as far as the addition of plaintiffs is concerned, only applies to those cases in which the original party who brought the suit had some title to sue.

*Per* PONTIFEX, J.—The power given by s. 27\* of the Code ought to be exercised before the first hearing of the case.

*Held* also, that s. 2† of Act XXVII of 1860 prohibited A from suing alone, for although he was, no doubt, beneficially entitled to recover it, yet there was no vexatious or fraudulent withholding of the debt within the meaning of that section.

*Per* GARTH, C. J.—A debt cannot be said to be “vexatiously withheld” within the meaning of that section, simply because the debtor omits to pay it.

APPEAL from a decision of WILSON, J.

This suit was brought by Gocool Chunder Bhattacharjee, as the only son and heir of his father Sibchunder Bhattacharjee, to recover from the defendants the amount of principal due on a joint and several promissory note executed by the defendants in favour of Sibchunder, and dated the 6th of June 1875, together with the balance of interest thereon from March 1878, the whole sum sued for being Rs. 6,736.

Sibchunder died on the 24th May 1878, and the plaint was filed on the 5th of June 1878. On the 6th of June, letters of administration of the estate of Sibchunder were granted to his widow Kisto Kaminee Dabee.

When the case came on for hearing, an application was made that the administratrix should be added as a plaintiff under s. 32 of the Civil Procedure Code. This application was [374] granted, and a decree was given by WILSON, J., to the two plaintiffs, for the full amount of the claim, with interest and costs.

necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

No one to be added as plaintiff or as next friend without his consent.

No person shall be added as a plaintiff or as the next friend of a plaintiff without his own consent thereto

Parties to suits instituted or defended under section 30.

Any person on whose behalf a suit is instituted or defended under section 30, may apply to the Court to be made a party to such suit.

Defendants added to be served.

All parties, whose names are so added as defendants, shall be served with a summons in manner hereinafter mentioned, and (subject to the provisions of the Indian Limitation Act, Section 29) the proceedings as against them shall be deemed to have begun only on the service of such summons.

Conduct of suit.

The Court may give the conduct of the suit to such plaintiff as it deems proper.]

\*[Sec. 27.—Where a suit has been instituted in the name of the wrong person as plaintiff, or where it is doubtful whether it has been instituted in the

Court may substitute or add plaintiff for or to plaintiff suing.

name of the right plaintiff, the Court may, if satisfied that the suit has been so commenced through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person or persons to be substituted or added as plaintiff or plaintiffs upon such terms as the Court thinks just.]

†[Sec. 2 :—No debtor of any deceased person shall be compelled in any Court to pay his

debt recoverable without a certificate.

debt to any person claiming to be entitled to the effects of any deceased person or any part thereof, except on the production of a certificate, to be obtained in manner hereinafter mentioned or of a probate, or letters of administration, unless the Court shall be of opinion that payment of the debt is withheld from fraudulent or vexatious motives, and not from any reasonable doubt as to the party entitled.]

From this decision the defendants appealed.

Mr. Phillips and Mr. J. G. Apcar for the Appellants.

Mr. Bonnerjee and Mr. Mitter for the Respondent.

The following Judgments were delivered :—

**Garth, C. J.**—I think that the Court below had 'no power, under the circumstances, to add the name of the administratrix as a co-plaintiff, or to give a decree in favour of both the plaintiffs.

The amendment was made at the trial under s. 32 of the Civil Procedure Code, which allows the Court "to order that the name of any person who ought to have been joined in the suit, either as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate and settle all questions involved in the suit, should be added." That section, so far as the addition of plaintiffs is concerned, appears to me to apply to those cases only where the plaintiff who has brought the suit is one of the right parties to sue, but some other person, either as being his co-contractor, or otherwise jointly interested with himself, ought to have been joined as a co-plaintiff. I do not think that the section is intended to enable a plaintiff who has brought a suit without having any right to do so, to add the name of a person who has the right to sue, and to obtain a decree in right of that person, and I rather think that the learned Judge in the Court below was of that opinion, because he goes into the question of whether the original plaintiff in this case had a right to sue, and decides that he had, because the defendants were vexatiously withholding the debt from the plaintiff, and so the case came within the exception in s. 2 of Act XXVII of 1860.

Now it appears to me that, in this case, there is no ground whatever for saying that the defendants "vexatiously withheld" the debt from the plaintiff. The plaintiff, of course, could have no claim whatever to the money till the death of his father Sibchunder on the 24th of May 1878. Within twelve days of [372] that time,—namely, on the 3rd of June 1878,—the plaintiff brings this suit. It does not appear that Sibchunder ever required payment of the debt in his lifetime, nor that the plaintiff ever asked for it before he brought this suit. There certainly was no refusal on the defendants' part to pay it; and so far from the debt being withheld vexatiously or fraudulently, it appears from the answers to the interrogatories which have been put in by the plaintiff himself, that the defendants have been trying to make an arrangement to pay whatever was due from them to the plaintiff as well as to the other creditors.

The real reason why the suit was brought so soon after Sibchunder's death, was very candidly admitted by the plaintiff's counsel to have been, because the promissory note bore date the 6th of June 1875, and the plaintiff's advisers filed their plaint on the 5th June 1878 to prevent the claim being barred by limitation.

But then Mr. Bonnerjee for the plaintiff contends, that where there is no real doubt as to the person entitled to receive a debt, the payment of it must be considered to be withheld vexatiously if the debtor simply omits to pay it. But this, in my opinion, is not the meaning of the section. If it were, I think the object of the Act would be entirely defeated. The heir of a deceased Hindu or Mahomedan might then always sue for a debt due to his ancestor without even asking for it; and unless the defendant could show at the trial that he had any reasonable doubt as to the party entitled to receive the money, the plaintiff would be entitled to recover. This would not be affording to the debtor the protection which the Act intended to give him, and it would be

giving no meaning, except perhaps a very strained and unnatural one, to the words "withheld from fraudulent or vexatious motives."

I consider the intention of the Act to be, that, as a general rule, no Court shall compel any debtor of a deceased Hindu or Mahomedan to pay his debts to any person unless such person shall either have obtained a certificate under the Act, or probate of the deceased's will, or administration to his effects. The only exceptions to this rule are cases where not only there is no reasonable doubt as to the person entitled to receive the [373] money, but where also the debtor withholds the debt from fraudulent or vexatious motives. The mere nonpayment of the debt when it has never been asked for, or where the debtor is doing his best to pay it, is to my mind clearly not a withholding it from fraudulent or vexatious motives.

I am strongly disposed to agree with what fell from my learned colleague during the argument, that if the heir of a deceased Hindu sues for a debt without having obtained a certificate or probate or administration, upon the ground that his case is within the exception,—that is to say, that there is no reasonable doubt that he is the person entitled to receive the debt, and that the defendant is withholding it from fraudulent or vexatious motives;—if he does not make this statement, it ought to be a good answer on the part of the defendants that the plaintiff has not obtained a certificate or probate or letters of administration, and consequently that he has no right to sue.

The Madras High Court has held in *Govindappa v. Kondappa Sastrulu* (6 Mad. H. C. R., 131), that it is sufficient for the plaintiff to be prepared at the trial with proof of his certificate when he has stated in his plaint that he has applied for it, and possibly it might be right (in analogy to cases in England, where a party sues as executor or administrator, and obtains his probate or letters of administration before the trial) to hold that this would be sufficient.

But that is not the plaintiff's case here. He has neither obtained nor intended to obtain administration, and the defendants raised the point by a direct plea that administration had not been granted to the plaintiff, but had been granted with the plaintiff's consent to a third person. The plaintiff, therefore, having no right whatever to sue, and the Court having no power to compel the defendants to pay him the money, he applies at the trial to add the name of the administratrix as a co-plaintiff with himself. He does not apply to substitute her name for his,—that he must have done under s. 27 of the Code, and the Court could not have granted the application unless it had been satisfied that the plaintiff had sued in his own name under some *bona fide* mistake. Here it is not pretended that there was any mistake. Nor was the application made upon the ground that [374] the plaintiff and the administratrix claimed the right to this debt in the alternative (see s. 26<sup>b</sup>). Mr. Bonnerjee does not attempt to put his case upon that ground. He contends, that the plaintiff and the administratrix had a joint interest in the debt, the one as the person beneficially entitled, the other as the person who had the legal right to sue.

But even assuming that in some cases it might be proper that a trustee and his *cestui que trust* should join as co-plaintiffs, that could only be in a case

\* [Sec. 26:—All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the

Persons who may be alternative, in respect of the same cause of action. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who is not found entitled to relief, unless the Court in disposing of the costs of the suit otherwise directs.]



where the Court was at liberty, if it thought proper, to make a decree in favour of the *cestui que trust*. But here the Court is expressly prohibited by s. 2 of the Act of 1860 from ordering the defendants to pay the debt claimed to the plaintiff, and it is equally prohibited, as it seems to me, from ordering the defendants to pay the debt to the plaintiff conjointly with some one else who has a better title. If this were permitted, creditors would be deprived of the very protection which Act XXVII of 1860 was intended to afford them. A party, claiming as heir to a Hindu, but having no title as such, might always sue with impunity for a debt due to the estate, and then by bringing into the suit at the last moment the party who is really entitled, they might obtain joint decree.

In this case the party who had no right to sue brought the suit. The party who had the right did not sue, and yet by making these two persons co-plaintiffs at the trial, the Judge not only places them in a position to obtain a joint decree, but obliges the defendants, who had at any rate an answer to the suit up to the time when the administratrix was joined, to pay the costs of it *ab initio*.

The plaintiff had really no excuse then for the course which he adopted. He might, if he pleased, have taken out administration himself, or when he waived his right in favour of his mother, he might have withdrawn his suit at little or no expense within three days after he had filed his plaint, and allowed another suit to be brought at once in the name of the administratrix. There was no difficulty as regards limitation, because interest had been paid up to March 1878, and the plaintiff had full notice of the mistake he was making, because the point was directly raised in the defendants' written statement. . . .

[375] In order to avoid further delay and expense, I am prepared, if both parties will assent to that course within a fortnight from this date, to allow the decree of the lower Court to stand in favour of the administratrix only. Mr. Bonnerjee's clients paying the costs in both Courts on scale 2. In that case the name of the original plaintiff will be omitted, and the amount of the defendants' taxed costs will be deducted from the amount of the decree.

If the parties do not consent to these terms within a fortnight from this date, the judgment of the Court below will be reversed, and the plaintiff's suit will be dismissed with costs in both Courts on scale 2.

**Pontifex, J.**—The plaintiff in this case sued as only son and heir of his father to recover the principal and interest, moneys secured by a promissory note granted by the defendants to the plaintiff's father. The plaint was filed on the 5th of June 1878, within twelve days of the death of the father; but the summons was not served on the defendants until the 18th of June. In the meantime, on the 8th of June, an order for a grant of letters of administration to the father's estate was made in favour of his widow. This order could only have been made with the concurrence of the plaintiff, who must have been aware before filing his plaint that it would be applied for.

The defendants, in their written statement, took the objection that letters of administration had been granted to the widow, which precluded the plaintiff from recovering in this suit. The plaintiff, however, elected to go to trial, and filed interrogatories, which the defendants were obliged to answer. But at the hearing the plaintiff's counsel asked the learned Judge in the Court below to add the administratrix as a co-plaintiff, which application, though opposed, was granted, as if authorized by s. 32 of the Code, and thereupon a decree was at once made for payment to the plaintiff and co-plaintiff, not only of the moneys secured by the promissory note, but also of all the costs of suit.

Against that decree the defendants have appealed, insisting that the learned Judge in the Court below had no authority to add the administratrix as co-plaintiff at the hearing, and at all events ought not to have directed the defendants to pay the [376] costs of the suit; for if the addition of the co-plaintiff was necessary, then no costs should have been given up to the hearing; and if her presence was unnecessary, then, at least, the defendants ought not to have been directed to pay her costs, or the costs incidental to making her a party.

Technically I am of opinion that the Court below did not have power to add at the hearing the administratrix as a co-plaintiff; and, of course, if the judgment of the Court below is technically wrong, the whole case of costs is open in appeal. In my opinion, s. 32 of Act X of 1877 applies to a suit which is to some extent properly instituted, though partially defective, in other words, there is no jurisdiction at the hearing to add a plaintiff, unless the original plaintiff had some title to sue. It was strongly urged before us, that the original plaintiff, as sole heir of his father, was entitled to sue alone for the debt, or at least had some title to sue. But s. 2 of Act XXVII of 1860 enacts that "no debtor of any deceased person shall be compelled in any Court to pay his debt to any person claiming to be entitled to the effects of any deceased person, or any part thereof, except on the production of a certificate, to be obtained in manner hereinafter mentioned, or of a probate or letters of administration, unless the Court shall be of opinion that payment of the debt is withheld from fraudulent or vexatious motives, and not from any reasonable doubt as to the party entitled."

In this case the plaintiff has not attempted to prove, nor is there any ground for saying, that the defendants withheld payment from fraudulent or vexatious motives. No demand was proved to have been made before suit, and before service of the summons an order for administration had been granted with the plaintiff's concurrence to another person. No offer of obtaining the concurrence of the administratrix was made before the hearing, and it appears that so far from evading payment, the defendants were taking steps to raise the money.

Section 27 of Act X of 1877 authorizes the Court to substitute or add the proper plaintiff when the suit has been instituted by a wrong person under a *bona fide* mistake; but even if there were a *bona fide* mistake in this case, it appears to me that, as the section does not contain the words "on or before the first hearing," which appear in s. 32, the power given by the section ought to be exercised before the first hearing; and as the objection was taken in the written statement, it was mere perversity of the original plaintiff to wait until the hearing before he asked for the administratrix to be made a co-plaintiff.

The order of the Court below being in my opinion technically wrong, the appellants would be entitled to have the decree reversed with costs in both Courts. But inasmuch as substantial justice was in fact done by the decree in ordering payment to the administratrix, I also should be willing, if the parties consent, and for the purpose of saving expense, to allow the decree to stand so far as it directs payment to the administratrix. But whether the parties consent or not, I think the plaintiff must pay the whole costs of suit and appeal, to be set off against the decree, if the parties elect to let the decree with the proposed modification stand.

*Appeal allowed.*

Attorneys for the Appellants : Messrs. *Beeby and Rutter.*

Attorney for the Respondent : *Baboo Brojonath Mitter.*

## NOTES.

**[I. JOINDER OF PLAINTIFFS.]**

Apparently to avoid the construction placed on section 27 by Pontifex, J. the words "*at any stage of the suit*" were inserted in the C. P. C. of 1882 by VII of 1888 and these words are retained in the C. P. C. of 1908 (Sch. I, O. 1, r. 10, 1).

The power to add parties has been held to be exercisable even where the person originally suing has no right to institute the suit.—

(1907) 30 Mad. 419; *See also* (1903) 2 L. B. R. 246 (253); compare 6 Cal. 827; (1895) 20 Bom. 587; 1 Mad. 383.

In a suit by a benamidar, the real person was allowed to come in :—(1896) 24 Cal. 34.

**II. NECESSITY TO TAKE OUT HEIRSHIP CERTIFICATE.**

*See* Act VII of 1889, s. 4; also (1886) 13 Cal. 47; (1889) 7 Mad. 115.]

[6 Cal. 377]

## APPELLATE CIVIL.

— — — — —  
The 3rd June, 1880.

PRESENT :

MR. JUSTICE PONTIFEX AND MR. JUSTICE McDONELL.

Doolee Chand and others..... ..Decree-holders.

*versus*Omda Khanum, *alias* Baboo Shubibu and others.....Judgment-Debtors.\*

*Mortgage Decree for Account and Sale—Taking of Accounts—Withdrawal of Execution-Proceedings—Principle on which Accounts are to be taken.*

A mortgagee, who has obtained a decree for an account and sale, is not entitled to withdraw from the taking of accounts in his execution-proceedings, when those accounts appear to be going against him.

THE appellants in this case had obtained a decree for an account and for the sale of certain property mortgaged to [378] them by the respondents. But finding that, at the taking of the accounts, the balance was against them, they applied to the Subordinate Judge of Gya to allow them to withdraw from further execution-proceedings. The Subordinate Judge, on the 30th August 1878, whilst allowing them to stop proceedings, refused to permit them to withdraw or strike off the case until the accounts were settled.

The decree-holders appealed to the Judge of Gya, who confirmed the order of the lower Court, and dismissed the appeal.

The decree-holders then appealed to the High Court.

Baboo Mohesh Chunder Chowdhry and Baboo Nilmadhub Sen for the Appellants.

Mr. C. Gregory and Baboo Prannath Pandit for the Respondents.

\* Appeal from orders, Nos. 174 and 175 of 1879, against the order of G. E. Porter, Esq., Officiating Judge of Gya, dated 7th June 1879, affirming the order of Baboo Matadin, Subordinate Judge of that district, dated the 30th August 1878.

The Judgment of the Court (PONTIFEX and McDONELL, JJ.), was delivered by

**Pontifex, J.**—The main question in this appeal is, whether a mortgagee, who has obtained a decree for accounts and sale, is entitled to withdraw from the execution-proceedings when those accounts appear to be going against him. There is a subsidiary question, *viz.*, if he is not so entitled, upon what principles are the accounts to be taken between the parties?

Now we think, that the essence of foreclosure and redemption suits is, that in such suits each party is entitled to enforce his rights. A plaintiff claiming foreclosure is bound, upon the accounts being taken, if the balance is against him, to pay that balance. On the other hand, a plaintiff claiming redemption must submit to a decree for sale or foreclosure if he makes default in payment. Unless this were so, there would be a multiplicity of suits. To avoid this, it is necessary, under decrees for foreclosure or redemption, that the accounts between the parties should be settled and discharged. In this case, the plaintiff obtained a decree on the 12th May 1862 upon a mortgage-deed, and he claims that, previously to the mortgage [379] to him, he held under the mortgagor, the predecessor in title of the defendants, a *zur-i-peshgi* lease, and he also claims, as I understand, that at the expiration, or soon after the expiration, of the *zur-i-peshgi*, the defendants themselves entered into another *ticca* arrangement with him. A question that has been repeatedly raised in this suit, and which has been before the High Court no less than four times, is, whether the plaintiff is to be treated as a mortgagee in possession in taking the accounts—that is to say, whether the *zur-i-peshgi* deed and alleged *ticcadari* are to be disregarded.

At first, by some inadvertence in Mr. Justice PHEAR's judgment, it seems to have been laid down that he was to be treated as a mortgagee in possession; but, on a subsequent appeal, Mr. Justice PHEAR distinctly stated that, if that construction had been placed upon his judgment, it was what he never intended. Of course, if the mortgagee held possession under any contract of title distinct from his mortgage, he would be entitled to set up that title, and insist that his possession under that contract was distinct from his mortgage title, and that he could, during such possession, only be charged with rent payable under that distinct contract. Now, when the case came before Mr. Justice PHEAR on the 13th March 1875, a decree was passed by this Court, directing that certain accounts should be taken, and under the terms of that decree as it stands, the plaintiff would have to account as a mortgagee in possession. Although that decree has not actually been set aside, and although no decree has been made in its place, yet it clearly appears from the judgment of Mr. Justice PHEAR of the 28th July 1876, that it was not the intention of the Court that the account should be taken against the mortgagee as against a mortgagee in possession. It is therefore necessary for us now to do justice between the parties. We agree with the lower Court in thinking that the mortgagee is not entitled to withdraw from the taking of accounts in his execution-proceedings at his own will and pleasure. The decree of Mr. Justice PHEAR of 13th March 1875 directed that the defendant, if a balance was due from him, should pay such balance to the plaintiff, and if, on the other hand, a balance was due from the plaintiff, he should pay such balance to the [380] defendant; and that appears to us to be the proper principle upon which a decree should be made.

We, therefore, dismiss the appeal on the main ground which has been taken before us.

In sending back the case to the Court below, we think we ought to point out distinctly, and so as to prevent future litigation between the parties, the principles upon which the accounts should be taken. We are of opinion that an account should be taken half-yearly of the interest due from the mortgagor under the mortgage-deed, and that, from such half-yearly amounts of interest should be deducted the rent payable but unpaid by the mortgagee during such half-year under any contract for possession, separate and independent of the mortgage; and if, for any period the mortgagee was in possession, rent became due under any such separate or independent contract, during such period, he should be charged as a mortgagee in possession. The balance of interest half-yearly (if any) will not carry interest up to the date of the decree. But an account must be made up, as on the date of the decree of the 12th May 1862, of the principal and interest, after making such deductions as I have mentioned, due to the plaintiff at that time. Upon that aggregate amount interest will again be calculated at one per cent. per mensem, and against the subsequent half-yearly accounts must be set off the amounts payable and unpaid by the mortgagee in respect of rent under any contract for possession, separate and independent of the mortgage; and for any period uncovered by such separate and independent contract, such a sum as should be charged against a mortgagee in possession.

The accounts being so taken, the mortgagor must pay the balance, if any, found due from him on such account, to the plaintiff, the mortgagee. On the other hand, if a balance is found due from the plaintiff, the mortgagee, to the defendant, the plaintiff must pay such balance to the defendant.

We think, in order to put a stop to further litigation between the parties, that, if any difficulty arises in carrying out this order, the parties should have liberty to apply direct to this Court. As the appellants have failed on the main point of their appeal, they must pay the costs of this appeal.

[381] The record will be sent down at once, and the parties must carry in their accounts within six weeks of the arrival of the record in the Court below, with liberty for such Court to extend the time on a proper case being made.

*Appeal dismissed and case remanded.*

#### NOTES.

#### I. PRINCIPLES OF ACCOUNTING BETWEEN MORTGAGOR AND MORTGAGEE.

See also (1907) 5 C. L. J. 192; 9 C. L. J. 633.

#### II. HALF-YEARLY RESTS.

Annual rests are generally allowed :—(1884) 6 All 303; 361.

#### III. WITHDRAWAL OF REDEMPTION OR FORECLOSURE SUITS.

The plaintiff cannot, when on taking accounts the balance is found against him :—(1907) 5 C. L. J. 192; (1903) 1 ch. 857.]

[6 Cal. 381]

## PRIVY COUNCIL.

*The 7th and 8th July, 1880.*

PRESENT :

SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH,  
AND SIR R. P. COLLIER.

Shoshinath Ghose and others.....Plaintiffs

*versus*

Krishnasunderi Dasi.....Defendant.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

*Hindu Law—Adoption among Sudras—Execution of mutual deeds—Actual giving and taking of child.*

Although it has been held that, in the case of Sudras, no ceremonies except the giving and taking of the child are necessary to an adoption, yet it is not to be taken for granted, that such giving and taking can be completed by the execution of mutual deeds without more; but, *semble*, that, according to Hindu usage which the Courts should accept as governing the law, the giving and taking in such an adoption ought to take place by the father handing over the child to the adoptive mother, the latter intimating her acceptance of the child in adoption.

In this case it was found on the evidence, that it was not the intention of the parties to complete the adoption by the mere execution of the deeds.

APPEAL from a decree of the High Court of Bengal (5th February 1878), confirming, except as to costs, a decree of the District Judge of Bhagalpore (8th February 1876), whereby the suit was dismissed.

The first appellant sued, in January 1875, to establish the fact of his adoption in 1864 by the respondent, the widow of Dwarkanath Ghose, who, before his death in 1863, had orally given to her power to adopt. The co-appellants were joined in the suit, having purchased a part of the estate claimed; and the object of the suit was to obtain a declaration of the right of the alleged adopted son to possession of the estate of Dwarkanath [382] Ghose, to which, as his sole and sonless widow, Krishnasunderi, the respondent, had succeeded.

Dwarkanath Ghose having, by custom, the title of "Mohashoi," was a zamindar of considerable estate, and a principal person in the caste of "Uter-rarhi," or Northern Kaists, residing near Bhagalpore in Behar. He left, besides his widow and heiress Krishnasunderi, two nephews, sons of a half-sister, Purnochandra Sing and Upendra Chandra Sing, who would, in the absence of an adoption by his widow, have been his heirs in remainder after her death. He also left a half-sister Bhagabati, a childless widow, and an aunt, Shibasunderi, whose names were on the instruments of adoption.

To record the existence of the authority to adopt, as well as certain dispositions said to have been made by Dwarkanath Ghose of his property, to take effect after the adoption should have been completed, the respondent Krishnasunderi executed, on the 1st of October 1863, and shortly afterwards caused to be registered, an instrument called a "bidhanpatro," setting forth the above facts. The nephews in the same year obtained a decree on the strength of the gifts recited in the "bidhanpatro."

Towards the end of 1863, Krishnasunderi, with the assistance of her half-brother, Chandra Narain Sing, and of her brother Surjonarain, a pleader in the Bhagalpore Courts, selected the first appellant as a suitable boy to adopt. He was then Nogendra Chandra Mitter, fourth son of Srinarain Mitter, brother of the mother of Chandra Narain Sing, resident at Mahta in the Burdwan district; and he was aged about seven years. On the 30th Jeyt, or 11th June 1864, the two instruments, the "danpatro" and the "grahanpatro," on which the appellants relied, were executed at the widow's residence near Bhagalpore, and registered at Bhagalpore on the same day<sup>1</sup>.

The only question material to this report is, whether the two instruments by themselves constituted a valid and irrevocable transfer of the appellant from one family to the other, so as to make him the adopted son of Dwarkanath Ghose.

[383] The Judge of Bhagalpore dismissed the suit, and that decision was upheld by the High Court (JACKSON and McDONELL, JJ.), on appeal.

The plaintiff, therefore, brought the present appeal.

Mr. T. H. Cowie, Q.C., Mr. Branson, and Mr. Evans appeared for the Appellants.

Mr. R. V. Doyle and Mr. Woodroffe for the Respondent.

For the appellants it was contended that the deeds of giving and taking, executed in June 1864, were sufficient to effect the adoption; and that, on the evidence, a complete adoption had taken place. Reference was made to *Sreenarain Mitter v. Kishensoondery Dossee* (11 B. L. R., 171; S. C., L. R., I. A., Sup. Vol., 149) and *Indromoni Chowdhram v. Beharilal Mullick* (L. R., 7 I. A., 24, S. C., I. L. R., 5 Cal., 770).

Counsel for the respondent were not called upon.

Their Lordships' Judgment was delivered by

**Sir J. W. Colville.**—The question in this case is, whether the plaintiff has been validly adopted as the son of Dwarkanath Ghose, who died on the 30th of June 1863, by his widow, the defendant. It is admitted that she had authority from her husband for that purpose, and the adoption is alleged to have taken place on the 11th of June 1864.

Their Lordships do not propose to go at any length into the facts of the case, which are fully and lucidly stated in the two able judgments that are the subject of this appeal. It is sufficient to refer to a few of them. It appears that the widow lost no time in seeking to carry out her husband's direction to adopt a son. A correspondence, which was carried on chiefly by Surjonarain Singh, her brother, who took the principal part in all these transactions, began in January 1864, from which it appears that, whatever unwillingness Srinarain, the natural father of the plaintiff, may have felt at first to give [384] his son in adoption, had been overcome before the end of the following May. The record contains only the letters written by Surjonarain during this period, but from them it may be inferred that Srinarain, in one or other of his letters that are missing, had stipulated for the execution of deeds of gift and acceptance which, if witnessed, as was contemplated, by the reversionary heirs of Dwarkanath Ghose, would afford evidence against them of the adoption and of the authority under which it was made. It may also be inferred that, at one time, it was contemplated that the defendant should send persons to bring the boy, without his father, to her house at Bhagalpore from Mahta, his father's place of residence, in order that she might see him before adopting him.

<sup>1</sup>Translations of these documents will be found in 11 B. L. R., pp. 172, 173.

Ultimately, however, Srinarain himself accompanied the boy, and came to Bhagalpore on the 7th of June 1864; and it may be that there was at that time some notion in the minds of all the parties that the adoption would then take place. However this may be, it is an undisputed fact that the deeds upon the construction of which the determination of this appeal must now depend, were executed on the 11th of June 1864. It is, on the other hand, equally clear, that the boy, instead of remaining with the defendant in her house, went back with his natural father to Mahta on the following day, the 12th of June 1864. He afterwards returned to the defendant's house, together with his brothers, who at least were only there on a visit, in September 1864, whilst Srinarain was on a pilgrimage. The brothers went home in November, but the boy remained in the house of the defendant. There appears to have been on the part of the father some remonstrance as to this, or, at all events, the expression of a wish that the boy should be sent back to him; and accordingly the boy was sent back to his father's house in December, 1864, as it was expressly stated in the letter which accompanied him on his return, agreeably to his father's order. After that period he never returned to the defendant's house. Further correspondence ensued, and ultimately, on the 25th of March 1865, Srinarain himself wrote a letter, in which, after stating the boy's repugnance to leave his own home, the repugnance probably being that of his mother to part with him, and the [385] general feeling of the family, he ends by saying: "In this I have no power, as I have already informed you in my previous letter; and now I positively inform you that you all, relinquishing this hope, in consideration of the future, for the preservation of the estate, should make dattak-grahan (accepting a son in adoption) or any other arrangement you think fit:" pointing evidently to the adoption of another child by the defendant.

In this the defendant appears to have acquiesced; but it was suggested on her part that the deeds which are in question ought to be cancelled, in order to remove the cloud which would otherwise rest on the title of any other boy whom she might adopt. For nearly a year Srinarain seems to have thought that this was the right and proper thing to be done, and to have been willing to concur in it; but in March 1866, he, having probably been advised, during a visit he was then paying to Calcutta, that his right to do so was at least questionable, refused to do it, and determined to leave things as they were; not, however, even then insisting on the adoption as complete and irrevocable. Thereupon the suit which has been before their Lordships on a former occasion was brought by the present defendant, seeking to have those deeds cancelled. In the course of that suit the validity of the adoption came in question. The Courts in India pronounced against it, and decided that the deeds should be delivered up to be cancelled. On appeal to Her Majesty, their Lordships were of opinion that the suit was improperly brought, and could not be maintained, being one in the nature of a suit for a declaratory decree, and brought in the absence of the child said to have been adopted; and they finally dismissed it, leaving every question touching the validity of the adoption open (11 B. L. R., 171).

So matters remained until the plaintiff came of age, and he then brought the present suit to enforce his rights as an adopted son.

The case made by him, and the case tried in the Courts below, was, not that he had a good title by adoption by virtue of the deeds in question alone, but treated the execution of those [386] deeds as contemporaneous with the performance of all the ceremonies incident to an ordinary adoption. There



was great conflict of evidence upon the case so set up ; and ultimately both the Indian Courts, in extremely well-reasoned judgments, found that no such formal adoption, as was alleged, ever took place, and dismissed the suit. A suggestion, however, as appears at the end of the judgment of the High Court, was made by one of the counsel for the plaintiff, to the effect that, even if there had been no such formal adoption as was alleged, the deeds themselves operated as a complete giving and taking of the plaintiff ; that that was all that was essential in the case of Sudras ; and that the adoption was completed by virtue of the deeds alone.

Their Lordships, by their ordinary rule, are precluded from going into the correctness of the findings of the two Courts upon the fact of the formal adoption attempted to be proved. This has been fairly admitted by the learned counsel for the appellants at their Lordships' bar, who have accordingly argued only the latter point,—namely, whether the effect of the two deeds was not to make the plaintiff fully and completely the adopted son of Dwarkanath Ghose.

It seems to their Lordships that two questions arise upon this point : *first*, whether, according to Hindu law, an adoption can be effected, even amongst Sudras, by the mere execution, without more, of such instruments as those in question ; and *secondly*, whether it was the intention of the parties, when they put their hands to those two instruments, that such should be the case, or whether the execution of them was not intended to be a mere step in the proceedings which were to result at one time or another in a complete and full adoption. Their Lordships will deal with the last of those questions in the first instance.

The first thing that strikes them is the extreme improbability that it should have been the intention of the parties to make an adoption by the mere execution of the deeds. Yet that such must have been their intention, if there was then a complete adoption, follows from the findings of the Courts that nothing more was done, or, presumably, intended to be done. Such a [387] course of proceeding seems to be in the highest degree repugnant to the ordinary habits, feelings, and usages of two Hindu families, both of considerable respectability. That this is so is shown by the circumstance that the plaintiff has thought (as the father in the former suit thought) it necessary to set up a case of formal and full adoption, with all ceremonies, whether necessary or not necessary ; being the case which has been negatived by the two Courts. Nor does it appear to their Lordships that the terms of the deeds are necessarily inconsistent with the finding of the High Court that such was not the intention of the parties. The words of the deed of acceptance, no doubt, are strong, and are, as translated, in the present tense. Those words, according to the translation on the present record, are these :—" I take in adoption Srinarain Nogendro Chandra Mitter, the second son of your third wife, Srimati Monmohini, with the consent of all, and according to rule and usage." In the record of the former case before their Lordships there is a somewhat different and more expanded translation of the same passage, the terms of which are :—" I do, with the prescribed rights and ceremonies, adopt as my son Nogendro Chandra Mitter, your second son by your third wife, Srimati Monmohini." The words "with the prescribed rights and ceremonies" are stronger than the words "according to rule and usage" ; but even taking, as their Lordships do, the latter to be the correct translation, it seems

to them that the words point to an adoption in the customary and formal manner, and to something being done *ultra*, the mere execution of those two instruments.

Great stress has been laid, by Mr. Branson, particularly upon the immediate registration of the deeds. But as to that, their Lordships think that, although the circumstance of registration, as well as that of the execution, of the deeds would, of course, be very cogent evidence upon the main issue which was tried in the case,—namely, whether there had been a formal and regular adoption,—and might, if the other evidence that was given upon that point had been nicely balanced, have been sufficient to turn the scale,—it is of far less weight upon the question whether it was the intention of the parties, without [388] more, to treat the execution of the deeds as an adoption. It shows, no doubt, what is fully admitted, that both parties then supposed that the adoption would take place at some time.

Their Lordships, therefore, see no reason to differ from the conclusion to which the High Court came upon the whole case,—that it never was the intention of the parties that the deeds should operate in the manner contended for. That conclusion, they think, is very much fortified by the subsequent correspondence that took place; the mode in which the child was treated, going from one house to the other, and the clear willingness of the father at one time to treat the adoption as simply inchoate, and something which could be given up, so that the defendant might carry out her purpose of performing the wishes of her husband by adopting another child. The circumstance, moreover, which the Courts have laid great stress upon, that, on the occasion of Dwarkanath's *sradh*, the boy supposed to be adopted was not present, and took no part in the ceremony, is strongly confirmatory of the notion that all parties then considered that at that time the adoption was not complete, but remained, to some extent, still *in fieri*.

That being so, it is unnecessary for their Lordships positively to decide the first question,—namely, whether there can be, according to Hindu Law and usage, an adoption simply by deed, and without that corporeal delivery and acceptance of the child which is almost universally treated as the essential part of an adoption in the *dattaka* form. They desire, however, to say, that they are very far from wishing to give any countenance to the notion that there can be such a giving and a taking as is necessary to satisfy the law, even in a case of Sudras, by mere deed, without an actual delivery of the child by the father. There is no decided case which shows that there can be an adoption by deed in the manner contended for, all that has been decided is that, amongst Sudras, no ceremonies are necessary in addition to the giving and taking of the child in adoption. The mode of giving and taking a child in adoption continues to stand on Hindu law and on Hindu usage, and it is perfectly clear that, amongst the twice-born classes, there could be no such adoption by deed, because certain religious ceremonies, the *datta* [389] *homam* in particular, are in their case requisite. The system of adoption seems to have been borrowed by the Sudras from these twice-born classes; whom in practice, as appears by several of the cases, they imitate as much as they can, adopting those purely ceremonial and religious services, which it is now decided are not essential for them, in addition to the giving and taking in adoption. It would seem, therefore, that, according to Hindu usage, which the Courts should accept as governing the law, the giving and taking in adoption ought to take place by the father handing over the child to the adoptive mother, and the adoptive mother declaring that she accepts the child in adoption.

For these reasons, their Lordships think that no ground has been laid for disturbing the judgment of the High Court; and they will, therefore, humbly advise Her Majesty to affirm that judgment, and to dismiss this appeal with costs.

*Appeal dismissed.*

Solicitors for the Appellants: Messrs. *Barrow and Rogers*.

Solicitor for the Respondent: Mr. *T. L. Wilson*.

#### NOTES.

#### [I. ADOPTION BY EXCHANGE OF DEEDS.]

There must be an actual handing over of the boy, the exchange of deeds is insufficient:—

In (1887) 11 Mad. 5 at p. 7 this case is referred to as an authority for the proposition that any overt act is not sufficient, but that there must be corporeal delivery of the child by a person competent to give, to a person competent to take, accompanied by a declaration on the one side, 'I give the child in adoption', and on the other, 'I take the child in adoption'. See also (1892) 19 Cal. 452 P. C. = 19 I. A. 101, (1889) 13 Mad. 214, (1897) 2 C. W. N. 154; (1899) 1 Bom. L. R. 842; 2. I. J. N. S. 22, 28 Cal. 168.

#### II. RELIGIOUS CEREMONIES HOW FAR NECESSARY FOR A VALID ADOPTION

In 5 Cal. 770 it was declared that among Sudras there may be a valid adoption without them.

The dictum at the end of this case "it is perfectly clear that amongst the twice-born classes there would be no such adoption by deed, because certain religious ceremonies, the *Datta homam* in particular, are in their case requisite."—has been held to be decisive.—(1889) 13 Mad. 214, see *contra* (1884) 6 All. 276. See (1889) 13 Mad. 214; (1884) 7 Mad 548; (1887) 11 Mad. 5; (1884) 6 All. 276, (1887) 11 Bom. 381; (1871) 16 W. R. C. R. 179.

The ceremonies are not necessary in the case of adoption of one of the same *gotra* —

(1899) 24 Bom 218; (1887) 11 Mad 5; (1899) 13 Mad. 214 (1884) 6 All. 276 (*Dakhani Brahmins*); (1891) 15 Mad. 6.

Nor among the *Kshatriyas* or *vaishyas* of the Madras Presidency. (1882) 6 Mad 20, (1889) 13 Mad. 214.

The capacity to (give or) take in adoption may be affected by the capacity to perform the religious ceremonies where these are required, 22 Cal. 347, 5 B. L. R. 362; 11 Bom. 381; 22 Bom. 590; 5 Mad. 358; 13 Mad. 214, 27 Mad. 538, 18 Mad. 397. Presumption as to performance of ceremonies, see (1899) 24 Bom 473.

As to the application of *factum valet*, see (1886) 9 All 253, (1889) 12 All. 328.]

[6 Cal. 390]

## APPELLATE CIVIL.

*The 27th August, 1880.*

PRESENT:

MR. JUSTICE WHITE AND MR. JUSTICE FIELD.

Chatraput Singh.....Plaintiff

*versus*

Grindra Chunder Roy and another.....Defendants.\*

*Sale of Government Revenue-paying Lands—Purchaser's Liability.*

Government revenue does not become due from day to day, but at certain specified times, according to the contract of the parties, or the custom of the district in which the lands liable to pay such revenue are situate. It is not, therefore, liable to apportionment; and the person who is the owner of a revenue-paying estate at a time when the payment of the revenue falls due, is the only person liable for its payment.

The purchaser of an estate which pays Government revenue, takes it subject to all revenue and cesses, whether in arrear or accruing.

[390] *Held* therefore, in a suit by a purchaser for a certain sum for Government revenue and cesses, which became due after the date of, though due for a period previous to, his purchase, which sum he alleged he had been compelled to pay to save his interest in the subject of his purchase, that he was not entitled to recover.

THE facts of this case relevant to the report are stated in the **Judgment** of the Court.

Baboo *Sreenath Dass* and Baboo *Rashbehary Ghose* for the Appellant.

Baboo *Mohun Mohun Roy* and Baboo *Prosonno Gopal Roy* for the Respondents.

**White, J.**—The appellant was the plaintiff in the lower Court, and that Court dismissed his suit without going into evidence. The question, therefore, to be determined upon this appeal is, whether in his plaint he stated a case which, if proved, would entitle him to the relief which he sought against the defendants. The following are the material allegations in his plaint:—That, on the 9th of December 1878, he purchased an eight-anna share of a large zamindari under a decree that was obtained against the defendants; that, after that date, a large sum of money became due in respect of the third quarter's Government revenue for the year 1878-79, and also in respect of the road cess and public works cess for the same quarter; that on the 13th January 1879, the last day for paying the same, he paid the entire amount into the Government treasury; that, prior to the date of his auction-purchase, he had no right in the property which he had bought; that the defendants, down to the 8th of December 1879, were owners of the mehal sold and entitled to realize rent from the tenants; and that he was compelled, in order to save his interest in the mehal, to pay the amount that so became due for revenue and cesses.

His plaint prays for a declaration that he is entitled to recover from the defendants a proportionate amount of the Government revenue, road cess and

\* Appeal from Original Decree, No. 248 of 1879, against the decree of Baboo Sree Nath Roy, Subordinate Judge of Hooghly, dated the 5th July 1879.

public works cess payable in respect of the mehal from the 29th of September to the 8th [391] of December 1878, and for a decree for that proportionate amount.

It is admitted by the appellant that his title to the eight annas share of the zamindari dates from his purchase,—namely, the 9th December 1878, and that the revenue and cesses which he seeks to apportion, although accruing from an earlier date, did not become due until after the 9th of December 1878, when the eight annas share had, by virtue of the purchase, become vested in himself. It is also admitted by his pleader that the sale was not made under the revenue sale law. Government revenue does not become due from day to day, but at certain specified times, according to the contract of the parties, or the custom which may prevail in the district. The same remark applies to the cesses mentioned in the plaint, which are payable along with, and under the same conditions as, revenue. Therefore, the liability to pay revenue in this case was a liability which first became due after the appellant had acquired his title. As the payments did not become due until after he had become owner of the estate, and he bought under no special stipulation which allowed of the payments being apportioned, I am of opinion that the doctrines neither of contribution nor of apportionment apply, but that he is liable to discharge the whole amount of the payments, and cannot make the judgment-debtors pay any portion of them.

There is another view of the case presented by the lower Court, which to my mind seems also a sound one, namely, that, upon the facts alleged, the plaintiff must be held to have purchased at the auction the eight annas share of the mehal with all revenue and cesses that may be either due or accruing due at the time of his purchase. Revenue and the public cesses mentioned constitute a standing incumbrance and first charge upon the land subject to them. A man who purchases an estate which pays revenue and cesses to Government, knows that the estate is by the law chargeable with this revenue and cesses, whether in arrear or accruing, and that unless he pays the same he will lose his purchase. In the absence of any express stipulation to the contrary in the proclamation of sale he must be taken to purchase the estate subject to the discharge of these liabilities. A purchase can easily, and I have no doubt does, protect himself from these liabilities by taking them into account in estimating the value of what he is about to buy, and regulating his biddings accordingly.

The proposition is supported by authority. The lower Court refers to the cases of *Obhoy Chunder Bundopadhya v. Nilambur Mookerjee* (W. R. 1864, 73) and *Sheik Khoda Buksh v. Degumburee Dossee* (W. R. 1864, 207); and we are also referred to another case decided by Mr. Justice LOUIS JACKSON and Mr. Justice McDONELL on the 20th January 1876, Special Appeal No. 706 of 1876. The cases of *Obhoy Chunder Bundopadhya v. Nilambur Mookerjee* (W. R. 1864, 73), and *Sheik Khoda Buksh v. Degumburee Dossee* (W. R. 1864, 207), although not cited in the judgment of Mr. Justice JACKSON, are yet cited in the judgment of the lower Court then under appeal, and are approved of by the High Court.

The appeal is dismissed with costs.

**Field, J.**—In this case the plaintiff purchased a moiety of a revenue-paying estate at a sale held in execution of a decree. The date of the sale was the 9th December 1878; and it is admitted on both sides that the case is governed by the Full Bench decision in *Bhyrub Chunder Bundopadhya v. Soudamini Dabee* (I. L. R., 2 Cal., 141),—that is to say, that the plaintiff's title

accrued from the date of sale,—namely, the 9th December 1878. After the date of sale the judgment-debtor made objections, and the sale was not confirmed until the 10th March. Meanwhile an instalment of Government revenue became payable on the 13th January 1879; and this, together with the road cess and public works cess, amounting in all to Rs. 15, 833 annas 12, was paid by the plaintiff.

The ground upon which the plaintiff seeks to recover from the defendants their share of this sum, is set forth in the 4th paragraph of the plaint in the following words:—

“As the defendants were owners of the mehal sold and were entitled to realize rent from the tenants of that mehal from the 29th of September 1878, the first day of the aforesaid third [393] quarter up to 8th December, and as they held possession thereof during that time, and as the plaintiff had no right to realize the rent of the period antecedent to his auction-purchase, the defendants are bound to pay the collectorate revenue and the road cess and public work cess of the above period.”

In other words, the plaintiff contends, that as the defendants were in receipt of the rents and profits of the estate up to the 8th December 1878, they ought to pay the Government revenue and other outgoings up to that date. At first sight it does appear somewhat inequitable that the person who has received the profits and rents should not by law be compelled to pay the outgoings; but I think there can be no doubt that upon the authorities we are concluded from making any other decree in this case than that which has been made by the lower Court. There is no law providing for the apportionment of Government revenue in such cases. According to the law of landlord and tenant rent is not apportionable in these provinces, and the defendants would not therefore be entitled to have the rents payable by the tenants apportioned so as to entitle them to recover exactly the rents due up to the 8th December 1878. The principle upon which the apportionment of revenue is claimed would not, therefore, be supported by the apportionment of the rent.

If this be regarded as a suit for the recovery of money paid to the defendants' use, there must be either an express or implied promise on the part of the defendants to pay that money. That there was any express promise has not been contended, and the circumstances are wanting from which a promise could be implied. The law under certain circumstances implies a promise when money is paid by *A* which *B* was lawfully bound to pay. In the case before us, it is impossible to say that *B* was lawfully bound to pay this money. According to the revenue law of these provinces, the estate must first have been sold for the realization of Government revenue due thereupon, and *B*, or the defendants in this case could have been compelled to pay this money only if, after the estate had been sold, the arrears of Government revenue had not been realized from the sale-proceeds. It is not contended, and there is no evidence that, if [394] the estate had been sold in this instance, the revenue would not have been realized from the sale-proceeds; and, therefore, that the personal liabilities of the defendants would have arisen. I think, therefore, that no grounds exist from which a promise on the part of the defendants to pay this money can be implied.

I concur in dismissing the appeal.

*Appeal dismissed.*

NOTES.

[APPOINTMENT OF PERIODICAL JUDGMENTS.]

The Transfer of Property Act, 1882, s. 86 deals with this subject.

See the Notes of Mr. Gour or Messrs. Shephard and Brown thereon. See also *Barsht v. Tagg* (1900) 1 ch. 231

The liability was also stated in (1899) 21 Cal. 383 ; (1900) 4 C. W. N. 590.

The question whether cesses were a charge was in (1908) 30 Cal. 778 considered with reference to Beng. Act IX of 1880.]

[6 Cal. 394]

PRIVY COUNCIL.

*The 13th and 14th July, 1880.*

PRESENT :

SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, and  
SIR R. P. COLLIER.

Rajrup Koer.....Plaintiff

*versus*

Abul Hossein and others.....Defendants.

[*On Appeal from the High Court of Judicature at Fort William in Bengal.*]

*Limitation Act (IX of 1871), ss. 24, 27 ; sched. ii, art. 31 part v—Presumption of Title  
founded on long continued User—Easement—Obstructing a Watercourse—  
Continuing Act of Wrong.*

More than twenty years, and possibly fifty or sixty, before suit, the plaintiff's ancestors and predecessors in estate had constructed and used a *pain*, or artificial watercourse, on the defendants' land, making compensation to them. The *pain*, by a channel at one part of its course, contributed to the water in a *tal*, or reservoir, belonging to the defendants ; and by a channel at another part, took the water which overflowed from the *tal*, after the defendants had used as much of the water therein as they required. Less than twenty years before the suit, the defendants, without authority, obstructed the flow of water along the *pain* in several places. The Courts below differed as to whether some of these obstructions had not been made more than two years before the suit, the rest having been made within that period.

*Held*, that the provisions of Act IX of 1871, a remedial Act, and neither prohibitory nor exhaustive, did not exclude, or interfere with, the acquirement of rights otherwise than under them. A title might be acquired under that Act by a person having no other right at all ; but it did not exclude, or interfere with, other titles and modes of acquiring easements

And s. 27\* by allowing a user of twenty years, if exercised until within two years of suit, under the conditions prescribed, to give, without more, a title, did not prevent a grant of an easement founded on another title independently of the Act. Such a long enjoyment as the plaintiff had proved should be [395] referred to a legal origin, and the long user of the *pain* and of the superfluous water of the *tal*, afforded evidence giving rise to a presumption that a grant, or an agreement, had been made creating an easement. Although, on the assumption that some of the obstruction in question had existed for more than two years before the suit, the plaintiff might not have shown a right under Act IX of 1871, s. 27, yet he did not require its aid.

*Held* also, that such obstructions being continuous acts, as to which the cause of action accrued *de die in diem*, Act IX of 1871, sched. ii, part v, art. 31†, fixing two years from the date of the obstruction as the period of limitation "for obstructing a watercourse," did not preclude a suit complaining of obstructions though made more than two years preceding the date of the commencement of the suit.

APPEAL, by special leave, from a decree of a Division Bench of the High Court of Bengal (23rd February 1877), reversing a decree of the Subordinate Judge of Gaya (17th August 1875), and restoring a decree of the Sudder Munsif of Gaya (26th August 1874).

In January 1874, this suit was brought by Maharaja Ramkissen Sing, Raja of Ticari, in the Gaya district, against the respondents, who were the owners of a village, Mouza Mora, in the neighbourhood of a zamindary, named Mehal Sunaut Purwariya, belonging to the Raja. Mouza Mora was situate between the Raja's zamindary and the commencement of a *pain*, or artificial watercourse, which brought water from a stream called the Phalgu Nadee to the Raja's Mehal. This *pain* named Pain Desain, had been made by the Raja's ancestors on lands belonging to Mouza Mora, and on its course over the lands of that village towards Mehal Sunaut Purwariya, it was connected with a *tal*, or reservoir, which also was within the boundary of Mouza Mora.

The plaintiff claimed a declaration of his sole right to Pain Desain, and to the use of the water in the *tal*. He also claimed an order for the closing of openings in the *pain* recently made by the defendants for the draining off of

\*[Sec. 27:—Acquisition of ownership by possession where the access and use of light or air to and for any building has been peaceably enjoyed therewith, as an easement, and as of right, without interruption, and for twenty years and where any way or water course, or the use of any water, or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, way, watercourse, use of water, or other easement, shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

*Explanation*.—Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in, for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.]

†[Art 31:—

Description of suit.	Period of limitation.	Time when period begins to run.
For obstructing a way or a water course	Two years.	The date of the obstruction]



water on to their lands ; and for restraining them from interfering with sluices which regulated the flow of water out of the *tal*.

The defendants maintain that the water in the *tal* belonged to them, and that the plaintiff had not the sole right to the use of Pain Desain ; that the openings and obstructions complained [396] of were of long standing, and that the suit for their removal was barred by limitation.

The Sudder Munsif of Gaya held, that the right to the use of the *pain* belonged to the plaintiff, and that the defendants had the right to the water in the *tal*, excepting the overflow, to which the plaintiff was entitled. He ordered, that all the openings made by the defendants in the *pain*, twelve in number, should be closed, except two, numbered 3 and 10, as to which he held the suit was barred by art. 31, sched. ii, Act IX of 1871, they having been in existence for more than two years before the suit was brought.

Both parties appealed to the Subordinate Judge of the district, who modified the decision of the Munsif in favour of the plaintiff, holding that the two years' limitation did not apply to the claim. Whilst proceedings were pending in the High Court, to which both parties appealed, the Raja died, and the present appellant was substituted for him on the record. The judgment of the High Court (JACKSON and McDONELL, JJ.) was as follows :

"The questions before the Court in this case are not unlike those which came before this Bench, at least before myself and my colleague, Mr. Justice GLOVER, in 1870, in a case which is reported in 14 Weekly Reporter, page 349 (*Maharanee Indarjit Koer v. Lachmi Koer*, 14 W. R., 349), with this exception, that the position of parties is reversed. The plaintiff here is the owner of a *pain*, which traverses the land of the defendants. It appears to me, that it is scarcely an adequate description of the plaintiff's right in this case to say that he has a bare easement or right to pass water over the defendants' land for the purpose of irrigating his own. The evidence shows, and the Courts appear to have found, that the *pain* was constructed by the ancestors of the plaintiff a great many years ago, possibly fifty or sixty years, certainly more than twenty years, for the purpose of irrigation : and there is part of the evidence which indicates that such construction was accompanied with certain advantages on the part of the defendants, which compensated them for any injury or inconvenience caused by the construction of the *pain*. In that state of things, it seems that the defendants have, [397] at various times within the last few years, made a number of openings in that *pain*, for the purpose of drawing water, to the injury of the whole village. In this state of the facts, what we stated in the case above cited would apply, and we think that if the defendants were to be at liberty, without the plaintiff's consent, to construct a number of openings, and thereby seriously diminish the supply of water carried through the *pain* to the plaintiff's mouza, that would cause serious disturbance, and the plaintiff would be most wrongfully injured thereby. But to this state of the rights of the parties we have to apply the provisions of the Limitation Act ; and we find that the plaintiff, in order that he may obtain relief in respect of an infringement of his easement, must come into Court within two years from the time that such infringement took place. The Munsif found, and it appears to us on very good grounds, that, as regards two of the openings from which the plaintiff complained that he sustained injury, they were in existence much more than two years before the commencement of the suit. Of course, the Subordinate Judge might, if the evidence permitted it, come to a different conclusion upon that part of the case, and the respondents' vakeel suggests that he did intend to do so by the use of these words—' With reference to the *dhonga* and *khund*, the Munsif

has referred to the papers filed by the plaintiff, but those papers do not refer to the *dhonga* and *khund* in particular'; but we do not think that, in these words, the Subordinate Judge meant to reverse the finding of the Munsif on a question of fact, for, after the remark which he there makes, he goes on to dispose of part of the case on different grounds by, as is admitted before us to day, a misapplication of the law of limitation. If we thought that there was any ground for coming to a different conclusion upon this fact, we should have been inclined to remit the case back; but we are satisfied that the Munsif's finding on this point is unassailable. Concurring, therefore, in the general view taken by the Court below of the rights of the parties, and being of opinion that the decision of the Munsif is correct as regards the *khund* and the *dhonga* mentioned by him, and being also of opinion that the cross-appeal filed by [398] the plaintiff in regard to the use of the *tal* has no force, we think that the judgment of the lower Appellate Court, so much as varies the judgment of the Munsif, must be set aside, and that the Munsif's decision must be restored."

From this decision the plaintiff appealed.

Mr. Woodroffe for the Appellant.

Mr. C. W. Arathoon for the Respondents.

For the appellant it was contended that the law relating to title by prescription had not been correctly applied, and that there had been misdecision on the merits. Title was to be presumed after long and undisturbed enjoyment, such as the plaintiff had shown in the continuous user of the *pain* for fifty or sixty years. The *pain*, also, had been originally constructed by the plaintiff's ancestors, from whom he had inherited the right to it, and compensating advantages had been conferred on the defendants' village. Documentary evidence, extending back to 1830, had been referred to. After all the above, the plaintiff should have been found entitled to the *pain*, independently of the rules relating to prescription in Act IX of 1871. It was also argued that, as insufficient weight had been given to necessary presumptions, and as the finding of the Subordinate Judge in regard to obstructions 3 and 10 had been misread by the High Court, a general modification of the decree was required. On the questions of law, to which it was intimated that Mr. Woodroffe's argument must be limited, it was contended, that neither the plaintiff's title, nor his consequent right to the removal of all the obstructions, failed, even supposing that all the conditions in s. 27 of Act IX of 1871, in order to prove an easement, had not been satisfied. That Act, as its preamble stated, provided "rules for acquiring ownership by possession"; but it repealed no law under which title existed independently of it. On ancient user being established, as it had been in this case, the presumption arose that such user was of right, and was lawfully founded on title. On this point were cited *Gooroopershad Roy v. Bykunto Chunder Roy* (6 W. R., 82) [399] and *Mahomed Ali v. Jugulram Chundra* (5. B. L. R., App., 84; s. c., 14 W. R., 124). But even if the plaintiff's title, and his claim to the removal of the obstructions, rested on the Act, it still was unnecessary to consider whether or not any of the obstructions had been in existence for more than two years before the commencement of this suit, when certainly none of them had been in existence for twenty years. Obstructions did not amount to legal "interruption" of the exercise of a right, unless submitted to or acquiesced in for a year by the owner after notice to him, according to the 'explanation' given in s. 27 of Act IX of 1871. On this point *Alimooddeen v. Wuzeer Ali* (23 W. R., 52) was referred to; and on the corresponding provisions of the English Statute, 2 and 3 Will. IV, c. 71, *Flight v. Thomas* (10 Ad. & E. 590; s. c. on appeal, 8 Cl. and F., 231) was cited. It had not been shown that the violation of the

plaintiff's right had been accompanied by the submission which s. 27 contemplated, so that the plaintiff's right of suit was complete under the Act if he resorted to it. Lastly, cl. 31 of Part V of the sched. ii to Act IX of 1871 had no application to this claim. That section must be read as governed by the provisions of s. 24 of the Act relating to continuous acts, such as were the acts of obstructing the flow of water from the *tal*, and along the *pain*. The analogous rule of English law was laid down in *Gillon v. Boddington* (1 Ryan & Moody, 161) and *Whitehouse v. Fellowes* (30 L.J., C. P., 305), showing that in such a case there was a cause of action arising every day that the obstruction was continued. As regards damages, cl. 31 might operate to limit the amount recoverable, but the cause of action in this suit would accrue day by day during the maintenance of the obstructions, until twenty years should have expired, upon the expiration of which period other rights would have arisen in favour of the opposite party.

Mr. C. W. Arathoon, for the respondents, having reviewed the position of the parties in regard to previous litigation and disputes about the subject of this claim, and having pointed out [400] that some of the obstructions were of long standing, argued that rights on either side, long contested, had resulted in the partial use of the *pain* by the defendants for their own purposes. The rights of the respondents in the *tal* required the protection that had been given to them in the decree. The survey maps having been referred to in connection with the above, the object of averting inundation was also shown to enter into the question of the rights of the parties. It was, however, contended that the facts had been found in the Indian Courts without any such difference of decision as rendered them still open to question. On the application of Act IX of 1871, it was argued that the judgments of the High Court and the Sudder Munsif were correct, and *Juggessur Singh v. Nundlall Singh* (20 W. R., 283) was cited.

Mr. Woodroffe in reply.

Their Lordships' Judgment was delivered by

**Sir M. E. Smith.**—This was a suit brought by Maharaja Ramkissen Singh Bahadur to establish an asserted right to a *pain* or artificial water-course, and also to a *tal*, or reservoir, and the water flowing from them through another estate to his own, and to obtain the removal of certain obstructions in the *pain*. The Maharanee, the present appellant, is his widow. Several questions arising in the suit have been finally disposed of in the Courts below, leaving for the decision of their Lordships the main question, which arose on the special appeal before the High Court, as to the effect of the Statute of Limitations upon two of the obstructions complained of.

The facts necessary to raise this question may be shortly stated: The Maharaja and his ancestor were the owners of Mehal Sunaut Parwariya, in the district of Gya, and the defendants were the owners of an estate called Mouza Mora. The system of irrigation claimed by the plaintiff embraces an artificial *pain*, which is fed by a natural river at a point to the south of the defendant's mouza. The *pain*, which runs from the south in a northerly direc-

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\*[Sec. 24 :—In the case of a continuing nuisance a fresh right to sue arises, and a fresh period of limitation begins to run, at every moment of the time during which the nuisance continues.

*Illustration.*

A diverts B's water-course at every moment of the time during which the diversion continues and B retains his right of entry, a fresh right to sue arises and a fresh period of limitation begins to run.]

tion, after traversing other estates, enters Mouza Mora, and runs through it, and afterwards through other lands [401] to the defendants' mehal. There is, branching from the main *pain*, a channel or smaller *pain*, which helps to feed the *tal* claimed by the plaintiff. The *tal* lies near the foot of some hills, and is fed partly by the water which runs through the channel connected with the *pain*, and partly by the rainfall from these hills. It appears that there is another channel in a lower part of the *tal*, which runs from it and joins the *pain* at a point near a bridge, described in the Munsif's map. It is said there were doors or sluices in the bridge by which the flow of the water had been, to some extent, regulated, but no question now arises with regard to them. The obstructions complained of were twelve in number, consisting of dams, cuts, and other modes of obstructing or diverting the water from the *pain*.

The general result of the litigation below is, that the plaintiff succeeded in establishing his right to the *pain* as an artificial water-course, and to the use of the water flowing through it, except that which flowed through the branch channel; but failed to establish his right to the water in the *tal*, except to the overflow after the defendants, as the owners of Mouza Mora, had used the water for the purpose of irrigating their own land. That, generally stated, is the result of the finding as to the rights of the plaintiff.

It was found in the Courts below that all the obstructions were unauthorised; and the plaintiff has succeeded below as to all the obstructions, except two, which are numbered No. 3 and No. 10. No. 3 is a *khund*, or channel cut in the side of the *pain* at a point below the bridge which has been spoken of. No. 10 is a *dhonga*, also below the bridge, and consists of hollow palm trees so placed as to draw off the water in the *pain* for the purpose of irrigating the defendants' land. No question arises here as to the fact that those two works are an interruption of the plaintiff's right, and he would be entitled to succeed as to them, as he has succeeded as to the other obstructions, unless he is prevented from so doing by the operation of the Statute of Limitations.

The Munsif has found that the Statute opposes a bar to his claim. The Subordinate Judge was of a different opinion, and reversed the Munsif's decree. On special appeal to the High Court, the Judges of that Court concurred with the Munsif, [402] and reversing the decree of the Subordinate Judge, affirmed the Munsif's judgment.

Before adverting to the Statute, it is necessary to see upon what facts the Courts based their decisions. It appears that the Munsif found that these obstructions had been made more than two, but less than twenty, years before the institution of the suit. The Subordinate Judge found, that the two obstructions were recently made; and it may be inferred from his disagreeing with the inferences which the Munsif drew from certain accounts which were produced, and the comments he made upon the latter's judgment in dealing with those accounts, that he meant to overrule the finding of the Munsif that the obstructions had existed for two years. If they had not existed for that period, no question on the Statute can arise. The High Court, without going into the facts, construed the judgment of the Subordinate Judge as not overruling the Munsif on the question of fact, and therefore they assume that these obstructions had existed for more than two years before the institution of the suit.

Their Lordships are disposed to dissent from the view of the High Court, and to come to the conclusion that the Subordinate Judge really did intend to overrule the finding of the Munsif upon the fact of the length of time during which these obstructions had existed; but, assuming the fact to be as the Munsif and the High Court have regarded it,—namely, that these obstructions

had existed for more than two, but for less than twenty years, they think that no provision of the Statute of Limitations interferes with the plaintiff's right to recover in respect of them.

The Limitation Act, No. IX of 1871, contains two sets of provisions, which are in their nature distinct. One relates to the limitation of suits, and prescribes the limitation of time for bringing suits after the right to sue has arisen. The other set relates to the manner of acquiring title and rights by possession and enjoyment. The latter provisions are contained in Part IV of the Act, and are introduced under the heading "Acquisition of ownership by possession." They enact a mode of acquiring ownership by possession or enjoyment. Section 27 is as follows: "Where any way or watercourse, or the use of any water or any other easement (whether affirmative or negative), has been [403] peaceably and openly enjoyed by any person claiming title thereto, as an easement and as of right, without interruption and for twenty years, the right to such access and use of light or air, way, watercourse, use of water, or other easement, shall be absolute and indefeasible." Then there is this provision, on which the judgment of the Munsif certainly proceeded, though whether the High Court proceeded on that, or on the part of the Act which relates to limitation properly so called, may be open to doubt. The clause is this: "Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested."

On the assumption of fact made by the Munsif that these obstructions had existed for more than two years before the suit, he might be right in finding that the plaintiff had not had peaceable enjoyment for twenty years ending within two years before the institution of the suit, and, therefore, that the plaintiff had acquired no title by virtue of this Statute. The object of the Statute was to make more easy the establishment of rights of this description, by allowing an enjoyment of twenty years, if exercised under the conditions prescribed by the Act, to give, without more, a title to easements. But the Statute is remedial, and is neither prohibitory nor exhaustive. A man may acquire a title under it who has no other right at all, but it does not exclude or interfere with other titles and modes of acquiring easements. Their Lordships think that, in this case, there is abundant evidence upon the facts found by the Courts for presuming the existence of a grant at some distant period of time. The result of the facts which appear in evidence, and the effect of the judgments of the Munsif and of the Subordinate Judge, are thus stated in the judgment of the High Court: "The evidence shows, and the Courts appear to have found, that the *pain* was constructed by the ancestors of the plaintiff a great many years ago, possibly fifty or sixty years—certainly more than twenty years—for the purpose of irrigation; and there is part of the evidence which indicates that such construction was accompanied with certain advantages on the part of the defendants, which compensated them for any injury or incon-[404]venience caused by the construction of the *pain*." This being an artificial *pain* constructed on the land of another man at the distant period found by the Courts, and enjoyed ever since, or at least down to the time of the obstruction complained of by the plaintiff and his ancestors, any Court which had to deal with the subject might, and indeed ought to, refer such a long enjoyment to a legal origin, and, under the circumstances which have been indicated, to presume a grant or an agreement between those who were owners of the plaintiff's mehal and the defendants' land by which the right was created. That being so, the plaintiff does not require the aid of the Statute;

and his right, therefore, is not in any degree interfered with by the provision in the 27th section, upon which the Munsif decided.

This being their Lordships' view of the case, it becomes unnecessary to consider the argument addressed to them by Mr. Woodroffe upon the effect of the clause in the same 27th section under the head 'explanation,' which defines what is to be considered an interruption. Nor is it necessary to consider the doctrine laid down in *Thomas v Flight* (10 Ad. & E., 590; s. c., on appeal, 8 Cl. and F., 231) in the Court of Exchequer Chamber, and afterwards in the House of Lords, with reference to a similar clause in the English Prescription Act.

Their Lordships have already observed that it appears to be open to doubt whether the High Court did not base its judgment on the part of the Statute which relates to limitation properly so called,—namely, on art. 31 of Part V. of the second schedule, which limits the time for bringing suits for the obstruction of watercourses to two years "from the date of the obstruction." The judgment contains this passage: "We find that the plaintiff, in order that he may obtain relief in respect of an infringement of his easement, must come into Court within two years from the time when such infringement took place." If the Judges really meant to apply the limitation of art. 31 above referred to, their decision is clearly wrong: for the obstructions which interfered with the flow of water to the plaintiff's mehal were in the nature of continuing nuisances, as to which the cause of action was renewed *de die in diem*, so long as the obstructions causing such interference were allowed to continue. [405] Indeed, s. 24 of the Statute contains express provision to that effect. For these reasons, their Lordships are of opinion that the judgment of the High Court with regard to the two obstructions in question cannot be sustained, and that the judgment of the Subordinate Judge as regards these obstructions ought to be restored.

There remains to be noticed the contention raised as to the *tal*. Mr. Woodroffe has strongly argued that the findings as to the *tal* in favour of the defendants are wrong; and he further endeavoured to show by reference to the judgments that they were not conclusive on that part of the case. Their Lordships, however, find that there are distinct judgments of the Munsif and of the Subordinate Judge to the effect, that the defendants had a proprietary right in the *tal* and to the use of the water in the *tal*, and that the plaintiff had no right to the *tal* or to the water in it, except to so much as flows out of it in a natural course to the plaintiff's *pam*. To that overflow they considered him to be entitled, but to no more. Their Lordships, therefore, have come to the conclusion that, this case being heard only on special appeal, it is not open to the appellant to impeach those findings; and that, therefore, so far as this part of the case is concerned, they must dismiss the appeal. The result is, that their Lordships will humbly recommend Her Majesty, that both the decrees of the High Court be reversed; that the decree of the Subordinate Judge be affirmed; and that the decree of the Munsiff be modified in accordance therewith.

Mr. Woodroffe desired that the language of the Munsif's decree with regard to the enjoyment of the water in the *tal* should be modified. Their Lordships, having considered what was addressed to them on that subject, and the language of the Munsif's decree, are not disposed to interfere with it. The plaintiff having claimed the whole of the water in the *tal*, they think that the Munsif had to determine upon that claim; and that, having given only a qualified enjoyment of the water to the plaintiff, it was necessary, in order to arrive

at what that qualified right was, to define the prior right of the defendants. He has done this in language which their Lordships, perhaps, would not have used themselves, but which is sufficiently intelligible. [406] The Munsif having gone to the spot, and having taken apparently great pains with his decision, their Lordships are not disposed to alter or interfere with this part of his decree. Substantially it amounts to a declaration that the defendants are entitled to use the water of the *tal* for the irrigation of their estate. If this should be wastefully or improperly done with reference to the right declared to belong to them, it may be the subject of a future inquiry. Their Lordships will, therefore, humbly advise Her Majesty to the effect above stated.

Their Lordships have considered the question of costs. The plaintiff having failed as to part of his appeal, they will follow the course which the High Court took, and give no costs to either party.

*Appeal allowed,*

Solicitors for the Appellant: Messrs. *Henderson & Co.*

Solicitor for the Respondents: Mr. *T. L. Wilson.*

#### NOTES.

#### [1. SECTION 26 OF THE LIMITATION ACT, 1877, IS REMEDIAL AND NOT PROHIBITORY OR EXHAUSTIVE—

- (a) This view has been applied to uphold easements, etc., otherwise than under the statute.—(1882) 5 Mad 226, 253, (1881) 6 Cal 812, 7 Cal. 132 (boat way), (1882) 8 Cal. 956 (easement of necessity), (1903) 31 Cal. 503 (pasturage) *P. C.* 8 C.W.N. 425, (1908) 35 Cal. 851 (right to dam river), (1883) 10 Cal. 214, (1891) 16 Bom. 592, (1881) 6 Bom. 20, (1909) 2 I C 410.
- (b) In (1882) 5 Mad 253 a twelve years' user was said to be sufficient. See as to the presumption of legal origin, *Mitra on Limitation*, Vol. I (1911), pp. 552 *et. seq.*
- (c) When a right is claimed as *unmemorial user*, then also it is necessary for the plaintiff to prove a user as of right as an *easement*, as distinguished from a *right of ownership*:—(1891) 16 Bom. 592.
- (d) A right by custom may be established; if they rely on custom, they must prove that it was ancient, continuous, peaceable, reasonable, certain, compulsory, and consistent with other customs regarding the right to irrigate from the river Banka.—(1908) 35 Cal. 851.
- (e) *Easements of necessity* were sought to be established in (1882) 8 Cal 956, and in (1893) 15 All. 270 an easement of convenience rather than strict necessity.
- (f) In (1881) 6 Cal. 812, it is pointed out what *the issues should* be, having regard to the law laid down in this case.
- (g) In (1881) 7 Cal. 132, proof of *actual user* was held not necessary, notwithstanding illustration (b) to sec. 26 of the Limitation Act, 1877. (It may be noted, that the Limitation Act of 1908 has dropped this illustration, on account of the remarks in 7 Cal. 132.)

#### CONTINUING INJURY—

The judgment of BUCKLEY J, in *Earl of Harrington v. Derby Corporation* (1905) 1 Ch. is very instructive on the subject.

- (a) Continuance of damage consequent upon a single act.—*Crumbie v. Wallsend Local Board* (1891) 1 Q.B. 503 (continuing subsidence from completed excavation); *Fairbrother v. Bury Rural Sanitary Authority* (1889) 37 (Eng.) W.R. 544.

- (b) Repeated acts with recurring damage:—*Wilkes v. Hungerford Market Co.* (1835) 2 Bing. N.C. 281 (obstruction to a road); (1892) 1 C.W.N. 96; (1880) 6 Cal. 394; 6 Bom. 20; (1904) 28 Mad. 72 (obstruction to water-course, etc.) Pollution of a river:—*Harrington v. Corporation of Derby* (1905) 1 Ch. 205; violation of ferry:—(1891) 18 Cal. 652; trespass (1883) 6 Mad. 176; (1892) P.R. 8 (harbouring a runaway wife).
- (c) See (1902) 26 Mad. 410 at 416 as to what the criterion is—a continuing *right* or a continuing *wrong*.]

[6 Cal. 406]

## APPELLATE CIVIL.

*The 30th August, 1880.*

PRESENT :

MR. JUSTICE PONTIFEX AND MR. JUSTICE McDONELL.

Run Bahadoor Singh.....Plaintiffs

*versus*

Lucho Kooer.....Defendant.\*

*Res judicata*—Want of Jurisdiction as to Valuation of Suit—Subsequent Suit between the same Parties—Intervenors—Competent Court—Rent Suits.

A judgment of a Court not competent to try the case in which the judgment is pleaded as *res judicata*, must, nevertheless, be held to be the judgment of a Court of competent jurisdiction within the rule as laid down in the maxim *nemo debet bis vexari pro eadem causa*, and s. 13 of Act X of 1877; more especially where the first suit is tried, decided, and affirmed on regular appeal by a Subordinate Judge, who would have been competent to decide the suit (had it been brought before him) in which the judgment was pleaded.

The rule of *res judicata* ought to be held to apply to judgments in rent suits, at least until interventions in such suits are authoritatively prohibited.

Costs not allowed where the plea of *res judicata* was not raised until after all the evidence had been taken.

[407] IN this case, the plaintiff stated that he and his brother Murlidhur were, prior and up to the date of the latter's decease, members of a joint undivided Mitakshara family; and that he, on the death of his brother, became his heir. The defendant, who was the widow of Murlidhur, contended that, at the death of her husband, the brothers were separate, and therefore that she was entitled to succeed to her husband. The defendant had taken out a certificate under Act XXVII of 1860 to collect the debts of her husband, and had dispossessed the plaintiff from certain properties, and the plaintiff therefore brought this suit for possession. The circumstances of the case were as follows:—

In 1268, one Bishen Singh was the head of the family, his two sons being the plaintiffs and his younger brother Murlidhur. Bishen Singh was possessed of self-acquired property only, consisting of three *milkiat* mouzas and a *mokurari*

\* Appeal from Original Decree, No. 144 of 1878, against the decree of Baboo Matadin Roy Bahadoor, Subordinate Judge of Gya, dated the 21st January 1878.



held under the Tikari Raj of part of another mouza taken benami in the name<sup>s</sup> of Mutra Rawut and Dukhoor Rawut. This mokurari tenure was sold and purchased by a representative of the Tikari Raj some time between 1268 (1861) and 1275 (1868); a subsequent mokurari of the same land was regranted by the representative of the Tikari Raj in 1275 benami in the names of Banwari Rawut and Kewal Rawut, and from a recital in this mokurari it appeared, that the prior mokurari was sold, not for arrears of rent, but in execution of a decree in a suit against Bishen Singh. At some time between 1268 and 1270 (1863), Bishen Singh disappeared from his house, and it was set up for the first time in this suit, that the cause of his disappearance was, that he became a fakir; other totally different reasons had been put forward in prior proceedings during the life of Murlidhur. The plaintiff contended that these mokuraris were taken benami for Bishen Singh, whilst the defendant contended that the mokurari deeds were intended to be given, and were benami for the brothers separately.

After all the evidence had been taken, the defendants set up for the first time the plea of *res judicata*, which, she stated, was made out under the following circumstances, *viz.*:—some time after Murlidhur's death, *viz.*, in July 1874, and contemporaneously with the defendant's application for a certificate to [408] collect debts as heir of Murlidhur, she instituted a suit against one Goneshi Roy, a tenant, for the sum of Rs. 53-6-10, due as rent in respect of eight annas of his holding, on the allegation that the food and transactions of Murlidhur were separate. Into that suit Run Bahadoor intervened by petition of objection dated the 13th of August 1874, asserting that Murlidhur was, till his death, joint with him, and asking to be made a defendant. Accordingly an order was passed that he should be made a defendant; and, on the 4th of September 1874, he filed his written statement as a defendant in the rent-suit.

In that written statement he insisted that Murlidhur died in a state of commensality; that the Mouza, of which the rent was claimed, and several other villages obtained by Bishen Singh, the father, were held in the fictitious names of their servants; that no division and separation of family were ever made in any way; and that he, Run Bahadoor, since Murlidhur's death, had been in possession and occupation of the whole of the property left by Murlidhur. On the other hand, the defendant, on the 14th September 1879, filed a petition in a certificate case, in which she alleged an absolute separation in 1270.

The rent-suit was heard before a Munsif, who, in his judgment dated the 6th of January 1875, after stating Run Bahadoor's allegation that he and Murlidhur were joint, and that Murlidhur died during the community of interest, raised the second issue as follows:—

"Whether, before this, the plaintiff or her husband realized the rent of eight annas separately; or whether the plaintiff's husband has been receiving the rent in his lifetime jointly with Run Bahadoor, and since his death Run Bahadoor alone received the rent of sixteen annas?"

Upon that issue the Munsif proceeded to adjudicate on the title to the entire mokurari, under which was held the mouza, for the rent of which the suit was instituted; and his conclusion was, that the brothers were in possession separately, and that "the two brothers were separate," arriving at this conclusion on almost precisely the same documentary evidence as was filed in the present suit, and to a great extent on the oral [409] evidence of the same witnesses as were examined in the present suit.

On the 28th of August 1875, this judgment was affirmed on appeal by the Subordinate Judge, holding that Bishen Singh, the father, "took the mokurari in the names of Banwari Rawut and Kewal Rawut in equal halves;" a fact which the Subordinate Judge held sufficiently indicated "that a moiety was obtained for the benefit of his son Run Bahadoor, and a moiety for that of his other son Murlidhur;" and that "the evidence of Moharaneer Inderjeet Koer, Moharajah Ramkishen Singh, and other witnesses examined, satisfactorily proved that Run Bahadoor and Murlidhur were till (at) the death of the latter separate, each carrying on his affairs, and paying revenue of his share of the mouza apart from the other."

The Subordinate Judge in the present suit found that a separation had been come to between the brothers prior to the death of Murlidhur, and that the defendant had continued in possession of the properties left by her husband; he, therefore, overruling the plea of *res judicata*, dismissed the plaintiff's case with costs.

The plaintiff appealed to the High Court, and the defendant put in a cross-appeal on the question of *res judicata*.

The Advocate-General (Mr. Paul, with him Mr. C. Gregory, Baboo Mohesh Chunder Chowdhry, Baboo Srish Chunder Chowdhry, and Baboo Ram Chunder Mittra) for the appellant.—As to the question of *res judicata*, the respondent will, no doubt, rely on *Krishna Behari Roy v. Brojeswari Chowdrance* (I. R., 2 I. A., 283; s. c., I. L. R., 1 Cal., 144), but I contend that case does not apply, as the property claimed in our case is not identical with that in the rent-suit. The rent-suit related only to one mouza held under one of the mokuraris. In the rent-suit the present plaintiff came in as an intervenor, and that suit is not an estoppel to the present suit, see *Chunder Coomar Mundul v. Nunnee Khanum* (11 B. L. R., 434, s. c., 19 W. R., 322), which approves of the case of *Aradhun Dey v. Golam Hossein* (8 W. R., 487). The Munsif was competent to try the rent-case, as that was [410] only of the value of Rs. 1,000; but he would not be competent to try the present suit for possession of the mouza in respect of which the rent had been claimed, and therefore his judgment in the rent-suit ought not to have the effect of *res judicata* in the present case, which he is not competent to try—*Mussamut Edun v. Mussamut Bechun* (8 W. R., 175, s. c., 2 Ind. Jur., N. S., 265). [PONTIFEX, J.—*Flitters v. Alfrey* (L. R., 10 C. P., 29) shows that a judgment of a Court not competent to try the case in which the judgment is pleaded as *res judicata*, must, nevertheless, be held to be the judgment of a Court of competent jurisdiction. On the question of an intervenor, in the case of *Collner v. Walters* (L. R., 17 Eq., 252), the person who pleaded *res judicata* was not a necessary party to the suit, but as he raised the question by putting in his answer, he was held to be bound.]

Baboo Mohesh Chunder Chowdhry on the same side.—The suit is not *res judicata*, and even allowing that it is, can it be *res judicata* further than the rent-case was decided? The subject-matter of the first suit was the rent of particular land, whilst the subject-matter of the second suit is as to who is the proprietor of the properties in suit. There may be a right to recover rent wholly independent of proprietorship. [PONTIFEX, J.—There is no such thing as an attornment by an occupancy-ryot in this country; the person who has the right to rent is the proprietor.] The receipt of rent would be immaterial if the Court was trying the right of the intervenor in a rent-suit—*Choolse Lall v. Kokil Singh* (19 W. R., 248). *Gobind Chunder Koondoo v. Taruck Chunder Bose* (I. L. R., 3 Cal., 145) is not so strongly against us; in order to affect us,

it must be shown that a distinct issue as to title was raised and decided. [PONTIFEX, J.—I am told by the Chief Justice that the case is not correctly stated; there were several other jotes besides the one set out.] As far as my argument is concerned, it is immaterial whether there were other jotes. I say a distinct issue to title must be raised; the case itself is distinct from this, but might have been in our way if the Court had raised the issue and decided it. In the case of *Tekant Doorga Persad Singh v. [411] Tekant Doorga Konwar* (L. R., 5 I. A., 149; s.c., 1 L. R., 4 Cal., 190), the plaintiff raised an issue, and the Court held that the defendant was bound to disclose his whole defence. That case shows, that although an issue may be tried, and that issue may for certain purposes be conclusive, yet, for other purposes, the same issue may be raised in another suit. The case of *Booa Russoolee v. The Nawab Nazim of Bengal* (11 W. R., 382) shows, that although an issue may be raised for one purpose, it is not conclusive for all purposes. The Munsif was not competent to try the case, because the value of the property exceeded the limits of the value of cases triable by him—*Shankh Muzhur Ali v. Mussanul Basoo* (8 W. R. 47).

The *Standing Counsel* (Mr. J. D. Bell, with him Baboo Kally Mohun Doss and Moonshee Mahomed Yusoof) for the respondent.—The issue in the rent-suit as regards separation was intended to be raised. [PONTIFEX, J.—Supposing the issue to have been raised and determined, was the Court competent to decide it?] If I can satisfy the Court that all the property was held under one title, then the title of one and all the properties must stand or fall by the title of one of them. Then *res judicata* would apply. The mokurari pottas may be considered to be the title-deeds of the properties of each of the parties. According to the case of *Krishna Behari Roy v. Brojeswar Chowdranee* (L. R., 2 I. A., 283; s.c., 1 L. R., 1 Cal., 144) the present case is barred. [PONTIFEX, J.—In a question of adoption, where there is a decision as to separation, the issue must apply to the whole of the land, but in a question of partition it need not.] The case of *Gobind Chunder Koonloo v. Taruck Chunder Bose* (I. L. R., 3 Cal., 145) decides that a suit which reopens an issue decided on the intervention of a third party in a former suit, is barred; and the case of *Bemola Soondury Chowdrain v. Panchanun Chowdhry* (I.L.R., 3 Cal. 705) followed that decision. The case of *Pran Nath Sandyal v. Ram Coommar Sandyal* (2. C.L.R., 33) decides, that an intervenor is bound where the plea of *res judicata* had been waived in the Court below. [412] and it further decides that the Munsif's decision was conclusive, although outside his pecuniary jurisdiction.

The *Advocate-General* in reply.

The **Judgment** of the Court (PONTIFEX and McDONELL, JJ.) was delivered by

**Pontifex, J.** (who, after going into the merits of the case at some length, and stating the facts material to the question of *res judicata*, continued).—

The question we have now to determine is, whether the prior decisions affect the present suit and the title set up by the plaintiff as *res judicata*. It is to be observed that only a special appeal could be preferred to the High Court against the judgment of the Subordinate Judge (though, as a matter of fact, no special appeal was preferred), and that this rent-suit related to only one mouza, or part of a mouza, held under one only of the mokuraris.

But, on the other hand, the two mokuraris, though separate, were exactly similar titles; and it has never been part of the plaintiff's case, that different parts of Bishen Singh's property are governed by different circumstances.

Indeed the evidence in the rent-suit applies generally to the commensality or separation of the plaintiff and Murlidhur; and that was the issue which the plaintiff Run Bahadoor raised by his written statement in the rent-suit.

With respect to this, the judgment of Lord Ellenborough in *Outram v. Morewood* (3 East, 346), seems significant. Recovery in any one "suit upon issue joined on matter of title is conclusive on the subject of such title; and a finding upon title in trespass not only operates as a bar to the future recovery of damages for a trespass founded on the same injury, but also operates by way of estoppel to any action for an injury to the same supposed right of possession."

It is necessary, however, for us to examine a few of the Indian authorities upon this subject.

In a case referred to Sir Barnes Peacock, in consequence of a division of opinion in a Bench of this Court, and reported at [413] p. 175 of the Civil Rulings of the eighth volume of the Weekly Reporter (unreported elsewhere) \* it was held, that the Collector's Court, in a case under the Rent Law of 1859, and the Civil Court were not concurrent Courts; and therefore that a decision by the Collector was clearly not *res judicata* to effect the Civil Court. But while establishing this plain proposition, Sir BARNES PEACOCK, in his judgment, entered into certain ingenious, but extra-judicial, observations with respect to the doctrine of *res judicata* as applicable or not to Indian Courts. At page 178 he says:—"It is very important also to see what would be the result if the question of concurrency of jurisdiction were put out of question. It appears to me to be of much more importance in this country than it would be in England, that, in order to render a judgment between the same parties upon the same point in one Court conclusive in another Court, the two Courts must be Courts of concurrent jurisdiction. If it were not so, the whole procedure as regards appeals might be entirely changed, meaning, I presume, that different procedure as to appeals might apply to the two cases."

And again (p. 179) he says: "A bond of a very large amount might be set up as an answer in a suit in the Munsif's Court or in a Court of Small Causes for a very small amount; but it never could be held that a decision in those Courts as to the validity or invalidity of the bond as a defence to the suit would be conclusive upon the (District) Judge in a suit brought upon the bond, and upon the High Court in a regular appeal from a decree in that suit." And again: "It is quite clear that, in order to make the decision of one Court final and conclusive in another Court, it must be a decision of a Court which would have had jurisdiction over the matter in the subsequent suit in which the first decision is given in evidence as conclusive." And again (p. 180): "I should be disposed to say that the English rule of estoppel ought not to be introduced into the Courts of this country, if the question should ever arise before me. I am at present disposed to think that such a judgment is only *prima facie* evidence, and not conclusive."

[414] The last opinion quoted has been expressly overruled by the Privy Council. The other observations, however, raised a serious question; they have not been expressly, but it seems to us they have been impliedly, overruled by the Privy Council; and they also seem opposed to other decisions.

Now a suit in the Munsif's Court must be under Rs. 1,000 in value; from his decision there is a regular appeal on fact and law to the District Judge or Subordinate Judge, from whom there is only a special appeal on points of law to the High Court; and no appeal at all, except under very special

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\* The case *Mussamat Edun v. Mussamat Bechan* is also reported in 2 Ind. Jur. N. S., 265.

circumstances, to the Privy Council. If, then, the advantages or disadvantages with respect to appeal are to govern the question, whether a judgment can be relied on as *res judicata*, it would seem to follow that judgments in cases under Rs. 10,000 and, indeed (see s. 596 of the present Procedure Code), in cases over Rs. 10,000, where concurrent judgments have been given by the original Court and first Court of appeal, and no substantial question of law arises, would, in all cases of Rs. 10,000 and upwards, be incapable of being pleaded as *res judicata*, because in such last-mentioned cases it would be impossible to predicate that there might not be an appeal to the Privy Council. This, to say the least, would be an extremely shifty and inconvenient principle to act upon; and, as I shall presently show, has been disregarded by the Privy Council.

But the Advocate-General has argued, and argued with great force, that the judgment of a Court ought not to have the effect of *res judicata* in a case which that Court was not itself competent to try; being in fact the proposition contained in the third of the above extracts from Sir BARNES PEACOCK'S judgment, which seems to require identity, rather than concurrency, of jurisdiction. As for example, in the present case, the Munsif having a jurisdiction to try cases only up to the value of Rs. 1,000, was competent to try the rent-suit against Guneshi Roy, but was not competent to try the present suit; nay, would not have been competent to try a suit for possession of the mouza in respect of which rent was claimed. But this contention would in effect make the doctrine of *res judicata* inapplicable to suits tried by Munsifs except in Munsifs' Court—a result which might [418] possibly be advantageous, but for which we find no authority. The 2nd section of Act VIII of 1859 speaks of a Court of "competent jurisdiction." Did it mean competent to try the question of title, or competent to try the second suit? The words are "competent to try the cause of action."

The judgment of the Privy Council—*Khugowlee Sing v. Hossem Bux Khan* (7 B. L. R., 673)—refused to consider a Collector's decision *res judicata*, because it was not that of a "Court competent to adjudicate on a question of title."

It would seem to be refining too much to confine the doctrine of *res judicata* in India to exactly parallel Courts, to hold that a Munsif's judgment on a question of title should only be *res judicata* in a Munsif's Court. One result would be, that there would constantly be a preliminary wrangle as to the valuation of the suit. And it does not seem a satisfactory principle that a Munsif's judgment should be *res judicata*, and an authoritative decision on title in a suit valued at Rs. 999, and not so in a suit on the same title valued at Rs. 1,001.

More especially would it be a hardship in a case like the present (which is only an example of the general practice in India), where the plaintiff obtruded himself into the rent-suit, raised the very question he raises in this Court, and put the defendant, who was plaintiff in that suit, to the same expence and trouble as if the title to the entire property depended on the result.

In the case of *Soorjomonee Dabee v. Suddanund Mahapatr* (12 B. L. R. 304), the Judicial Committee expressed their opinion that the 2nd section of Act VIII of 1859 "would by no means prevent the operation of the general law relating to *res judicata* founded on the principle, *nemo debet bis vexari pro eadem causa*."

This maxim was the foundation of the decision in *Collier v. Walters* (L. R. 17 Eq., 252), and the case of *Flitters v. Allfrey* (L. R., 10 C. P., 29) seems to show that the judgment of a Court not competent to try the case in which the judgment is pleaded as *res judicata* must, nevertheless, be held to be

the judgment of a Court of competent [416] jurisdiction within the rule. For in that case the defendant having complied with the provisions of s. 39 of 19 and 20 Vict., c. 108, the County Court thereupon became incompetent to try the case, though otherwise it might, in the absence of the defendant's dissent, have tried it; and the present case especially falls within the wholesome principle expressed in the judgment of that case (p. 42): "It would in our judgment be against principle and authority, if a party, having tried an experiment in a County Court, could, when judgment was against him, proceed again in another Court, not by way of appeal, but by merely varying the form of procedure, or forcing the opposite party to proceed for redress in respect of the same question as had been previously litigated, again harass his antagonists for the same cause, and take his chance of success in another Court, when he has previously failed in a Court of competent jurisdiction."

The 13th section of Act X of 1877 seems to support this view; for it enacts, that no Court shall try any "issue, &c." (reads s. 13). And this section being in a Procedure Act, must, we think, be taken to be declaratory of the existing law. We think it clear that the issue of separation was "directly and substantially" in issue in the rent-suit, and though the Munsif was not competent to try the present suit, we think he was competent to try, and at the instance of the present plaintiff did try, in the rent-suit, the issue on which the present suit depends.

Moreover, if the question of advantage or disadvantage in respect to ultimate appeals is to be disregarded, as we think the Privy Council case hereafter referred to shows, then it is important to remember that the rent-suit was also tried and decided on regular appeal, both as to law and fact, by the Subordinate Judge, whose Court was a Court competent to try the present suit.

We do not refer to the Full Bench decision in the case of *Gobind Chunder Koonloo v. Taruck Chunder Bose* (I. L. R., 3 Cal., 145), because there, as we have been informed, both decisions were in the Munsif's Court, otherwise that case would be conclusive on the question.

[417] There are, however, two decisions of this Court in which, being cases instituted in the Court of the Subordinate Judge, judgments of the Munsif's Court were regarded as having the effect of *res judicata*. These cases are: *Benola Soondury Chowdrain v. Punchanun Chowdhry* (I. L. R., 3 Cal., 705) and *Nand Kishore Singh v. Huree Pershad Mundul* (13 W. R., 64). It is true, as pointed out by Mr. Justice WHITE in the case of *Toponadhee Dhirji Gu Gosain v. Sreeputty Sahanee* (I. L. R., 5 Cal., 832) that in both these cases the Judges were prepared to arrive at the same conclusion on other grounds. But in effect the question seems to have been substantially settled by the Judicial Committee in the case of *Krishna Behari Roy v. Brojeswori Chowdranee* (L. R., 2 I. A., 283; s.c., I. L. R., 1 Cal., 144).

In one sense, no doubt, the two Courts in that case had identical jurisdiction, for any suit which the District Judge was competent to try, the Principal Sudder Ameen (now called the Subordinate Judge) was also competent to try, if the District Judge appropriated the case to his Court for hearing. But practically (and this in effect meets the objections of Sir BARNES PEACOCK as to the advantages or disadvantages with respect to appeals) and as the matter actually stood, the jurisdictions were not identical; for when a Principal Sudder Ameen tried cases valued at over Rs. 5,000, the appeal lay direct to the High Court both on fact and law; but when he tried cases under Rs. 5,000, the appeal lay on law and fact to the District Judge, from whom only a special appeal on point of law lay to the High Court. The fact

that the District Judge might have tried the case as an original case, does not prevent the Court of the Principal Sudder Ameen being a subordinate Court to that of the District Judge in cases under Rs. 5,000, heard by the Principal Sudder Ameen.

In the case before the Privy Council, the judgment of the Principal Sudder Ameen in the first suit, as the suit was valued under Rs. 5,000, went on regular appeal to the District Judge, and from him, only on special appeal, to the High Court. The judgment of the Principal Sudder Ameen having been affirmed [418] by both Courts, was held to have the effect of *res judicata* upon the second suit heard primarily by the District Judge, which went up to the High Court on regular appeal, and thence to the Privy Council.

We think that the rule of *res judicata* ought to be held to apply to judgments in rent-suits, at least until interventions in such suits are authoritatively prohibited; otherwise all the inconvenience and hardships which the rule is intended to obviate must continue to exist.

Upon the whole, therefore, though with regret, we feel we are bound to hold that the judgment in the rent-suit on the substantial issue of separation must be regarded as *res judicata* governing the present suit, and we must, therefore, affirm the decision of the Court below, though we differ from its judgment both on the merits and on the question of estoppel, but as the plea of *res judicata* was not raised until after all the evidence had been taken and great expense incurred, we think each party should bear his and her own costs both in this Court and in the Court below, and we direct accordingly. We dismiss the appeal of the plaintiff, and allow the cross-appeal of the defendant.

*Appeal dismissed and cross-appeal allowed.*

#### NOTES.

[Reversed in appeal by Privy Council in *Ran Bahadur Singh v. Lucho Koer* (1884) 11 Cal. 301. Referred to in *Bhua Bai v. Adasing* (1884) 9 Bom. 75 for the position that section 13 C. P. C. (1882) should be construed reasonably.]

#### [6 Cal. 418]

#### SMALL CAUSE COURT REFERENCE.

*The 1st September, 1880.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE  
PONTIFEX.

Freck

*versus*

Harley.

*Costs—Abatement or dismissal of suit for want of Jurisdiction—Presidency  
Small Cause Courts Act (IX of 1850), ss. 42, 52.*

Where a plan to the jurisdiction of the Small Cause Courts established under Act IX of 1850 is successful, the judgment ought to be one dismissing the suit. But whatever the

\* Case stated for the opinion of the High Court under the provisions of Act IX of 1850, by H. Millett, Esq., and K. L. Banerjee, Esq., Judges of the Calcutta Court of Small Causes.

form, it should be stated that the suit abates or is dismissed "for want of jurisdiction." In such a case the Court has power to award costs to the defendant.

THIS was a case referred from the Calcutta Court of Small Causes. The reference stated as follows:—

"This suit was instituted on the 2nd April 1880, and heard by [419] the First Judge in the first instance on the 24th May. The first Judge was then of opinion, that the suit ought to be dismissed on a point of law and also on a question of jurisdiction, and he accordingly dismissed the suit, and certified it as a fit case for counsel and attorney, awarding to counsel two gold mohurs and to attorney one gold mohur.

"Against this decision an application for a new trial was made on the following grounds:—(i) that the Court, having no jurisdiction in the case, was wrong in making an order for costs; (ii) that the Court should have merely noted the abatement of the suit on the record, and had no jurisdiction to dismiss the suit.

"This application was allowed on the 26th June 1880. The only question now raised before us is, whether the original order as to costs was good or not, plaintiff's pleader admitting that the Court has no jurisdiction.

"It is necessary to state that, up to the present time, in questions connected with jurisdiction, this Court has always followed the decision in *Lawford v. Partridge* (1 H. & N., 621). The Court of Exchequer in that case laid down the rule, that where a County Court has no jurisdiction to hear a case, it has no power to award costs; and that the proper order should be that the suit should abate. It based its decision on ss. 79 and 88 of 9 and 10 Vict., c. 95 (the County Courts' Act), which are identical with ss. 42\* and 52† of Act IX of 1850, the Act which governs this Court. The former of these sections gives power to the Court to award costs to the defendant when he shall not admit the demand; and the latter gives the Court power to apportion the costs of any action or proceeding before it, not therein otherwise provided for, in such manner as it shall think fit. The same conclusion as in *Lawford v. Partridge* (1 H. & N., 621) was arrived at in *Peacock v. The Queen* (4 C.B., N.S., 264, at p. 268). The question again occurring in *Diss Urban Sanitary Authority v. Aldrich* (L.R., 2 Q.B.D., 285, note), the contrary opinion was arrived at, although *Peacock v. The Queen* (4 C.B., N.S., 264 at p. 268) was cited as an authority. The Court in the last instance seems to have followed *McIntosh v. The Lord Advocate* (L.R., 2 App. Cas., 41, at p. 78).

\* [Sec. 42:—If, upon the day of the return of any summons, or at any continuation or adjournment of the said Court, or of the cause for which the said summons shall have been issued, the plaintiff shall not appear, the cause shall be struck out, and if he shall appear, but shall not make proof of his demand to the satisfaction of the Court, the Judges may non-suit the plaintiff or give judgment for the defendant; and in either case, where the defendant shall appear and shall not admit the demand, may award to the defendant, by way of costs and satisfaction for his trouble and attendance, such sum as they, in their discretion, shall think fit and such sum shall be recoverable from the plaintiff by such ways and means as any debt or damage ordered to be paid by the same Court can be recovered: provided always that if the plaintiff shall not appear when called upon and the defendant or some one duly authorized on his behalf, shall appear, and admit the cause of action to the full amount claimed, and pay the fees payable in the first instance by the plaintiff, the Court if it shall think fit, may proceed to give judgment, as if the plaintiff had appeared.]

† [Sec. 52:—All the costs of any action or proceeding in the Court not herein or otherwise provided for, shall be paid by or apportioned between the parties, in such manner as the Judges shall think fit; and, in default of any special direction, shall abide the event of the action, and execution may issue for the recovery of any such costs, in like manner as for any debt adjudged in the said Court.]



[420] "It was again raised in *The Great Northern Committee v. Inett* (L. R., 2, Q. B. D., 284) in which previous cases, except *Lawford v. Partridge* (1 H. & N., 261) were referred to; and COCKBURN, C. J., gives his opinion thus: The respondent is entitled to avail himself of the objection, and he is obliged to come here and inform us of the absence of jurisdiction, for if he did not, the objection would not appear and judgment would be given against him. As he is obliged to come here by the act of the appellant, he is entitled to his costs. It is clear that, to some extent, there is jurisdiction over the subject, for the Court has jurisdiction to hear and determine whether the appeal lie or not. I am of opinion that, under these circumstances, there is jurisdiction to give costs.' Such reasoning as has been very ably put by Mr. Allen, the defendant's counsel, commends itself to the intelligence."

The following decisions, under the general power to award costs given by s. 187\* of Act VIII of 1859, were also referred to as bearing on the question:—*Gopal Chunder Bose v. Dhurun Dhur Roy* (Marsh. Rep., 311), *Maharajah Jugesshur Bunwaree Gobind v. Seet Chunder Sircar* (Marsh. Rep., 375), *Punchanun Ghose v. Brojendro Narain Deb* [1 Ind. Jur. (N. S.), 38.], in all of which it was held that, where a suit or an appeal is dismissed for want of jurisdiction, the Court has power to award costs to the successful party.

The learned Judges were of opinion that the weight of the authorities was in favour of the Court having power to award costs, whether it has jurisdiction to hear the matter or not, and therefore gave judgment that the suit should abate, and that the plaintiff should pay costs to the defendant, contingent on the opinion of the High Court on the following questions:—

- (i) Whether the judgment, where the Court has no jurisdiction, should be, that the suit abates or that it be dismissed?
- (ii) Whether, where the Court has no jurisdiction, it has power to award costs to the defendants?

The **Opinion** of the High Court was as follows:—

**Garth, C. J.**—It appears to us that the real answer to this suit was rather a matter of law than of jurisdiction, but we [421] think that the questions referred to should be answered as follows:—

(i) A plea to the jurisdiction is a plea in bar, and, therefore, the proper judgment would be, that the suit be dismissed, but whatever may be the form used, it should be stated that the suit abates or is dismissed "for want of jurisdiction," otherwise the plaintiff might be prejudiced when he brings his suit in another Court.

(ii) We think that the Court has power in such a case to award costs to the defendant. The question of jurisdiction is one which the Court is bound to try, and as the plaintiff invites the trial by bringing his suit, it is only right that he should pay costs if he turns out to be wrong. It appears to us that the cases of *Lawford v. Partridge* (1 H. & N., 621) and *Peacock v. The Queen* (4 C. B., N. S., 264, at p. 278) have been virtually overruled by the case of *McIntosh v. The Lord Advocate* (L. R., 2 App. Cas., 41, at p. 78)..

\*[Sec. 187:—The judgment shall in all cases direct by whom the costs of each party are to be paid, whether by himself or by another party, and whether in whole or in what part or proportion, and the court shall have full power to award and apportion costs in any manner it may deem proper.]

Judgment to direct by whom costs are to be paid.

[6 Cal. 421]

APPELLATE CIVIL.

The 9th September, 1880.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MITTER.

Shoshi Shikhuressur Roy, a Ward  
of Court, by his Mother.....Defendant

versus

Tarokessur Roy.....Plaintiff.\*

*Hindu Law—Will—Construction of Will—Restriction of Gift to Male  
Descendants void—How such a Gift should be construed.*

A gift by will upon condition that the subject-matter should descend to heirs male only, is void by Hindu law.

By his will a Hindu testator made a gift of certain immoveable property to his nephews and their descendants in the male line with a condition that, "if any of them die childless, then his share shall devolve on the survivors of my nephews and their male descendants, and not on their other heirs."

Held, that the gift was bad in so far as it restricted the subject-matter of the gift to male descendants, but that the language used relating to the gift over to the testator's surviving nephew or nephews, was not inconsistent with the intention of the testator that the whole augmented share should pass to the plaintiff, the sole surviving nephew; but that, having regard to the doctrine frequently acted upon by the Courts of India, he was only entitled to a life-estate therein.

[422] THIS was a suit brought to recover possession of an eight anna share in two mouzas, together with mesne profits since the period of dispossession.

The plaintiff stated that Raja Chunder Shikhuressur Roy, his uncle, by a will dated 2nd Srabun 1272 (16th May 1865), bequeathed under the 8th clause, an eight-anna share in three estates, to Kumar Tarokessur Roy (the plaintiff), Kumar Jugodissur Roy, and Kumar Sibessur Roy, his brothers, providing "that they should possess the same in equal shares, having no right to alienate the same by gift or sale, but that they, their sons, grandsons, and their descendants, in the male line should enjoy the same if any of them die childless, which God forbid, then his share shall devolve on the survivors of my nephews and their male descendants, and not on their other heirs," that, on the death of the testator in 1273 (1866), his widow made over possession of the said properties to the father of the plaintiff, as guardian of the plaintiff and his two brothers, but subsequently again took possession of the properties and made them over to the Court of Wards on behalf of her minor son (the defendant); and that both the plaintiff's brothers died unmarried.

The widow of the testator, as representative of her minor son, contended, that the will had been tampered with; that the alleged gift to the nephews of the testator was contrary to Hindu law; and that, according to the will, the plaintiff and his brothers took only a life-interest in the properties, the gift beyond the life-interest being void; and that the two brothers of the plaintiff having died, their shares reverted to the testator's lawful heirs.

The Subordinate Judge held, that the will had not been tampered with, but that the testator had intended to tie up his estates in the direct male line, contrary to the Hindu law; but further added, that as the plaintiff survived

\* Appeal from Original Decree, No. 205 of 1878, against the decree of Baboo Jodu Nath Mullick, First Subordinate Judge of Rajshahye, dated the 2nd May 1878.

his other brothers, that part of the will which provided that, in the event of any one of the nephews dying without issue, his share was to go over to the surviving nephew, was capable of taking effect and therefore the plaintiff was entitled to a decree for possession of the eight-anna share of the estates with wasilat.

The defendant appealed to the High Court.

[423] The *Advocate-General* (Mr. G. C. Paul, with him Baboo Annoda Pershad Bannerjee) for the appellant.—I contend that the will is a forgery, the original will having been altered by interpolating leaves, the will which the testator made had his seal at the top and end of each page. Clause 8 is entirely inconsistent with the schedule, and this discrepancy has not been mentioned by the Judge. The testator has, by the words of the will, attempted to make a species of estate-tail, which he cannot do. see *The Tagore case* (9 B. L. R., 377, at p. 406). Can the donee, therefore, have more than an estate for life? If the estate which the testator intended to give was one which the law prohibits, effect cannot be given to his intention; and here it is clear, he endeavoured to give more than a life-estate: see *Bhoobun Mohini Debia v. Hurrish Chunder Chowdhry* (I. L. R., 4 Cal., 23, at p. 27, s. c., L. R., 5 I. A., 138). The gift is further one to a class, some persons of which were not in existence at the time of the death of the testator, and consequently the whole bequest is void—*Srimati Bramamayi Dasi v. Jages Chandra Dutt* (8 B. L. R., 400), see also the case of *Soudaminy Dosse v. Jogesh Chunder Dutt* (I. L. R., 2 Cal., 262).

The *Standing Counsel* (Mr. J. D. Bell, with him Baboo Srinath Doss) for the respondent.—The Courts are always inclined to assist a will as much as possible, where it is plain that the testator desired to make an absolute gift, and I contend that an absolute gift was given—*Mussamut Kollany Koer v. Luchmee Pershad* (24 W. R., 395). The present case seems very much on a footing with *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick* (9 Moore's I. A., 123). [GARTH, C. J.—I do not think that case applies, as, if we gave you an absolute estate, we should be doing that which the testator directly declared should not be done; but in *Soorjeemoney's* case (9 Moore's I. A., 123), the Court were enabled to give her an estate-in-fee consistently with the terms of the will.] The other side have relied on the case of *Bhoobun Mohini Debia v. Hurrish Chunder Chowdhry* (I. L. R., 4 Cal., 23, at p. 27, s. c., L. R., 5 I. A., 138), but there the gift was intended to convey [424] more than a life-estate, intending to convey what the law prohibits, and their Lordships of the Privy Council put a fair construction on the will, and gave an absolute estate to Kassissari.

The **Judgment** of the Court (GARTH, C. J. and MITTER, J.) was delivered by

**Garth, C. J.**—The plaintiff brought his suit to recover possession of an eight-anna share of taluks numberd 278 and 456, under the following circumstances :—

These two taluks and another numbered 96, together with several other estates, etc., constituted the joint property of two brothers, Raja Chunder Shikhuressur Roy and Raja Mohessur Roy, each entitled to a moiety. The plaintiff is one of the sons of the latter, and the minor defendant is the sole surviving son of the former. When Raja Chunder Shikhuressur died, Raja Mohessur had five sons living, *viz.*, the plaintiff, Kumar Jugodissur and Kumar Sibessur, being three uterine brothers by a deceased wife, and Bissessur and Kopessur by his then living wife. Chunder Shikhuressur died on the 29th Srabun 1272 (August 1865), leaving him surviving a widow, Ranee Soudamini, and only son, the minor defendant, by the aforesaid Ranee, and two daughters,

whether by the aforesaid Ranee or not is not clear upon the evidence. He died at Rampure Bolia, the head-quarters of the district of Rajshahye, having come thither about ten or twelve days before his death, accompanied by only a few servants; not a single member of his family was about him at the time of his death. It is not disputed that 27 days before his death,—i. e., on the 2nd Srabun 1272,—he executed a will at his family residence at Taherpur, distant about eight or ten hours' journey from the headquarters.

It is alleged that, by the 8th clause of this will, Raja Chunder Shikhuressur bequeathed his eight annas share of the taluks in claim, as well as of the taluk No. 96, to the plaintiff and his two uterine brothers. The clause in question is to the following effect:—

"My brother's sons, Kumar Jugodissur Roy, Kumar Tarokessur Roy, and Kumar Sibessur Roy, shall receive, for defrayment of the expenses of their pious acts, the following out of the [425] properties left by me, to wit: my one-half share in Pargannna Chungoo, recorded as No. 278 in the Collectorate of Zilla Rajshahye in Dihi Dolil, and others appertaining to Tuppa Byas, and recorded as No. 456; and in Mouza Dihi Govindpur in Pargana Sautool, recorded as No. 96 in the touji or rent-roll of the Collectorate of Zilla Dinagore. The said three nephews shall hold possession of the above in equal shares, and shall pay the Government revenue of the same into the Collectorate. They shall have no right to alienate the same by gift or sale, but they, their sons, grandsons, and other descendants in the male line shall enjoy the same, and shall perform acts of piety as they respectively shall think fit for the spiritual welfare of our ancestors. If any of them die without leaving a male child (which God forbid), then his share shall devolve on the surviving nephews and their male descendants, and not on their other heirs."

The plaintiff further alleged that, after the death of his uncle his father was allowed to take possession of the eight annas share of all these three taluks as guardian of his three sons. But from the month of Bysack 1273 B. S., Ranee Soudamini, on behalf of her minor son, the defendant in this case dispossessed him from the aforesaid eight annas share of the two taluks claimed in this suit; that, subsequently, when the whole estate of the minor defendant was taken charge of by the Court of Wards, the disputed share of the two taluks also came into their possession.

The plaintiff's elder brother, Kumar Jugodissur Roy, and his younger brother, Sibessur Roy, having both died on the 24th Maugh 1279 B. S. (February 1873) and the 5th Kartick 1276 (October 1869) respectively, without leaving any male issue, the plaintiff claims the whole eight annas share under the terms of the will. The taluk No. 96 is not included in this suit, because it is alleged that, out of the share bequeathed by the will, he is in possession of four annas, the other four annas being in possession of the Court of Wards, not on behalf of the minor defendant, but on behalf of the widow of his elder brother Kumar Jugodissur Roy.

According to the provisions of the Act relating to the Court [426] of Wards, the suit was brought against the minor defendant represented by the manager appointed by the Court of Wards, viz., Horo Gobind Bose. But the Court of Wards, by an order dated the 28th May 1877, authorized Ranee Soudamini, the mother of the minor defendant, to appear as his guardian, instead of the aforesaid manager, and thenceforward the suit was defended by the Ranee on behalf of her minor son.

Her defence was that the 8th clause and several other clauses of the will, upon which the plaintiff relies, are not genuine, but were substituted by some

of the amlahs of the deceased Raja shortly before his death in the place of certain other clauses of the original genuine will. It was further stated in the defence that, supposing the clause in question is genuine, the bequest is in many respects invalid, and that, at any rate, the plaintiff is not entitled to more than a life-interest in a one-third share of the eight annas which the clause in question purports to bequeath.

The lower Court, overruling the defence, decreed the plaintiff's suit. On appeal, all the points raised in the defence have been raised before us, and with reference to them two questions call for decision: First, whether the 8th clause of the will produced in this case, as that of the Raja Chunder Shikhuressur, is genuine or not? and secondly, if it is genuine, upon a correct construction of it, what are the rights of the contending parties under it in respect of the eight annas share of the two taluks which form the subject-matter of this suit?

(After considering the evidence, the learned Chief Justice continued.)

On the whole, upon a careful consideration of the evidence we think that the conclusion of the lower Court upon the question of the genuineness of the will filed in this case is correct.

The next question is, what are the rights of the contending parties under the 8th clause with reference to the taluks in suit. The gift in the first place is to the three brothers, including the plaintiff, and to their succeeding generation in the male line. There is this further condition that, should any of the brothers die without leaving a male child, then his share shall devolve on his surviving brother or brothers and their male descendants.

[427] We are of opinion that the condition imposed upon the gift, that its subject-matter should devolve on male descendants only, is invalid. In *Jotendro Mchun Tagore v. Ganendro Mohun Tagore* (9 B. L. R., 377, at pp. 394, 395 and 396) the Judicial Committee observe:—"It follows directly from this, that a private individual, who attempts by gifts or will to make property inheritable otherwise than the law directs, is assuming to legislate; and that the gift must fail, and the inheritance take place as the law directs." Further on they say:—"If, on the other hand, the gifts were to a man and his heirs to be selected from a line other than that specified by law, expressly excluding the legal course of inheritance, as for instance, if an estate were granted to a man and his eldest nephew, and the eldest nephew of such eldest nephew, and so forth for ever, to take as his heirs, to the exclusion of all other heirs, and without any of the persons so taking having the power to dispose of the estate during his lifetime, here, inasmuch as an inheritance so described is not legal, such a gift cannot take effect, except in favour of such persons as could take under a gift to the extent to which the gift is consistent with the law. The first taker would in this case take for his lifetime, because the giver had at least that intention. He could not take more, because the language is inconsistent with his having any different inheritance from that which the gift attempts to confer, and that estate of inheritance which it confers is void."

Applying the principle enunciated in these observations to the terms of the will in this case, it is clear that, under the bequest, the three brothers, including the plaintiff, received the taluks in equal shares for their respective lives, and that the course of succession which was subsequently indicated by the testator being contrary to Hindu law, the particular estate of inheritance which he attempted to create was void.

Therefore, on the testator's death, a one-third share of the eight annas of the taluks in suit devolved upon the plaintiff, enjoyable by him for his life, and

the remaining two-thirds in equal shares devolved upon his two brothers, enjoyable by them in equal shares for their respective lives.

[428] But then these brothers died, one after the other, without leaving any male issue. Kumar Sibessur died first on the 5th Kartick 1276 (October 1869), leaving him surviving the plaintiff and his elder brother Kumar Jugodissur. On the happening of such a contingency as this, the will provides that the share bequeathed to the deceased was to devolve upon the surviving brothers and their male descendants. This latter limitation being contrary to Hindu law, is void. But the gift over to the surviving brothers is not invalid according to Hindu Law: see *S. M. Soorjeemoney Dosse v. Denobundoo Mullick* (9 Moore's I. A., 123, at p. 134) and the observations of the Judicial Committee upon that case in *Tagore v. Tagore* (9 B. L. R., 377, see pp. 399, 400).

For similar reasons, upon the death of Kumar Jugodissur without leaving any male issue, his original share (*viz.*  $\frac{1}{3}$ ) devolved upon the plaintiff. It is somewhat doubtful whether, along with Jugodissur's original share (*viz.*  $\frac{1}{3}$ ), the share received by him on the death of Sibessur also did not pass to the plaintiff. But having regard to the provisions relating to the legacy as a whole, we think that it was the intention of the testator that the whole augmented share should pass to the plaintiff, who was the sole surviving brother. The language used relating to this gift over to the surviving brother or brothers is not inconsistent with this intention.

We, therefore, come to the conclusion that the whole eight annas share of the two taluks, the subject-matter of this suit, has devolved upon the plaintiff under the provisions of the will of Raja Chunder Shikhuressur. But we do not agree with the lower Court that the plaintiff's right thereto is absolute. His interest will determine with his death, and, upon the happening of that event, the disputed share of the taluks in question will revert to the legal heir of the testator.

In modification of the decree of the lower Court, we decree the possession of the disputed share of the two taluks, which is the subject-matter of this suit, and declare that the plaintiff has therein only a life-interest. We do not interfere with the [429] decree of the lower Court as to mesne profits, but, under the circumstances of the case, we think that each party should bear his own costs in this as well as in the lower Court.

*Decree varied.*

#### NOTES.

[Affirmed by Privy Council in *Tarokessur Roy v. Shoshi Shikareswar Roy* (1883) 9 Cal 952 P. C.]

[6 Cal. 429]

The 10th September, 1880.

PRESENT :

MR. JUSTICE MORRIS AND MR. JUSTICE PRINSEP.

In the Matter of the Petition of Nilmoney Sing\*

Umanath Mookhopadhya

versus

Nilmoney Singh.

*Probate—Application for Order revoking Probate—Attaching Creditor of Next-of-kin—Succession Act (X of 1865), s. 234.*

A judgment-creditor, who has attached property of his debtor, which purports to have been inherited by such debtor from his deceased father, may, where the will of such deceased is set up and proved at variance to his interests, apply for a revocation of the order granting probate of the will so set up.

*Komollochun Dutt v. Nsrutton Mundle* (I. L. R., 4 Cal., 360) followed.

THE facts of this case material to this report are as follows :—

One Bamon Dass died some time in January 1875, leaving him surviving his widow Bhoyharini Debi, his son Taranath, and several other sons. Nilmoney Singh, the petitioner, having obtained a decree against Taranath, attached, in February 1875, certain lands purporting to be the property of Taranath inherited from his father. The widow Bhoyharini intervened in these attachment-proceedings; but, on the 11th February of the same year, her claim was disallowed. Subsequently, on the 14th March 1876, Bhoyharini, in conjunction with her sons other than Taranath, applied for, and on the 24th of the same month obtained, an order granting her probate of the alleged will of her husband Bamon Dass. The probate itself, however, was not issued till the 21st of December following. On the 1st April 1876, Bhoyharini instituted a suit against Nilmoney, praying for a declaration of [430] her right to the lands attached by Nilmoney under the decree previously obtained by him against Taranath. On the 22nd of December 1876, Nilmoney lodged an application, under s. 234† of the Succession Act, in the Court of the District Judge, for a revocation of the order of the 24th March granting probate of the alleged will of Bamon Dass to the widow Bhoyharini. The District Judge, on the hearing of this application, reversed his former order granting probate, and also subsequently dismissed the regular suit instituted by Bhoyharini against Nilmoney. The widow appealed in both cases to the High Court. By its judgment, dated the 8th May 1878, the High Court (MARKBY and PRINSEP, JJ.) set aside the order made by the District Judge, reversing his previous order

\* Appeal from Original Decree, Nos. 108 and 109 of 1879, against the decree of L. R. Tottenham, Esq., Officiating Judge of Nuddea, dated the 24th March 1879.

Revocation or annulment for just cause, of grant of probate or administration.

† [Sec. 234 :—The grant of probate or letters of administration may be revoked or annulled for just cause.

*Explanation.*—Just cause is—1st, that the proceedings to obtain the grant were defective in substance; 2nd that the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case; 3rd. that the grant was obtained

by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently; 4th, that the grant has become useless and inoperative through circumstances.]

granting probate to the widow, on the ground of inadequate service of notice on all the parties interested under the will, and remanded the matter to the Court below in order that it might be again adjudicated upon after an opportunity had been afforded the petitioner to remedy this material defect. The High Court also reversed the order made in the regular suit instituted by the widow against Nilmoney, and remanded it to the Court below for rehearing. Under these orders of remand the Court below retried both cases, but substantially adhered to its former judgments, revoking the former grant of probate and dismissing the suit of Bhoyharini.

The widow again appealed in both cases to the High Court.

Baboo Sreenath Dass, Baboo Mohiny Mohun Roy, Baboo Rashbehary Ghose, Baboo Kashee Kant Sen, and Baboo Grish Chunder Chowdhry for the Appellant.

Baboo Ambica Churn Bose and Baboo Bhowani Churn Dutt for the Respondent.

The **Judgment** of the Court (MORRIS and PRINSEP, JJ.), so far as is material for the purposes of this report, was delivered by

**Morris, J.** (who, after stating the facts, proceeded as follows):—The first question that arises is, whether Nilmoney Singh, as creditor of Taranath, has any *locus standi*? Whether he has [431] such an interest in the estate of the deceased Bamon Dass as gives him a right to apply for revocation of the probate granted of his will? In support of the proposition that he cannot apply for the revocation of probate, several authorities have been cited. In *In the matter of Mee Tsee* (15 W. R., 351), Mr. Justice NORMAN, delivering the judgment of the Court, says: "We have no doubt of the soundness of the proposition that a person who is not next-of-kin, and who has no interest in the estate of a testator, has no right to oppose the grant of the probate or dispute the validity of the will. In England it has been held, that even a creditor cannot controvert the validity of a will, because it is a matter of indifference whether he should receive his debt from the executor or from an administrator." Then the case of *Baij Nath Shahar v. Desputty Singh* (I. L. R., 2 Cal., 208; s.c., 25 W. R., 489) is quoted to show that the learned Judges there considered that, in this country also, the creditors of next-of-kin to the deceased are not entitled to have citations served upon them under s. 250\* Act X of 1865, calling upon them "to come and see the proceedings before the grant of probate or letters of administration." But this case came subsequently under the consideration of another Bench of this Court, of whom a member of the present Bench was one, in connection with the case of *Komollochun Dutt v. Nilruttun Mundle* (I. L. R., 4 Cal., 360); and Mr. Justice MARKBY, in giving the judgment of the Court, made the following observations: "If we thought that the decision in *Baij Nath Shahar v. Desputty Singh* (I. L. R., 2 Cal., 208; s.c., 25

\* [Sec. 250:—In all cases it shall be lawful for the District Judge, if he shall think proper,

<p>District Judge may examine petitioner in person and require further evidence, and issue citations to inspect the proceedings.</p> <p>Publication of citation</p>	<p>to examine the petitioner in person, upon oath or solemn affirmation, and also to require further evidence of the due execution of the Will, or the right of the petitioner to the letters of administration, as the case may be, and to issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration. The citation shall be fixed up in some conspicuous part of the Court-house, and also in the Office of the Collector of the District, and otherwise published or made known in such manner as the Judge issuing the same may direct.]</p>
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W. R., 489) went as far as to hold that a purchaser or an attaching creditor could not apply for revocation of a probate, we should, as at present advised, refer the point to be settled by a full Bench, because we should disagree from such ruling." We entirely concur in the opinion here expressed and considered, that it is applicable to, and meets the circumstances of, the present case. There is no question that Nilmoney Singh, immediately after the death of Bamon Dass, and before probate of his alleged will had been taken out, [432] attached the property, which is the subject of the suit of Bhoyharini, as the property of his judgment-debtor Taranath, to which he had succeeded on the death of his father. Owing to the devolution of the property of Bamon Dass by natural succession to Taranath, Nilmoney Singh has such an interest in the property of the deceased as entitles him to dispute the genuineness of a will which purports to divert the succession from Taranath to another. Under s. 234 of Act X of 1865, the grant of probate or letters of administration may be revoked or annulled for just-cause; and according to *illus. (c)* at the foot of that section, such a just cause would be when the will, of which probate was obtained, was forged. Part XXXI, which succeeds s. 234, relates to the practice in granting and revoking probates and letters of administration. Under s. 250 of that chapter, the Judge, when a will is brought before him for probate, may issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate, &c. The words are general, and as Nilmoney Singh has, unquestionably, for the reasons above given, an interest in the estate of Bamon Dass, we see no sufficient cause under the Act why he should not be allowed to enter a *caveat* and oppose the application for probate by Bhoyharini and the other members of the family interested under the will. If he has the right to enter a *caveat* regarding the grant of a probate, he can, on similar grounds, apply for revocation of a probate improperly granted. To rule otherwise would, it seems to us, work great injustice and shut out Nilmoney Singh from all remedy. As pointed out by Mr. Justice MARKBY, in the case of *Komollochun Dutt v. Nilruttun Mundle* (I. L. R., 4 Calc., 360) already referred to, "it would lead to the greatest confusion if the validity of a will could be questioned in a civil suit after the grant of probate. There might be any number of conflicting decisions as to the validity of the will. The grant must be contested by a suit in the Court out of which the grant issued, and it must be contested before the Court sitting as a Court of probate, and not in the exercise of its ordinary civil jurisdiction." We, therefore, [433] decide this first point in favour of Nilmoney Singh, and proceed now to deal with the evidence bearing upon the genuineness or otherwise of the alleged will of Bamon Dass.

I would, therefore, set aside the order of the lower Court, and dismiss the application of the Raja petitioner for revocation of the will of Bamon Dass, and decree the suit of the plaintiff Bhoyharini with costs in both Courts.\*

*Appeal allowed.*

#### NOTES.

[Who is entitled to oppose the grant of Probate—

Succession Act Secs. 234 and 242. Probate and Administration Act s. 69†

Mortgagee of the heir of the deceased has an interest in the estate of the deceased entitling him to oppose the grant of probate to a will set up by the widow of deceased: *In the matter of the position of Bhobosondri Devi* (1880) 6 Cal. 460. See also the judgment creditor of the

\* See *In the matter of the Petition of Bhobosunduree Dabee*, post, p. 6 Cal 460.

next-of-kin of the deceased attaching the property as belonging to his debtor has a right to file a caveat.—*Ibid.* *Subomongala Das v. Shoshi Bhoshan Biswas* (1884) 10 Cal. 413. He can oppose the will under s. 69 of the Probate and Administration Act :—(1901) 28 Cal. 441.]

[6 Cal. 433]

*The 15th September, 1880.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND  
MR. JUSTICE MITTER.

Jugtanund Misser.....Plaintiff

*versus*

Nerghan Singh and another.....Defendants.\*

*Evidence Act (I of 1872), s. 92, prov. 3—Parol Evidence in addition to condition in Kistibundi Part Performance of portion of obligation in Kistibundi.*

*Per* GARTH, C. J.—Where, at the time of the execution of a written contract, it is orally agreed between the parties that the written agreement shall not be of any force until some condition precedent has been performed, the rule that parol evidence of such oral agreement is admissible to show that the condition has not been performed, and consequently that the contract has not become binding, cannot apply to a case where the written agreement had not only become binding, but had actually been performed as to a large portion of its obligations.

The true meaning of the words “any obligation” in the 3rd proviso to s. 92 of Act I of 1872† is any obligation whatever under the contract, and not some particular obligation which the contract may contain.

ONE Ram Monorath sold certain properties to Nerghan Singh and another (defendants), and desired them to pay parts of the purchase-money to one Jugtanund Misser (the plaintiff), to be applied to the discharge of certain debts charged on the properties. The defendants paid part of the purchase-money in cash to the plaintiff, and for the remainder executed a kistibundi in his favour, and gave as security a mortgage on certain immove-<sup>[434]</sup>able property belonging to them. The kistibundi contained stipulations that the property which was purchased by the defendants should be at once placed in their hands; (and they in accordance with such stipulation entered into possession), and further that the remainder of the purchase-money was to be paid in certain instalments, on failure of any one of which, the whole sum remaining due should become payable. The instalments not being paid, the plaintiff brought the present suit to recover the whole sum remaining due.

The defendants contended, that it had been verbally agreed between the parties at the time when the kistibundi was executed, that the obligation to pay these instalments was not to be put in force until the plaintiff had paid to one Gobindhur Singh a debt which had been charged upon the property conveyed, and that, at the time the suit was brought, this debt had not been satisfied.

\* Appeal from Appellate Decree, No. 636 of 1879, against the decree of E. Grey, Esq., Judge of Gya, dated the 30th December 1878, reversing the decree of Baboo Matadin, Officiating Subordinate Judge of that district, dated the 28th August 1877.

† [Sec. 92 :—*q. v. supra* I. L. R., 6 Cal. p. 329

Proviso (3)—The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or, disposition of property, may be proved. . . . .]

The Subordinate Judge, on the 28th August 1877, held, that parol evidence could not be thus admitted to add a very important condition to the kistibundi, and decreed the suit with interest in favour of the plaintiff.

On the 29th September 1877, a decree was obtained against the plaintiff for the money due to Gobindhur Singh.

The defendants appealed to the District Judge, who decided that parol evidence of the oral agreement was admissible under proviso 3 of s. 92\* of Act I of 1872, inasmuch as that agreement constituted a condition precedent to the attaching of the obligation upon which the suit was brought. He therefore remanded the case in order that evidence of the parol agreement should be taken, and on the case coming up again before him, on the strength of the evidence received, decided the case in favour of the defendants.

The plaintiff appealed to the High Court.

Mr. R. E. Twisdale and Baboo Juggesh Chunder Dey for the Appellant.

Baboo Mohesh Chunder Chowdhry and Moonsee Mahomed Yussoof for the Respondents.

[436] The Judgment of the Court (GARTH, C. J., and MITTER, J.) was delivered by

Garth, C. J. (who, after setting out the facts as above, continued) :—I think that the District Judge was wrong in admitting the parol evidence ; he appears to have admitted it under proviso 3 to s. 92 of the Evidence Act ; but that proviso in my opinion does not apply to a case of this kind.

I think that the District Judge has taken a wrong view of proviso 3. That proviso, as it seems to me, is intended to introduce into the law of evidence the rule which is well established and understood in England, and treated of in s. 1038 of Mr. Taylor's book on Evidence. That rule is, that when, at the time of a written contract being entered into, it is orally agreed between the parties that the written agreement shall not be of any force or validity until some condition precedent has been performed, parol evidence of such oral agreement is admissible to show that the condition has not been performed, and consequently that the written contract has not become binding.

This will be found exemplified and explained in the following cases :—*Davis v. Jones* (17 C. B., 625), *Bell v. Lord Ingestre* (12 Q. B., 317), *Pym v. Campbell* (6 E. and B., 370) and *Annagurabala Chetti v. Kristnasami Nayakkan* (1 Mad. H. C. Rep., 457).

These cases show that, until the condition is performed, there is in fact no written agreement at all.

But this rule could never apply to a case where the written agreement had not only become binding, but had actually been performed as to a large portion of its obligations.

To admit parol evidence to show that some particular stipulation could not be enforced, would be to introduce the mischief which s. 92 was intended to prevent ; and it seems clear to me that the true meaning of the words " any obligation " in proviso 3 is any obligation whatever under the contract, and not, as is contended by the defendants, some particular obligation which the contract may contain.

[436] I think, therefore, that the parol evidence was inadmissible, and that, as the defence entirely rests upon it, the plaintiff is entitled to a decree.

The plaintiff will be entitled to his costs in both Courts.

**Mitter, J.**—I concur in this decision. I do not think it necessary to decide the question whether the defendants are entitled to prove the parol agreement upon which they rely; because, assuming that they were so entitled, it was shown in the course of the argument that the plaintiff has discharged the obligation imposed upon him by that agreement.

*Appeal allowed.*

#### NOTES.

#### [ADMISSIBILITY OF EVIDENCE WITH REFERENCE TO CONDITION PRECEDENT—

Followed in *Ram Jabun Serowjy v. Oglon Nath Chatterjee*, (1897) 25 Cal. 40 where it was held that oral evidence could not be let in to show that the payee under a promissory note agreed not to enforce the payment of money till the maker received money in land acquisition proceedings. Referred to in *Taruvenjada v. Rangasami* (1888) 7 Mad 19 where it was held that oral agreement to give indemnity by the guardian as condition precedent for payment of money by the mortgagee under a mortgage executed on behalf of the minor, could be heard.]

[6 Cal. 436]

*The 15th September, 1880.*

PRESENT :

MR. JUSTICE TOTTENHAM AND MR. JUSTICE MACLEAN.

Mozhuruddin. ....Defendant

*versus*

Gobind Chunder Nundi.....PLAINTIFF.

*Landlord and Tenant—Forfeiture of holding—Demol by a Tenant of his Landlord's Title.*

A, a ryot with rights of occupancy, in a rent-suit brought against him by B, the purchaser of an *aima mehal*, denied the existence of the relationship of landlord and tenant between himself and B, on the ground that the lands occupied by him were not included on the *aima mehal* purchased by B. B's rent-suit having been dismissed for failure of evidence on this point, B afterwards brought a regular suit to evict A, and for mesne profits. Held, that A, by denying the title of B, in the rent-suit, thereby forfeited his rights of occupancy, and became liable to eviction.

THIS was a suit instituted by the plaintiff Gobind Chunder Nundi to evict the defendant Sheikh Mozhuruddin, a ryot with rights of occupancy, from certain lands comprised within the boundaries of the *aima mehal* Pilshua, the purchased property [437] of the plaintiff, and for a declaration that the occupancy rights of the defendant were forfeited, on the ground that, in a rent-suit which had been previously instituted by the plaintiff against the defendant, the defendant had falsely denied the title of the plaintiff. The plaintiff also claimed mesne profits.

\* Appeal from Appellate Decree, No. 1829 of 1879, against the decree of C. D. Field, Esq., Judge of East Burdwan, dated the 6th May 1879, modifying the decree of Baboo Janokinath Mookerjee, Munsiff of Cutwa, dated the 31st January 1879.

† *Aima*.—Land granted by the Mogul Government, either rent-free or subject to a small quit-rent, to learned or religious persons of the Mahomedan faith, or for religious and charitable uses in relation to Mahomedanism. Such tenures were recognised by the British Government as hereditary and transferable.—*Wilson's Glossary*.

It appeared that the plaintiff was the purchaser of the *aima mehal* Pilshua, at an auction-sale for arrears of Government revenue, and had obtained formal, but not actual, possession in June 1875. It was proved that the lands in dispute were included in the plaintiff's purchase; that the defendant had been in occupation of them as a ryot with rights of occupancy for a period of more than thirty years, and had paid rent to the former proprietor of the *aima mehal*, but had not, since the plaintiff's purchase, paid any rent to him. It was also proved that, in 1877, the plaintiff had sued the defendant for rent in respect of these lands; that in such suit the defendant had denied the plaintiff's title alleging that the lands occupied by him were not included in the plaintiff's mehal, and that, in consequence of such denial, the suit was dismissed.

Upon these facts the Court of first instance held that the plaintiff was entitled to a decree for mesne profits for a period of three years, but not to evict the defendant, as the denial of the plaintiff's title by the defendant in the former suit might have been occasioned by mistake on his part.

From this decision the plaintiff appealed to the Judge of East Burdwan, who, on the 6th May, gave the following judgment:—"I think there can be no doubt that the defendant being well aware of the plaintiff's title, denied it in the rent-suit. Now, a tenant who denies his landlord's title, and sets up an adverse title, is liable to be evicted. The Munsif says that 'this might be that he considered the lands are lakheraj and not the *aima* sold to the plaintiff,' and it is argued before me that the defendant was misled by the former proprietor of the *aima*, who also held lakheraj lands. Now, if this had been pleaded and proved, if it had been shown that the defendant, having made reasonable enquiries, was misled by the former *aimadar*, the Court might perhaps take this plea into consi-[438]deration. But I do not find that any such plea was set up before the Munsif, and indeed no one appears to have thought of it until the Munsif suggested, without evidence, that this was so. I think, therefore, that the plaintiff is entitled to evict the defendant."

From this decision the defendant appealed to the High Court.

Mr. G. Gregory and Baboo Omanath Bose for the Appellant.

Baboo Ram Chand Mitter for the Respondent.

Mr. G. Gregory (Baboo Omanath Bose with him) for the Appellant.—There have been cases in this country in which it was held that a ryot, who denies his landlord's title, forfeits his tenure; but those decisions seem to have followed English cases. In England a tenant forfeits his tenure because that is the common law of England, but the whole of the law of landlord and tenant in this country is comprised in Beng. Act VIII of 1869, and as the Legislature have not thought it proper to insert the provision in that law, the Courts are not competent to import into it a penal provision of that nature. In the previous cases here, it seems to have been assumed that the law here allows a forfeiture. In *Mahomed Basroollah Bhoonia v. Ahmed Ali* (22 W. R., 448). Mr. Justice DWARKANATH MITTER says: "It seems to me that it is by no means a settled point of law in this country that the denial by the tenant of the landlord's title works a forfeiture of the tenancy." In *Sutyabhama Dgssee v. Kirshna Chunder Chatterjee* (Ante, p. 55), your Lordship, Mr. Justice MACLEAN, took precisely the view I am now contending for, but the decision was, on appeal under the Letters Patent, reversed. But the second decree turned on entirely different grounds, which do not exist in this case. I submit it is *ultra vires* of the Courts to establish a penal law of this nature without legislative authority. A reference to a Full Bench would, I submit, be a proper order to make in this case in order that the question may be raised and decided. Even in some of

the cases decided here, it is said that the Courts, both here and in England, "always lean strongly against [439] a forfeiture." *Sreemutty Ahullya Dabia v. Bhyrub Chunder Pattro* (25 W. R., 146).

Baboo *Ram Churn Mitter* for the Respondent was not called upon.

The Judgment of the Court (TOTTENHAM and MACLEAN, JJ.) was delivered by

**Tottenham, J.**—The point pressed upon us by the learned counsel for the appellant is, that there is nothing in the law of this country warranting forfeiture of his holding as the penalty of denial by a ryot of his landlord's title.

The lower Appellate Court has decreed the defendant's (appellant's) eviction for denying the plaintiff's title, though well aware of it.

There are numerous reported cases in which this Court has affirmed similar decrees passed under the same circumstances, and there being no contrary ruling, we think that we are bound to follow these decisions, notwithstanding that the learned counsel has contended that the point was never really raised and decided in these cases, but that it was assumed that denial of the landlord's title rendered the tenant liable to be evicted. We are not at present prepared to take the opposite view, and to refer the case to a Full Bench. We may observe that the doctrine of forfeiture is not entirely unknown to the law of landlord and tenant in Bengal, for s. 38 of Beng. Act VIII of 1869 distinctly provides for it in the event of the Collector being unable, from the non-attendance of persons holding tenures and under-tenures, to ascertain them at the measurement of any lands under that section.

In the present case, we think we are supported by authority, and dismiss the appeal with costs.

*Appeal dismissed.*

## [440] APPELLATE CRIMINAL.

*The 29th September, 1880.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MACLEAN.

In the Matter of the Petition of Kasi Chunder Mozumdar.

Juggut Chunder Mozumdar

*versus*

Kasi Chunder Mozumdar.\*

*Sanction to Prosecution for giving False Evidence—Criminal Procedure Code (Act X of 1872), s. 468—Jurisdiction to give Sanction—Case settled without Evidence—Duties of Judge—Prosecution for False Evidence on verified Petition, when such verification is unnecessary.*

The Courts that have jurisdiction to grant a sanction to proceedings under s. 468 of Act X of 1872, are the Court before which the offence was alleged to have been committed, and the Courts to which such Court is subordinate.

\*Criminal Motion, No. 214 of 1880, against the order of C. D. C. Winter, Esq., Officiating District Judge of Pubna, dated the 22nd July 1880.

*Per* GARTH, C. J.—Where a case is settled without evidence being gone into, the Court in which the suit was brought, even if it have power to sanction criminal proceedings against any of the parties to such suit under s. 468\* of Act X of 1872, is guilty of great impropriety and indiscretion in so doing, inasmuch as it can have had no opportunity of judging of the *bond fides* of the claim or defence.

*Semble*.—A petition presented under Reg. XVII of 1806 not requiring verification, cannot, from the fact of its being verified unnecessarily, be made the subject of a prosecution for giving false evidence.

THIS was an application to set aside an order of the District Judge of Pubna sanctioning a prosecution under the following circumstances :

On the 17th July 1868, one Juggut Chunder Mozumdar executed a mortgage of certain property in Rajshahye in favor of one Kasi Chunder Mozumdar, securing a certain sum of money with interest. On the 28th October 1878, the mortgagee presented, under Reg. XVII of 1806, a verified petition to the Court of Rajshahye for the foreclosure of the mortgage. Subsequently to the date of the petition this Rajshahye district was divided, and the land, the subject of the mortgage, was taken to form part of the District of Pubna. On the 15th December 1879, the mortgagor presented a counter-petition to the Court of Rajshahye, in which he stated that the mortgage-money had been paid in full (in support of which statement a registered receipt was filed, which [441] on the face of it purported to show that the repayment had been made in 1869), and prayed that the property might be declared free from the mortgage charge. The mortgagee opposed that petition, and contended, that the money had, in point of fact, never been repaid, although it had been agreed and intended that it should be. On the 24th February 1880, the mortgagee presented another petition in the suit, stating that matters had been amicably settled, and praying that the petition in the foreclosure suit should be struck off the file. A decree by consent was accordingly drawn up and filed in accordance with the prayer of the petition.

In July 1880, the mortgagor applied to the District Judge of Pubna for leave to prosecute Kasi Chunder Mozumdar (the mortgagee), under s. 193 of the Penal Code, for the statements made in the petition dated the 28th October 1878 ; and the District Judge, reviewing the proceedings which had taken place in the Rajshahye Court, and having regard to the registered receipt, gave his sanction to the criminal prosecution.

Kasi Chunder Mozumdar then applied to the High Court to set aside the order of the District Judge, and obtained a rule calling on the other side to show cause why the order should not be set aside.

Mr. M. M. Ghose and Baboo Kali Churn Bannerjee in support of the rule. —The Judge of Pubna had no jurisdiction to make the order, the false evidence (if any) was given in the jurisdiction of the Judge of Rajshahye, but assuming the order to be legal, the Judge had no sufficient evidence before him to justify the order. And further, inasmuch as the petition filed in October 1878 did

\* [Sec. 468 —A complaint of an offence against public justice, described in section one

Prosecution for certain offences against public justice.

hundred and ninety-three, one hundred and ninety-four, one hundred and ninety-five, one hundred and ninety-six, one hundred and ninety-nine, two hundred, two hundred and five, two hundred and six, two hundred and seven, two hundred and eight, two hundred and nine, two hundred and ten, two hundred and eleven, or two hundred and twenty-eight of the Indian Penal Code, when such offence is committed before or against a Civil or Criminal Court, shall not be entertained in the Criminal Courts, except with the sanction of the Court before or against which the offence was committed, or of some other Court to which such Court is subordinate.]

not require to be verified upon affirmation or oath, the gratuitous verification could not render the petitioner liable to a conviction for giving false evidence under the Penal Code.

No one appeared to oppose the rule.

The **Judgment** of the Court (GARTH and MACLEAN, JJ.) was delivered by **Garth, C. J.** (who, after stating the facts, continued) :—The first ground upon which it is contended that the order is bad [442] is, that the Judge of the Pubna Court had no jurisdiction to make it.

Upon this ground alone it appears to me that the order is clearly illegal. The offence of which Kasi is said to have been guilty is that of giving false evidence in a judicial proceeding under s. 193 of the Penal Code, and he is said to have given this false evidence in the 4th paragraph of the petition which he filed in the District Court of Rajshahye in 1878. If this was an offence at all, it seems clear to me that the Court before which it was committed was the District Court of Rajshahye, and that, consequently, the only Court which could give sanction to any criminal proceeding under s. 468 of the Criminal Procedure Code was either the Judge of the District Court of Rajshahye, or some Court to which the Rajshahye Court was subordinate. The offence was certainly not committed before or against the District Court of Pubna, which was not in existence at the time when the alleged offence was committed.

The District Judge of Pubna appears to be under the impression that, because the land, which was the subject of the mortgage, has since been transferred to the jurisdiction of Pubna, the offence with which Kasi is charged must also be considered as having been committed before the District Court of Pubna. But this is clearly a mistake. The question is not within what jurisdiction the mortgaged property is now situate, but before what Court the offence was committed; and there is no doubt that the offence (if any) was committed before the District Court of Rajshahye. I think, therefore, that, upon this ground alone, the sanction given by the Judge of Pubna is illegal.

But it was further contended by Mr. Ghose that, even assuming the Judge to have had jurisdiction, he had no evidence or materials before him which would legally justify his making the order. It is not necessary for our present purpose to decide this further question; but as it is possible that another application of a similar nature may be made to the Rajshahye Court, I think it right, as the question has been raised, to express my views upon it.

In the case of *Barkatullah Khan v. Rennie* (I. L. R., 1 All., 17) it was held by [443] a Full Bench at Allahabad, that when the Court in which the evidence in a case has been given has, under s. 468 of the Criminal Procedure Code, sanctioned criminal proceedings, no superior Court has any right to question the propriety of that sanction. And in the case of *In the matter of the Petition of Ram Prasad Hazara* (B. L. R., Sup. Vol., 426; s. c. 5 W. R. Mis. Rul., 24) it was held by a Full Bench of this Court that where, in the course of a suit, a Civil Court commits a party for trial or sanctions criminal proceedings against him on a charge of perjury or forgery, the High Court cannot, as a Court of revision, reverse such sanction or order upon the ground that it was not warranted by the facts.

There are also other cases to the same effect. But I do not understand any of these cases to go so far as to decide, that when a Court before which a case is pending sanctions criminal proceedings against one of the parties to that



suit, before any evidence in the case has been given, and without any materials before it upon which it could properly exercise a discretion, the sanction cannot be set aside.

It seems to me that the reason of the rule laid down in s. 468 consists in this, that suitors in a Court of Justice ought to be allowed the fullest liberty of speech and action in support of their respective contentions, and so long as they use that liberty in good faith and honestly, they ought not to be subjected to malicious prosecutions.

The Court which has the best means of forming an opinion upon the *bona fides* of the parties and the truthfulness of the witnesses, is the Judge who hears the evidence, and therefore, upon that Court or upon some superior Court which has the power of looking into the proceedings, the law imposes the duty of sanctioning or refusing to sanction criminal proceedings against the parties or their witnesses.

But if a case is settled without any evidence being gone into, it seems to me that the Court in which the suit was brought has no opportunity of judging of the *bona fides* of the claim or defence, and if it has any power at all under such circumstances, which I very much doubt, to give its sanction to criminal proceedings against either party, I think it would be guilty of a [444] great impropriety and indiscretion in so doing. In this particular case no evidence was gone into. The proceedings taken by the mortgagee in 1878 were instituted under Reg. XVII of 1806, which does not make it necessary that his petition should even be verified in the ordinary way. The suit was subsequently compromised by consent, each party paying his own costs, and it seems to me that as no evidence was given on either side, it was quite impossible for them to form anything like a correct judgment as to whether the mortgage-money had or had not been paid when the proceedings were instituted in 1878.

Then there was another point taken by Mr. Ghose, which I think, upon consideration, is entitled to some weight.

The petition presented by the mortgagee in 1878 did not require (as we have already seen) to be verified upon oath or affirmation. The petitioner was, therefore, not bound so to verify it, although in point of fact he did so; and Mr. Ghose's contention is, that unless the petitioner was legally bound to verify the petition, his verifying it gratuitously would not render him liable to conviction for giving false evidence or making a false claim, see ss. 191\* and 193† of the Indian Penal Code.

\* [Sec. 191 — Whoever being legally bound by an oath, or by any express provision of law to state the truth, or being bound by law to make a declaration

Giving false evidence. upon any subject, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true is said to give false evidence.

*Explanation 1.*—A statement is within the meaning of this section, whether it is made verbally or otherwise.

*Explanation 2.*—A false statement as to the belief of the person attesting is within the meaning of this section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know.]

†[Sec. 193.—Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any

Punishment for false stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven evidence. years, and shall also be liable to fine, and whoever intentionally

An oath voluntarily taken in a proceeding where an oath is not necessary, would not, by the English law, support an indictment for perjury, and I should doubt whether, under the Penal Code, a statement upon oath, when the oath is not necessary, would come within the provisions of s. 191. But it is not necessary for our present purpose to decide that question.

The order of the District Judge, which sanctions the criminal proceedings, will be set aside on the first ground.

**Maclean, J.**—I concur in setting aside the proceedings on the ground that the Court of the Judge of Pubna and Bogra was not the Court before which the alleged offence was committed.

*Order set aside.*

#### NOTES.

[Criminal Procedure Code s. 468 (1872). s. 195 and 476 (1882) (1898)]

Followed in (1882) 6. Mad. 29. But the ruling in this case was explained in (1892) 19 Cal. 345 where it was held that the court can take fresh evidence in order to grant sanction though the case had been settled without the court giving into evidence. Again in (1897) 20 Mad. 339 it was held that the Court could go beyond the record in the case and could take additional evidence to give sanction pointing out the changes in the language in sections 195 and 476 of the Criminal Procedure Code of 1882 and of s. 468 of 1872.

[445] *The 9th November, 1880.*

#### PRESENT.

SIR RICHARD GARTH, KT., CHIEF JUSTICE, and MR. JUSTICE MACLEAN.

In the matter of the petition of Chandrakanta De.

*Penal Code (Act XLV of 1860), s. 188—Injunction in Civil Suit—Disobedience of Order.*

Section 188 of the Penal Code applies to orders made by public functionaries for public purposes, and not to an order made in a civil suit between party and party.

The proper remedy for disobedience of an order of injunction passed by a Civil Court, is committal for contempt.

THIS case was sent up to the High Court by the Sessions Judge of Mymensing for an expression of opinion on an order passed by the Magistrate of Mymensing

gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

*Explanation. 1*—A trial before a Court Martial or before a Military Court or Request is a judicial proceeding.

*Explanation 2*—An investigation directed by law preliminary to a proceeding before a Court of Justice is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

*Explanation 3.*—An investigation directed by a Court of justice according to law, and conducted under the authority of a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.]

\* Criminal Reference, No. 182 of 1880, from the order made by T. M. Kirkwood, Esq., Judge of Mymensing, dated the 2nd October 1880.

on 29th April 1880, dismissing a complaint against Girjakanta Lahory and others for an alleged offence under s. 188\* of the Penal Code.

The circumstances which led to the order were as follows :—

On the 21st August 1879 the District Judge of Mymensing, on regular appeal, passed a decree, directing " Girjakanta Lahory, the appellant, to refrain from excluding, as joint sharer, one Tarinikanta Lahory, from any portion of a tank (the subject of litigation between the parties), and both parties from taking or giving any person exclusive possession of any portion thereof without the consent of the other of them."

On the same date the District Judge passed another decree " directing Girjakanta Lahory to refrain from excluding Tarinikanta from possession of two plots as a joint sharer, and both parties from taking or giving to any other persons exclusive possession of either of the plots without the consent of the other of them." Subsequently to the passing of these decrees, Tarinikanta Lahory presented a petition to the District Judge, stating that Girjakanta Lahory had disobeyed the injunction, and had erected a hut on the land contiguous to the tank, asking for permission to prosecute Girjakanta under s 188 of the Penal Code.

[446] This was granted, and on the case coming up before the Magistrate on the 29th April 1880, he, without taking evidence as to the fact of the building of the hut, found that the order of injunction passed by the District Judge had not been promulgated, and expressed a doubt as to whether an order by a Civil Court was an order of a nature contemplated by s. 188 of the Penal Code, and therefore acquitted the accused under s. 211† of the Code of Criminal Procedure. The Sessions Judge disagreed with the view taken by the Magistrate, and referred the following points to the High Court for opinion :—

(i) Whether the Magistrate was right in holding that s. 188 of the Penal Code does not apply to disobedience of an order promulgated by a Civil Court?

(ii) Whether the Magistrate was right in holding that the order had not been adequately promulgated?

No one appeared for either party

\*[Sec. 188.—Whoever knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred Rupees or with both; and if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.]

*Explanation* :—It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces, or is likely to produce, harm.]

†[Sec 211 :—If the Magistrate, in any case tried under this chapter, finds the accused person not guilty, he shall record a judgment of acquittal.

Acquittal.

If the accused person is convicted, the Magistrate shall pass sentence upon him according to law. When the personal attendance of the accused person during the trial has been dispensed with, the sentence of the Magistrate, if the sentence be for fine only, may be pronounced

Sentence.

in the presence of such accused person's agent, if he has been permitted to appear by agent; or the accused person may be required to attend to hear such sentence.]

The opinion of the High Court (GARTH, C.J., and MACLEAN, J.) was given by

**Garth, C.J.**—In our opinion s. 188 applies to orders made by public functionaries for public purposes, and not to an order made in a civil suit between party and party; so we think the Magistrate was right in refusing to act under the section.

If the defendant in the suit has disobeyed the injunction, the Judge ought, on the application of the plaintiff, to have sent him to jail for disobeying the Court's order; that was the proper remedy.

### [447] APPELLATE CIVIL.

*The 13th November, 1880.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MITTER.

Laljee Sahoo.....Plaintiff

*versus*

Roghoonundun Lall Sahoo .....Defendant.\*

*Limitation Act (XV of 1877), s. 19, and sched. ii, art. 85—Acknowledgment of Debt due—Uncontradicted Acknowledgment of Debtor, not openly admitted by Creditor.*

Article 85, sched. ii of Act XV of 1877, is intended to apply to cases where an account has been going on between two parties, and balances have been struck from time to time, showing the amount due from one of such parties to the other; and the suit to which that article is intended to apply is a suit brought by one of those parties against the other for the balance found to be due on that account.

A creditor who does not openly assent to an amount acknowledged by his debtor to be due to him, is nevertheless entitled to take advantage of such acknowledgment so long as it remains uncontradicted and unexplained by his debtor.

THIS was a suit brought on the 21st December 1877 to recover Rs. 17,590-3-6, principal and interest, due on an ikrarnama, under the following circumstances.—

The plaintiff and defendant were members of the same family, and their ancestors carried on business as mahajuns, and owned a mahajani koti in Durbunga, which was known by the name of the Burra Koti. Subsequently the shareholders of eight annas of this business established a koti for themselves, which was called the Choti Kota; and these two kotis had mutual dealings with one another, independently of the business which they jointly carried on as mahajuns with the outside public.

On the 27th September 1871 the mahajani business with the public came to an end, but the accounts of the Burra Koti and Chota Koti as between themselves remained unsettled until the 23rd of November 1873, when the disputes between them were referred to arbitration.

\* Appeal from Original Decree, No. 58 of 1879, against the decree of W. DaCosta, Esq., First Subordinate Judge of Tirhoot, dated the 12th December 1878.

[448] Although some discussions took place with reference to the accounts, no regular meeting of the arbitrators was ever held: but, on the 24th December 1874, an ikrarnama was executed, in which the sums due from the members of the Burra Koti to the members of the Chota Koti, are said to have been ascertained; and upon this ikrarnama the claim of the plaintiff, who is a member of the Chota Koti, against the defendant, who represents the Burra Koti, is founded.

The parties who executed this instrument were the defendant Roghoonundun Lall Sahoo and his deceased father Bissessur Lall Sahoo, the members and representatives of the Burra Koti. It recited the disputes which had arisen between the members of the Burra Koti on the one hand, and the plaintiff and Roghubur Sahoo and Ram Golam Sahoo, the members of the Chota Koti, on the other; it further recited that an arbitration agreement had been drawn up, but had not been carried out, and that disputes with regard to their monetary dealings with one another had been settled on the basis, that up to the previous day, the 30th Aughran 1282 (corresponding with 23rd December 1874), there was found due to the members of the Chota Koti from the members of the Burra Koti the sum of Rs. 53,951-10-3. It further recited that the sum of Rs. 16,793-6-6 had been found due from the Chota Koti to the Burra Koti, and that, after setting that off against the Rs. 53,951-10-3, the balance, being the sum of Rs. 37,158-3-9, was due from the Burra Koti to the Chota Koti. Of this amount, Rs. 24,772-2-6, being two-thirds of the Rs. 37,158-3-9, were declared to be due to Roghubur Dyal Sahoo, Ram Golam Sahoo, and Turban Lall Sahoo, in respect to which they had executed a separate deed of assent to the ikrarnama in favour of the members of the Burra Koti, and the remaining sum of Rs. 12,386-1-3 was declared and acknowledged by Roghoonundun Lall Sahoo and Bissessur Lall Sahoo to be due from them to the plaintiff.

The Subordinate Judge found that the suit should have been brought within three years from the close of the year in which the last item in the accounts between the parties had been admitted or proved. The last admitted item bearing date the 27th September 1871, he held, that the suit was [449] barred under Art. 85,\* sched. ii, of Act XV of 1877, inasmuch as the ikrarnama had been executed on the 24th December 1874, at a time when limitation had already expired, and therefore such an ikrarnama could not be said to be an acknowledgment of the debt due under s. 19 of the Limitation Act.

The plaintiff appealed to the High Court.

Mr. *Phillips* and Baboo *Chunder Madhub Ghose* for the appellant.

The *Advocate-General* (Mr. *Paul*) and Baboo *Hem Chunder Banerjee* for the respondent.

\* [Art. 85.—

Description of suit.	Period of Limitation,	Time from which the period begins to run.
For the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties.	Three years. ...	The close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account.]

The **Judgement** of the Court (GARTH, C. J., and MITTER, J.) was delivered by

**Garth, C. J.** (who having stated the facts continued) :— We think that the lower Court has made a mistake in this case.

The plaintiff says in his plaint that he was a party to the adjustment of accounts which resulted in this deed of settlement, but he has not been called as a witness, and it has not been proved that he was actually a party to that adjustment. This suit was brought just within the three years from the time when that deed was executed, and it was contended by the plaintiff in the Court below, that this deed was a sufficient admission of a debt due from the defendant to the plaintiff to prevent the suit being barred by limitation.

The Subordinate Judge, however, considered that the case must be governed by art. 85, sched. ii, div. 1, of the Limitation Act of 1877, which provides for a suit brought "for the balance due on a mutual, open and current account, when there have been reciprocal demands between the parties," and as in that case the period of limitation would run from the close of the year in which the last item admitted and proved is entered in the account, he considered that the limitation would run in this case from the end of the year 1871, in which year the last item of Rs. 2,000, placed to the credit of the members of the Chota Koti, appears to be entered under date 27th September 1871. As the case fell under this article, and the limitation ran from [450] the end of 1871, the lower Court held the plaintiff's suit to be barred. We consider that, in dealing with the case in this way, the lower Court has misapprehended both the nature of the suit and the true meaning of art. 85 in the Limitation Act.

That article, as it seems to us, is intended to apply to cases where an account has been going on between two parties and balances have been struck from time to time showing the amount due from one of such parties to the other, and the suit to which that article is intended to apply, is a suit brought by one of those parties against the other, for the balance found to be due to him on that account.

It seems to us that this is a suit of a totally different nature. It is not brought to recover the balance due upon any account at all; it does not appear that in the accounts which were kept between these parties there were ever any balances struck, or that any balance was ever found to be due to the plaintiff upon that account. On the contrary, we must presume that the parties to that account would be the members of the Burra Koti on the one hand, and of the Chota Koti on the other, and it would be quite inconsistent with the nature of such an account that any balance should be found due on that account to the plaintiff separately.

The plaintiff's real claim, as it seems to us, consists in this :— At the time when the mahajani business ceased,—i.e., in the year 1871,—disputes were going on between the members of the Burra Koti and those of the Chota Koti with reference to their unsettled accounts. They had been carrying on at that time a partnership business, in which certain members of the partnership had had separate transactions with the other members of the partnership. Whilst these disputes were pending, it was competent, of course, for the members of either koti or for any one of these members, making all the other members of the partnership parties, to institute a suit for an account, and until the accounts had been adjusted and a particular sum found due to one of the members from all or some of the other members, no member could have brought a separate

suit for a specific sum such as the plaintiff claims in the present case. The plaintiff, as we take it, could only bring the suit to recover the sum, [451] which he claims here, upon an adjustment of account having taken place, the result of which was, that a debt was found due from one or more of the other members of the concern to himself.

But his case is, that such an adjustment of account has in fact taken place, and that the ikrarnama of the 24th December 1874 is of itself sufficient evidence of it.

It was contended before us in the first instance, that the admission made by the defendant in the ikrarnama of 24th December 1874 amounted, in fact, to an account stated with the plaintiff; and if that were so, of course the account stated would be itself sufficient to enable the plaintiff to maintain an action. But in order to make it an account stated, the plaintiff himself must have been a consenting party to it, and there is certainly no evidence that he was a consenting party to it. On the contrary, it would appear from the latter portion of the ikrarnama that the other three persons who constituted the Chota Koti with the plaintiff had assented to the ikrarnama and had given a deed to the members of the Burra Koti to confirm their assent, but that the plaintiff had not done so. We think, therefore, that the plaintiff has not established any case upon an account stated.

But then it was argued by Mr. Phillips that the ikrarnama at least amounts to this, to an admission by the members of the Burra Koti that they had adjusted accounts with the members of the Chota Koti, including the plaintiff, and that, upon such adjustment of accounts, they acknowledged that a sum of Rs. 12,386-1-3 was due to the plaintiff. Whether the plaintiff himself was a party to that acknowledgment does not appear, but the deeds of the 24th of December 1874, and the other deed, which was executed by the three members of the Chota Koti, amount, at any rate, to an acknowledgment by all the other members of both concerns, except the plaintiff, that the plaintiff is entitled to receive the sum found to be due to him from the defendant.

We think that this contention is well founded. It does not appear when the adjustment took place, but I think the ikrarnama is sufficient evidence as against the defendant, especially [452] as it is uncontradicted and unexplained, that the sum of Rs. 12,386-1-3 is a separate debt acknowledged to be due by the defendant to the plaintiff at some time prior to the date of the ikrarnama.

But then it is said that, as no time is shown when the adjustment took place, and consequently when the separate debt first had an existence, it is improper to say that the ikrarnama, which contained an acknowledgment of the debt, was made within three years of the time when the debt first arose; but the answer to this argument appears to us to be patent upon the evidence.

As long as the account remained unsettled and no adjustment took place, it is clear that the separate debt, for which the plaintiff now sues, could have had no existence, and it appears from the evidence of the plaintiff's first witness, that those disputes were unsettled and were referred to arbitration so lately as the 23rd November 1873. The adjustment of accounts, therefore, must have taken place, and the separate debt due to the plaintiff by the defendant must have had its origin, at some time between the 23rd November 1873 and the 24th of December 1874. The acknowledgment, therefore, which was made on the 24th December 1874 in the ikrarnama, was made within three years from the time when the debt first accrued due; this acknowledgment would be clearly sufficient under s. 19 of the Limitation Act, and it was made within three years from the commencement of this suit.

It may then be said, that the plaintiff, by never openly assenting to the amount of the debt thus acknowledged to be due to him by the defendant, has placed it out of his power to take advantage of it now; but we think that he has a right to take advantage of it at any time, so long as the acknowledgment of the debt remains uncontradicted and unexplained by the defendant. Assuming that the execution of the ikrarnama was unknown in the first instance to the plaintiff, still if he afterwards became aware of it, and communicated to the defendant, as he did at any rate by bringing this suit, that he had assented to the adjustment, unless the defendant repudiated or explained away the admission that he had made, we consider that the [453] plaintiff is entitled to take advantage of that admission in this suit.

We think, therefore, that the plaintiff is entitled to recover the amount admitted by defendant to be due, and the only question that remains is as to interest. With regard to this, as it does not appear that the plaintiff took any steps to enforce his claim, or to take advantage of defendant's admission, before he brought this suit in December 1877, we do not think that he ought to be entitled to any interest up to that time. But from the commencement of the suit to the date of decree we think that he should be entitled to interest at 12 per cent., and from that time till payment to the usual 6 per cent. He should also obtain his costs in proportion to the amount recovered in both Courts.

*Appeal allowed.*

[6 Cal. 453]

*The 26th November, 1880.*

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE FIELD.

Hurri Prasad.....Plaintiff

*versus*

Jaumna Prasad and another.....Defendants.\*

*Survey proceedings—Beng. Act V of 1875, s. 45, cl. (b), and s. 62—Survey proceedings not taken for public purposes—Right of suit.*

Section 45, cl. (b) of Beng. Act V of 1875 applies only to a survey or some similar proceeding taken by a revenue officer "for some public purpose," and against which any party who may be affected by the boundary laid down by such officer would have a right to object.

Therefore, where such a proceeding, although initiated under Beng. Act V of 1875, has been taken for the purpose of settling the boundaries of private property as between the owners of it, the party aggrieved by the order of the Collector in such proceeding is not debarred by s. 62 of the Act from bringing a suit in the Civil Court to have the boundaries ascertained.

THIS was a suit brought for the purpose of having the plaintiff's right and possession in three bighas one cotta of land declared, and certain boundary pillars removed, and a map, sanctioned by a Collector, rectified.

\* Appeal from Appellate Decree, No. 2151 of 1879, against the decree of Baboo Koylash Chunder Mookerji, Subordinate Judge of Bhagalpore, dated the 25th August 1879, affirming the decree of Mouli Mahomed Nurul Hosain, Khan Bahadur, Munsif of the district, dated the 26th March 1879.



[454] The plaintiff and defendants were owners and proprietors of adjoining lands, and it appeared from the proceedings filed, that some time previous to the institution of the present suit, an application had been made by the present defendants to a Collector under the Bengal Survey Act (V of 1875) for a settlement of the boundary of their estate, and that the Collector, in pursuance of such application, had settled the boundaries and sanctioned a map. The plaintiff alleged, in the present suit, that this boundary was erroneous, and that it had the effect of depriving him of three bighas and one cotta of land, transferring it to the defendants, and that the real boundaries had been correctly ascertained in a suit between himself and the father of the defendants; he therefore brought this present suit for the purposes above-mentioned.

The Munsif decided in accordance with the contention raised by the defendants, that, inasmuch as the plaintiff had not preferred an appeal against the proceedings, under Beng. Act V of 1875, taken by the Collector, he was therefore debarred by the provisions of s. 62 of Beng. Act V of 1875 from bringing this suit in the Civil Court. He accordingly dismissed the suit.

The plaintiff appealed to the Officiating Subordinate Judge, who upheld the decision of the Munsif.

The plaintiff then appealed to the High Court.

Baboo Amarendro Nath Chatterjee for the Appellant.

Baboo Rojendro Nath Bose for the Respondents.

The arguments used are sufficiently set out in the judgments of the Court.

The following **Judgments** were delivered :—

**Garth, C.J.**—The plaintiff, who is the owner of Mouza Mokimpore, brings this suit for the purpose of having a certain boundary ascertained between his mouza and the mouza at Chuck Gopal, which belongs to the defendants.

He says, that this boundary was determined in a suit which he [455] brought against Roghubar Singh and others, the proprietors of the defendants' mouza, to which Lali Sahu, the father of the defendants, was a party.

In answer to this claim the defendants' case is, that they had made an application to the Collector, under Beng. Act V of 1875, to have the boundary between the plaintiff's land and their own laid down in accordance with the map made in a butwara-proceeding, which took place many years ago between the proprietors of the defendants' mouza.

The defendants further say, that, upon the application so made by them to the Collector, the boundary was laid down by an Ameen in the first instance; that the plaintiff appeared and made objections to it, that eventually the Collector made an order laying down the boundary in accordance with the Ameen's views, and that the plaintiff has not appealed against the decision of the Collector, as he should have done (*see* s. 62 of the said Act), before he could bring this suit.

The lower Courts apparently considered, that the case depended upon whether the proceedings of the Collector were regular or not, and whether by reason of s. 62 the plaintiff's suit was barred; and they both decided that the order of the Collector was binding upon the plaintiff, and that he had no right (under s. 62), not having appealed against the Collector's order, to bring this suit.

It has now been contended before us, that the order of the Collector is not binding upon the plaintiff at all ; that the Collector had no jurisdiction under the circumstances to enter upon the enquiry ; and that, although the plaintiff may have taken part in the proceedings, the order of the Collector was not binding upon him.

The defendants, on the other hand, contended that the proceedings of the Collector were perfectly legal.

First they say, that the case was one coming under the provisions of those sections of the Act which immediately precede s. 45. But I think that this is clearly not so. In order to bring the case within those sections, it must appear that there was a survey going on under s. 3, and that the order of the Collector had been made under the survey-proceedings.

[456] Then, secondly, they say, that under s. 45 the Collector has power to lay down a boundary in any one of these three cases :—

(a) Where the boundary has been determined by a competent Court ; or (b) where it has been laid down on a map in the course of a previous revenue survey or settlement or other proceeding of a revenue officer for any special purpose, and against which no objection has been preferred to any authority competent to decide upon such objection, or (c) where it has been laid down by a survey under this Act.

In any of these cases the Collector may, if he thinks it desirable that the boundary so laid down shall be relaid, proceed to relay it in the manner prescribed by s. 44. The defendants say that the boundary which the plaintiff desires to have ascertained in this suit is one which has been determined by a competent Court, because it was determined in the suit between himself and certain of the proprietors of the defendants' mouza, of whom the defendant's father was one. But the boundary which the Collector was asked to lay down was not the boundary which was determined in that suit between the plaintiff and the proprietors of the defendants' mouza, on the contrary, it was a very different one, which was laid down, not in that suit, but in the butwara proceedings, which took place between the several proprietors of the defendants' mouza and to which the present plaintiff was no party.

Then it is said that the case comes within cl. (b) of s. 45, because the defendants' alleged boundary was laid down in the butwara, which was a proceeding taken by a revenue officer for a special purpose.

But in my opinion this is not so. I consider that cl. (b) applies only to a survey or some similar proceeding taken by a revenue officer for some public purpose, and against which any party who may be affected by the boundary laid down by such officer would have a right to object. The latter part of the clause clearly points to this, because, speaking of the boundary, it says, "against which no objection has been preferred to any authority competent to decide such objection."

Now the defendants' butwara was not a proceeding taken for any public purpose. It was taken for the purpose of a division [457] of private property as between the owners of it ; and the boundary which was laid down was one to which neither the plaintiff, nor any other person besides those interested in the defendant's estate, had any right to object.

For these reasons I think that the Collector had no power, under Act V of 1875, to determine the boundary laid down in the butwara-proceedings so as to bind the present plaintiff ; and therefore the latter is not prevented from bringing this suit by s. 62.

Then, lastly, the defendants contend, that even assuming the proceedings of the Collector to have been invalid under that Act, as the proceedings were taken at the instance of one of the parties and acquiesced in by the other, who took a part in them, his decision between them ought to be binding as an award. But the plaintiff was clearly no party to the proceedings in that sense. He objected to the boundary laid down by the Ameen, because he was under the impression that the Collector had a right by law to decide the boundary; but there is no reason whatever for supposing that he intended to leave the matter to be determined by the Collector as a private and independent arbitrator.

I think, therefore, that the plaintiff has a right to bring this suit in order to have the boundary laid down in the present suit ascertained

The judgments of both the lower Courts will be reversed, and the case must go back to the Munsif's Court for retrial. The costs in all the Courts will abide the ultimate result.

**Field, J.**—The plaintiff in this case is the proprietor of Mouza Mokimpore. The defendants are the proprietors of Mouza Chuck Gopal. It appears that, at sometime previous to the institution of this suit, an application had been made to the Collector professedly under "The Bengal Survey Act" (V of 1875). The Collector, professing to proceed under this Act, laid down a boundary between Mouza Mokimpore and Mouza Chuck Gopal.

The plaintiff alleges that this is an erroneous boundary, and that it has the effect of taking away from Mouza Mokimpore [458] three bighas one cotta and 14½ dhurs of land, and transferring this portion of land to Mouza Chuck Gopal, to which, according to his contention, it does not belong. He therefore asks that his right and possession in these three bighas one cotta and 14½ dhurs of land may be declared; that the boundary pillars erected under the Survey Act may be removed, and that the map, upon which this boundary has been marked, may be rectified.

In the lower Courts it was objected that the proceedings of the Collector were not in strict conformity with the provisions of Beng. Act V of 1875; and further, that as the plaintiff had preferred no appeal to the revenue authorities, he is debarred by the provisions of s. 62 of the Act from bringing this suit in the Civil Court.

If the Collector had jurisdiction, and in the exercise of that jurisdiction committed certain irregularities of procedure, that is a matter which must have been rectified by an appeal to the superior revenue authorities. It becomes, therefore, unnecessary to say anything further upon this first question.

In order to decide the second question, it becomes necessary to consider, in the first place, whether the Collector had, under the provisions of Beng. Act V of 1875, any jurisdiction whatever to deal with the question of the boundary between Mouza Mokimpore and Mouza Chuck Gopal.

The jurisdiction given to the Collector in boundary disputes by Beng. Act V of 1875 is a limited one. When the Collector is engaged in the survey of a district, or portion of a district, which has been authorized by the Lieutenant-Governor under s. 3 of the Act, he has then power under s. 40 to deal with boundary disputes arising and necessary to be determined in the course of such survey.

It is perfectly clear that no such survey was being conducted in the present case, and that, therefore, the provisions of ss. 40 to 44 have no application.

We come then to s. 45. It was at one stage of the argument contended, that the Collector in laying down this particular boundary was merely laying down a boundary which had been determined by a Civil Court in a previous case; in fact [459] the case referred to in s. 2 of the defendants' written statement. But on a reference to the application made to the Collector and to his proceedings, it is quite clear that the Collector never intended, and did not proceed, to lay down any boundary which was determined by the Civil Court in that suit.

The respondents' pleader then contended, that cl. (b) of s. 45 is applicable, and that what the Collector was really doing was relaying the boundary determined in previous butwara-proceedings.

It is clear, however, that those butwara-proceedings were only for the purpose of partitioning Mouza Chuck Gopal between the proprietors thereof, and that the boundaries which the Collector had jurisdiction to determine in those proceedings were only the boundaries of the respective shares of the proprietors of that mouza. The Collector had not, and could not have, under the law, any power to determine the boundaries between Mouza Chuck Gopal and Mouza Mokimpore. It is therefore impossible to say that this boundary was determined in the butwara-proceedings, and that the Collector was, under cl. (b) of s. 45 of Act V of 1875, proceeding to relay the boundary so determined.

It is clear, therefore, to my mind that, upon the application made to the Collector, he had no jurisdiction under the Act of 1875 to proceed to relay the boundary between Mouza Chuck Gopal and Mouza Mokimpore. I am also of opinion, that the submission of the plaintiff to the proceedings erroneously taken under Act V of 1875, could not give to the Collector a jurisdiction not conferred on him by the Act. I agree, therefore, in setting aside the judgments of the lower Courts and in remanding the case to the first Court for trial upon the merits.

*Appeal allowed—Case remanded.*

**[460] The 27th November, 1880.**

PRESENT:

MR. JUSTICE WHITE AND MR. JUSTICE FIELD.

In the matter of the Petition of Bhabosoonduri Dabee, Nobeen Chunder Sil and  
others  
*versus*  
Bhabosoonduri Dabee.\*

*Probate—Caveat—Interest of Attaching Creditor—Next-of-kin—Mortgagees—Succession (X of 1865), s. 234, illus. (b), s. 242—20 and 21 Vict., c. 77, s. 61.*

A, a judgment-creditor, attached certain property as belonging to B, his debtor. B was the next-of kin of C, deceased. The widow of C applied for probate of an alleged will of her husband. On caveat entered by A,—*held*, that he had such an interest as entitled him to oppose the grant.

\* Appeal from Original Decree, No. 218 of 1879, against the order of A. T. Maclean, Esq., Judge of 24-Pargannas, dated the 25th of April 1879.

*D* held a mortgage from *B*, executed subsequently to *C*'s death, of other property, which the widow also alleged formed part of her husband's estate. On *caveat* entered by *D*,—held also, that he had such an interest as entitled him to oppose the grant.

*Per* FIELD, J.—Under s. 242\* of the Succession Act, any person who can show that he is entitled to maintain a suit in respect of property over which probate would have effect, possesses a sufficient interest to entitle him to enter a *caveat* and oppose the grant.

THE facts of the case relevant to this report sufficiently appear in the judgments of the Court.

Baboo *Sham Lall Mitter* and Baboo *Mohun Chund Mitter* for the Appellants.

Baboo *Ambica Churn Ghose* for the Respondent.

The following Judgments were delivered :—

**White, J.**—This is an appeal against a decree of the District Judge of the 24-Pargannas, granting probate of the will of Nobo Coomar Ganguli, deceased, to Bhobosoonduri Dabee, the respondent, who is his widow and executrix.

The testator died on the 21st October 1877, and left, besides his widow, two sons, Parbutti Churn Ganguli, an adult, and Hori Churn Ganguli, a minor. The will purports to give the entire property of the testator to his widow for her life, and after her [461] death to his sons. It thus postpones the inheritance of the sons until after their mother's death.

- Nobeon Chunder Sil, the appellant No. 1, claims to have obtained in 1878 a money-decree against Parbutti Churn Ganguli for a private debt of his, and, on the 4th of February 1879, which was about a month before the will was propounded, to have attached the share of Parbutti in the immoveable property left by the testator.

The remaining two appellants, Brojo Mohun Ghose and Obhoy Churn Sen, claim, under a mortgage executed by the two sons of the testator about a month after his death, to be the mortgagees of the immoveable property left by the testator.

The three appellants filed a *caveat* against the grant of probate, but the District Judge, on the authority of a decision of this Court—*Barjmath Shahai v. Desputty Singh* (I. L. R., 2 Cal., 208)—refused to allow them to take part in the proceedings or oppose the grant.

The question before us is, whether, supposing the appellants to prove that they have the interests which they claim, they or either of them have such interests in the estate of the deceased as entitle them to file a *caveat* and oppose the grant?

It is not necessary to consider whether the case cited by the District Judge is good law, for it does not determine the question with which we have to deal. In that case the parties opposing the probate were simple creditors of a person who was the heir of the deceased, supposing the testator had died without a will, and supposing also that he had not adopted a son. In the present case the appellants have a claim upon the immoveable property left by the testator,—two of them as mortgagees of the persons who, if the testator

\* [Sec. 242 :—Probate or letters of administration shall have effect over all the property and estate, moveable and immoveable of the deceased, throughout the province in which the same is granted, and shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belonged to him, and shall afford full indemnity to all debtors paying the

debts, and all persons delivering up such property to the person to whom such probate or letters of administration shall have been granted.]

left no will, are entitled to create the mortgage, and one of the appellants as the attaching creditor of one of these persons.

In the search which I have been able to make in the English reports and text-books, I can find no cases, and therefore no decision, in which persons standing to the deceased's estate in the relation in which the appellants respectively stand have entered *caveat* or applied to revoke grants. Probate and administrations in England only affect personal property, and no title to such [462] property can be made without the act of the executor or administrator. It is plain that mortgages by the next-of-kin of their shares in the deceased's personal estate, before distribution of the assets by the executor or administrator, if they ever occur there, must be of extreme rarity. It is almost beyond the bounds of probability that a party would before probate take from the next-of-kin an assignment of their interest in the estate as upon an intestacy; or that, if he did, he would not fortify his title by making the next-of-kin execute a power-of-attorney authorizing him to oppose probate in their name. In this country, however, probate has effect over all the property of the deceased, both moveable and immoveable (s. 242 of the Indian Succession Act, 1865), and everything that is capable of assignment is, according to the habits and practice of the people of this country, constantly being assigned, quite irrespective of whether the title is inchoate or imperfect, doubtful or bad.

It cannot be disputed that the appellants have a direct interest in disputing the will. They alleged that the will is a forgery, and has been concocted for the purpose of overriding their mortgage and attachment. The authorities show that, so long as the probate remains unrevoked, the attaching creditor could not bring the attached property to sale, nor could the mortgagees by any suit get the benefit of their mortgage. Their proceedings in each case would be defeated by the production of the probate, for they could not raise the issue that the will was forged. "A probate unrevoked," says Mr. Justice WILLIAMS in Vol. I Williams on Executors, 7th edition, p. 549, "is conclusive both in the Courts of law and equity, not only as to the appointment of executors, but as to the validity and contents of the will, so far as it extends to personal property." As a probate in India extends to immoveable property, the doctrine applies in this country to all the property left by the deceased. The only grounds on which the appellants could impeach the probate in a Civil Court would be those stated in the 44th section of the Indian Evidence Act, namely,—that the probate was granted by a Court not competent to grant it, or that it was obtained by fraud or collusion, which means fraud or collusion upon the Court, and perhaps also fraud upon the person disinherited by the will—[463] *Barnesly v. Powell* (1 Ves., Sen., 119, 284); but they could not show that the will was never executed by the testator or was procured by a fraud practised upon him. It is obvious, therefore, that, unless the appellants have a *locus standi* in the Probate Court, they are without remedy, supposing their case against the will to be true.

MARKBY and PRINSEP, JJ., in *Komollochun Dutt v. Nilruttun Mundle* (I. L. R., 4 Cal, 360) have virtually decided the question before us, so far as the mortgagee-appellants are concerned. The plaintiff there had purchased from a widow an estate which she was supposed to have inherited from her husband. Afterwards the brother of the husband obtained and produced at the trial probate of a will of the husband, by which he bequeathed the whole property to his brother. The plaintiff sued to recover the property from the possession of the brother, alleging that the will was a forgery. This Court reversed a remand order of the District Judge, which directed the first Court to try the

question of the genuineness of the will, and directed that the trial should be postponed in order that the plaintiff might apply to the Probate Court of the District Judge to revoke the grant of probate.

MARKBY, J., apparently based his decision upon the language of s. 242 of the Indian Succession Act. But that section, whilst stating that the probate shall be conclusive as to the representative title, is silent as to its effect with respect to the validity and contents of the will. Its conclusive effect in the latter respects is really the legal consequence of the exclusive jurisdiction of the Court of Probate, as stated by Mr. Justice WILLIAMS in Vol I, Williams on Executors, p. 549. In the mofussil the District Judges are the sole Courts of Probate, and it would be obviously inconsistent with the exclusive jurisdiction conferred upon them, that probates until revoked should not be conclusive as to the due execution of the will to which the grants relate.

The mortgagee-appellants in the present case stand substantially in the same position as the plaintiff in *Komollochun Dutt v. Nilruttun Mundle* (I.L. R., 4 Cal., 360); they are purchasers *pro tanto* and assigns of the immoveable estate of the deceased, although only for the limited purpose of securing money which they have advanced to the testator's heirs. If, according to the authority just cited, they might apply to revoke the probate that has issued, it follows that they may also enter a *caveat* and oppose the grant.

The case of an attaching creditor of the next-of-kin was not before the Court in *Komollochun Dutt v. Nilruttun Mundle* (I. L. R., 4 Cal., 360), but MARKBY, J., intimated an opinion that an attaching creditor was also entitled to apply to revoke probate. This point has been recently decided in favour of the attaching creditor in *Umanath Mookhopadhya v. Nilmoney Singh* (*Ante*, p. 429).

I am of opinion, therefore, that the appellants claim respectively such interests in the estate of the deceased as entitle them, upon proof of their interests, to file a *caveat* and oppose the grant of probate of the will of Nobo Coomar Ganguli, deceased.

As the Court below in effect dismissed their *caveat* without deciding whether they had the respective interests which they claim, it will be necessary for them to prove those before being allowed to oppose.

The appeal is allowed, the decree of the lower Court is set aside, and the case remanded for trial on the merits, upon proof being first given by the appellants of the respective mortgage and attachment. The costs of the first trial and of the trial on the remand to abide the result of the remand.

**Field, J.**—In this case one Bhobosoondury Dabee applied to the Court of the District Judge of the 24-Parganas for probate of a will said to have been executed by her deceased husband, Nobo Coomar Ganguli. A *caveat* was lodged by three persons, Nobeen Chunder Sil, Brojo Mohun Ghose, and Obhoy Churn Sen. Brojo Mohun Ghose and Obhoy Churn Sen claimed to come in and see the proceedings and oppose the grant of probate, on the ground that the testator's sons Parbutti Churn Ganguli and Hori Churn Ganguli had mortgaged to them a portion of the property which belonged to the deceased Nobo Coomar Ganguli, and which would have descended to these sons, the heirs, according to Hindu law, if Nobo Coomar Ganguli had died intestate.

Nobeen Chunder Sil obtained a decree for a private debt against Parbutti Churn Ganguli, and in execution thereof attached Parbutti Churn's share in the property before the will was propounded.

The learned District Judge of the 24-Parganas, upon the authority of the case of *Bajinath Shahai v. Desputty Singh* (I. L. R., 2 Cal., 208), held, that these three caveators were not entitled to see the proceedings and oppose the grant of probate.

The contention of all three caveators is substantially this, that the sons of Nobo Coomar Ganguli had, upon their father's death, inherited his property and mortgaged it to Brojo Mohun and Obhoy Churn; and that the will propounded by Nobo Coomar's widow is a forgery, and has been concocted for the purpose of defeating the rights of the mortgagees and the creditors of the sons.

With respect to Brojo Mohun Ghose and Obhoy Churn Sen the case stands thus: These two persons are mortgagees, and being assignees of Nobo Coomar's sons, may be said to stand in the shoes of these sons. If the contention of these two persons is true—namely, that Nobo Coomar died intestate, and that the will propounded by his widow is a forgery, concocted for the purpose of perpetrating a fraud upon them—it becomes an important question to consider whether they have not such an interest as will enable them to show that the will is a forgery, and has been manufactured for the purpose of practising a fraud upon them, and *secondly*, whether they are entitled to show this in the probate proceedings before the District Judge, or have the right to show it in a suit framed for the purpose and instituted in a different Court.

In the case of *Komollochun Dutt v. Nilruttun Mundle* (I. L. R. 4 Cal., 860) it has been held by MARKBY and PRINSEP, JJ., that the grant of probate is the decree of the District Judge, which cannot be [466] questioned or set aside in any other Court of inferior jurisdiction. In that case two brothers were joint proprietors of certain property. One of them died childless, leaving his widow him surviving. This widow sold her interest in her husband's estate to one Nilruttun Mundle. After this sale the surviving brother propounded a will said to have been executed by his deceased brother. Probate of this will was obtained in the Court of the District Judge. Nilruttun subsequently sued to recover the widow's share of the property, alleging the will to be a forgery. MARKBY, J., referring to, and approving of, the case of *Mayho v. Williams* (2 All. H. C. Rep., 268), held that the validity of the will could not be questioned in the Court of the Subordinate Judge, and that the proper course for Nilruttun was to apply to the District Judge to revoke probate of the will. Nilruttun's appeal was accordingly adjourned to enable him to make an application to the District Judge for revocation of the probate. MARKBY, J., said that "the grant of probate is the decree of a Court which no other Court can set aside except for fraud or want of jurisdiction, and no such ground is alleged here."

So far as the facts of the case appear from the published report, I am myself unable to understand this observation. Nilruttun contended that the will was a forgery. There was no suggestion that the surviving brother had propounded and obtained probate of a forged will, being in ignorance of the fact of its being forged, and if, knowing the will to be forged, he propounded it in the Court of the District Judge for the purpose of obtaining probate accordingly, it is difficult to see that fraud was not practised upon the Court of the District Judge.

In the case now before us the caveators, Brojo Mohun Ghose and Obhoy Churn Sen, allege that the will is a forgery, and has been concocted by the widow and her sons in collusion for the purpose of defeating the rights of them, the mortgagees. This is a case which appears to stand on all fours with the



case of *Komollochun Dutt v. Nilruttun Mundle* (I. L. R., 4 Cal., 360); and if these caveators are unable to contest the validity of the will in [467] another Court, and are also precluded from coming in to see the probate-proceedings and opposing the grant of probate, it is clear that they will be entirely without a remedy.

In the case of *Bairnath Shahai v. Desputty Singh* (I. L. R., 2 Cal., 208) the persons who opposed the grant of probate had not lodged a *caveat*, and they were merely creditors of the next-of-kin of the deceased. I think that there can be no doubt that such "persons were not persons claiming to have an interest in the estate of the deceased" within the meaning of s. 250 of the Indian Succession Act (X of 1865). In *Komollochun Dutt v. Nilruttun Mundle* (I. L. R., 4 Cal., 360), MARKBY, J., drew a distinction between a mere creditor of the next-of-kin and a purchaser or assignee of the next-of-kin, and observed that a purchaser or assignee would be in a very different position from a creditor of the next-of-kin. Following the authority of this case, I think that Brojo Mohun Ghose and Obhoy Churn Sen, being mortgagees of the sons of the alleged testator, are entitled to come in and see the proceedings and contest the grant of probate.

According to the law of England, the grant of probate of a will has always been conclusive as to the validity of the will, so far as personal property is concerned. Repeated attempts were made to induce the Court of Chancery to assume a jurisdiction which would have infringed this principle. In the case of *Allen v. M'Pherson* (1 H. L. Cas., 191) a bill was filed to have the executors of a will declared trustees for one R. A. to the amount of certain bequests which had been made in the will and certain codicils, but revoked by a later codicil. The ground upon which relief was asked was, that this last codicil had been executed under undue influence of the residuary legatee and false representations made at her instance respecting R. A.'s character. It was decided (*dissentientibus* Lord COTTENHAM, Chancellor, and Lord LANGDALE, M. R.) that the Court of Chancery had no jurisdiction in the matter, and that the proper course would have been an appeal to the Judicial Committee of the Privy Council against the sentence of the Ecclesiastical Court.

In the case of *Meluish v. Milton* (L. R., 3 Ch. D., 27) a wife had, as sole exe-[468]cutrix, obtained a grant of probate, and it was held that the Court of Chancery had no jurisdiction to entertain a bill to have her declared a trustee for the heir-at-law and sole next-of-kin, on the ground that she was not the lawful wife of the testator, as she had a former husband living, and that as the will was made in favour of the wife, she was not entitled to take the property under this will.

There are numerous other cases which establish the position that a grant of probate is, so far as regards personal estate, conclusive as to the genuineness of the will of which probate is granted.

In 1857 it was enacted by the Court of Probate Act, 20 and 21 Vict., c. 77, s. 61, that "where proceedings are taken for proving a will in solemn form, or for revoking the probate of a will on the ground of the invalidity thereof, or where, in any other contentious cause or matter under this Act, the validity of a will is disputed, unless, in the several cases aforesaid, the will affected only personal estate, the heir-at-law, devisees, and other persons having or pretending interest in the real estate affected by the will, shall, subject to the provisions of this Act and to the rules and orders under this Act, be cited to see proceedings; or otherwise summoned in like manner as the next-of-kin or others having or pretending interest in the personal estate

affected by a will, should be cited or summoned, and may be permitted to become parties or intervene for their respective interests in such real estate, subject to the rules and orders and to the discretion of the Court." Section 62 then enacts, "that where probate of such will is granted after such proof in solemn form, or where the validity of the will is otherwise declared by the decree or order in such contentious cause or matter as aforesaid, the probate, decree, or order respectively shall enure for the benefit of all persons interested in the real estate affected by such will, and the probate copy of such will, or the letters of administration with such will annexed, or a copy thereof, respectively stamped with the seal of the Court, shall, in all Courts and in all suits and proceedings affecting real estate of whatever tenure, be received as conclusive evidence of the validity and contents of such will, in like [469] manner as a probate is received in evidence in matters relating to the personal estate; and where probate is refused or revoked on the ground of the invalidity of the will, or the invalidity of the will is otherwise declared by decree or order under this Act, such decree or order shall enure for the benefit of the heir-at-law or other persons against whose interest in real estate such will might operate, and such will shall not be received in evidence in any suit or proceeding in relation to real estate, save in any proceeding by way of appeal from such decrees or orders." Section 63 provides that in certain cases the heir need not be cited, and that where he has not been cited, he is not to be affected by the proceedings. Section 64 enacts that, "in any action at law or suit in equity, where, according to the existing law, it would be necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of, or affecting, the real estate, it shall be lawful for the party intending to establish in proof such devise or other testamentary disposition to give to the opposite party ten days, at least, before the trial or other proceeding in which the said proof shall be intended to be adduced, notice that he intends at the said trial or other proceeding to give in evidence as proof of the devise or other testamentary disposition the probate of the said will or the letters of administration with the will annexed or a copy thereof, stamped with any seal of the Court of probate; and in every such case such probate or letters of administration, or copy thereof, respectively stamped as aforesaid, shall be sufficient evidence of such will and of its validity and contents, notwithstanding the same may not have been proved in solemn form, or have been otherwise declared valid in a contentious cause or matter, as herein provided, unless the party receiving such notice shall, within four days after such receipt, give notice that he disputes the validity of such devise or other testamentary disposition."

The Indian Succession Act (X of 1865) makes no distinction between real and personal property and the effect of probate of a will upon such property respectively. Section 242 enacts that "probate or letters of administration shall have effect over all the property and estate, moveable or immoveable, of [470] the deceased, and shall be conclusive as to the representative title against all debtors of the deceased and all persons holding property which belongs to him, and shall afford full indemnity to all debtors paying their debts, and all persons delivering up such property to the person to whom such probate or letters of administration shall have been granted."

That probate of a will is conclusive as to the legal character of the executor was decided in *Allen v. Dundas* (3 T. R., 125) and in *Noell v. Wells* (1 Lev., 235), and has never since been doubted.

The section, which I have just quoted affirms and enacts the conclusiveness of a grant of probate or administration as to the representative title

merely, and it is a matter of observation that in this Act, passed in 1865, no provisions were introduced similar to those which I have just quoted from the Court of Probate Act of 1857, declaring a probate of will to be conclusive evidence in all Courts and in all proceedings of the validity and contents of the will itself. Are there any provisions in the Indian Succession Act which supply this omission or deficiency, whichever it may be called? Section 250 of the Act gives to the District Judge the large power of issuing citations to all persons claiming to have any interest in the estate of the deceased. What is the meaning of the expression "persons claiming to have any interest?" It appears to me that the persons claiming to have any interest "must be persons having such an interest as would entitle them to maintain a suit in respect of the subject-matter of such estate—persons having, for example, such an interest as, according to the practice of the Court of Chancery, would entitle them to file a bill in a Court of Equity"; see this question discussed in Daniell's Chancery Practice, 5th Edition, page 267. If this be the proper construction, I think that the mortgagees, Brojo Mohun Ghose and Obhoy Churn Sen, and also the attaching creditor, Nobeen Chunder Sil, are persons who might have been properly cited under s. 250, and who, having come in and stated the interests claimed by them, are entitled to be made parties to the suit brought in the Court of the District Judge to obtain probate of the alleged will. Section 261 then enacts "that in any case before the District Judge in which there is contention, the proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who may have appeared to oppose the grant shall be the defendant."

It would appear that the persons who have appeared as caveators, and have been parties to the contentious proceedings in the Court of the District Judge (and perhaps also those persons who having been served with personal notice have failed to appear), will be the only parties bound by those proceedings; and that other persons falling within the definition "persons claiming to have any interest, &c.," who are not parties to the original proceedings, or, though entitled to be cited, were not served with personal notice thereof [see *illus. (b)* to s. 234], have for their only remedy an application under s. 234 for the revocation or annulment of the grant of probate or letters of administration; and that, in making such an application, they will be limited by the expression "just cause" as defined in that section.

Section 235 enacts that "the District Judge shall have jurisdiction in granting and revoking probate and letters of administration in all cases within his district." The jurisdiction created in the mofussil by the Indian Succession Act is a new jurisdiction which, before the passing of this Act, did not belong to the Civil Courts. According to the ordinary rules for the interpretation of Statutes, it follows that this jurisdiction can be exercised only by the Court of the District Judge, and not by any other Civil Court in the mofussil. I am, therefore, of opinion that, whether the persons interested came in the first instance to oppose the grant of probate, or subsequently to have a grant revoked or annulled, they must come to the Court of the District Judge; and as this Court has thus an exclusive jurisdiction, it must be careful not to deny all remedy to persons interested by refusing to allow them to be made parties to its proceedings. As to the text of what constitutes a sufficient interest to entitle any particular person to be made a party, according to the view which I have already stated, I think it comes to [472] this, that any person has a

sufficient interest who can show that he is entitled to maintain a suit in respect of the property over which the probate would have effect under the provisions of s. 242 of the Indian Succession Act.

I concur in allowing the appeal and remanding the case for trial on the merits. The appellants will of course have to prove the interest alleged by them.

*Appeal allowed.*

#### NOTES.

##### {CAVEAT—WHO CAN FILE?—

Following this case it was held in *Subhomongal Dossi v Shoshi Bhosan Dossi* (1884) 10 Cal. 415 that a mortgagee of the properties inherited by a son from his mother could oppose the grant of a probate to a will set up by daughter-in-law. A presumptive reversioner is held to have sufficient interest to oppose the grant of probate though his interest is only contingent: *In the matter of the petition of Hurro Lall Saha* (1882) 6 Cal. 570; *Brindaban Chunder Saha v. Someshwar Shaban Parmanuck* (1907) 10 C. L. J. 263. But a person claiming adverse interest in the estate of the deceased and denying the power of disposing properties in the testator cannot file a caveat *Abiram Das v Jayaram Parid* (1889) 17 Cal. 48 where the proposition laid down in this case by FIELD J was dissented from. The practice of the Bombay High Court is the same *Ochuva Ram v. Dolatram* (1904) 6 Bom L. R. 961 where it was held that the brother of a testator could not file a caveat objecting that the testator had no power to dispose of joint family property.]

[6 Cal. 472]

*The 27th November, 1880.*

PRESENT:

MR. JUSTICE MITTER AND MR JUSTICE MACLEAN.

Baboojan Jha.....Judgment-Debtor

*versus*

Byjnath Dutt Jha and others.....Decree-holders \*

*Execution Proceedings—Mesne Profits—Amount awarded in Execution larger than that claimed in Plaint—Court Fees Act (VII of 1870), s. 11, para. 2.*

The plaintiff brought a suit for possession, and for a certain sum as mesne profits which he assessed at three times the annual rent paid to the defendant by tenants in actual possession of the land. He obtained a decree for possession, and the decree ordered that the amount of mesne profits due to him should be determined in the execution-proceedings. On an investigation, a larger sum was found to be due to him for mesne profits than that claimed by him in his suit. The plaintiff, therefore, paid the excess fee as provided by para 2 of s. 11 of Act VII of 1870; but *held*, the amount of mesne profits recoverable by him must be limited to the amount claimed in the plaint.

In this matter the decree-holders had been plaintiffs in a suit to recover possession from the defendant (the judgment-debtor in this matter) of certain lands in Mouza Juggut, and also for mesne profits which it appeared they had in their plaint assessed at Rs. 309, or three times Rs. 103, the annual rent paid to the defendant by tenants in actual possession of the land. In this suit the plaintiffs, on the 24th July 1878, obtained a decree for possession, and it was

\* Appeal from order, No. 174 of 1880, against the order of H. W. Gordan Esq., Judge of Tirhut, dated the 30th April 1880 affirming the order of Baboo Tej Chunder Mookerjee, Munsif of Madhoobani, dated the 18th September 1879:

also ordered by the decree that the amount of the mesne profits claimed was to be determined in the execution department. An Amin was accordingly deputed to make [473] the necessary investigation, and he, after doing so, reported that the amount of mesne profits to which the plaintiffs were entitled for the three years, was a sum nearly three times as great as that mentioned in their plaint. In making this report, the Amin went on the principle that the plaintiffs having been in actual or khas possession of the lands claimed by them at the time when they were wrongfully dispossessed, were entitled to recover the full amount which they would have realized had they not been wrongfully dispossessed, and not what the judgment-debtor chose to receive according to his own arrangement while in wrongful possession.

The Munsif having overruled the objections of the judgment-debtor to this report, the latter appealed to the Officiating District Judge of Ti-hut, and in this appeal, for the first time, raised, in addition to the objections previously urged by him, the further objection that the plaintiffs were bound by the claim as to mesne profits made by them in their plaint. The District Judge overruled all the objections of the judgment-debtor, and as to the one then first urged before him, ruled, that the appellant could not go behind the decree which had ordered that the amount of the mesne profits claimed was to be determined in the execution department without directing that the amount of mesne profits specified in the plaint should be the maximum amount recoverable in execution. In support of this view he referred to the following cases—*Hurno Gobind Bhukut v. Dugumburee Debia* (9 W. R., 217), *Lukheekant Doss v. Deendyal Doss* (14 W. R., 82), and *Pearce Soonduree Dossee v. Eshan Chunder Bose* (16 W. R., 302), also to s. 11\*, para. 2 of Act VII of 1870 (The Court Fees Act), which provides, that "where the amount of mesne profits is left to be ascertained in the course of the execution of the decree, if the profits so ascertained exceed the profits claimed, the decree shall be stayed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained, is paid." It was clear, the Court remarked, from this section that the Legislature did not intend that the claimant should, [474] in the matter of mesne profits, be limited to the amount claimed in his plaint, and as in the case before it, the excess fee had been paid by the decree-holders, it dismissed the appeal with costs.

From this decision the judgment-debtor appealed to the High Court

Baboo Anund Gopal Palit for the Appellant.

Baboo Umakali Mukerjee for the Respondents.

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\*[Sec. 11 —In suits for mesne profits or for immoveable property and mesne profits, or for an account, if the profits or amount decreed are or is in excess of the profits claimed or the amount at which the plaintiff valued the relief sought, the decree shall not be executed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits or amount so decreed shall have been paid to the proper officer.

Where the amount of mesne profits is left to be ascertained in the course of the execution of the decree, the decree shall be stayed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid. If the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed.]

The Judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by Mitter, J.—In this case the appellant has been adjudged liable for about Rs. 1,200 as mesne profits due for three years on account of the respondents' share, three annas eight gundas one dumri, in Mouza Juggut, for which the respondents got a decree on 24th July 1878.

The only contention raised before us is, that the respondents are bound by the amount of mesne profits claimed by them in the plaint, viz., Rs. 309.

For the appellant two cases have been cited—*Karoo Lal Thakoor v. Forbes* (7 W.R., 140) and *Gooroo Doss Roy v. Bungshee Dhursein* (15 W.R., 61). In the former of these, it was laid down that "if the plaintiff had estimated his mesne profits in a general way with the view of determining the value of the suit, he would have been entitled to recover whatever sums had been realised or were capable of being realised by the defendant; but when he comes into Court, and knowingly fixes the rate of each bigha of land, he is bound by his own assessment." LOCH, J., who was one of the Judges in this case, seems to have decided a subsequent case, that of *Hurro Gobind Bhukut v. Digumburee Debia* (9 W. R., 217), in an opposite sense: but he joined in deciding the latter case, that of *Gooroo Doss Roy v. Bungshee Dhur Sein* (15 W.R., 61), on the same principles as were laid down in *Karoo Lal Thakoor v. Forbes* (7 W. R., 140). The respondent meets the contention by reference to two decisions of this Court—*Lukheekant Doss v. Deendyal Dass* (14 W. R., 82). [475] and *Pearce Soonduree Dossee v. Eshan Chunder Bose* (16 W. R., 302). In the former of these cases it was laid down, that "even with respect to the claim as stated in the plaint that would be subject to the result of further investigation;" and in the latter case, D. N. MITTER, J., laid down that where the decree did not limit the amount, and the plaint stated the amount approximately, the Court executing the decree could not go behind it.

Section 11 of the Court Fees Act was also cited in support of the respondent's contention.

In their plaint the respondents deliberately claimed Rs. 103 as the annual rent of the land from which he had been dispossessed. There was no approximate rate or amount mentioned.

We think that the general rule that a plaintiff cannot recover more than he claims in his plaint, ought not to be departed from except under special circumstances. The decision in the case of *Gooroo Doss Roy v. Bungshee Dhur Sein* (15 W. R. 61) lays this down, as we think, correctly. In this case the plaintiffs appear to have been aware that the lands of which they sought possession were in the occupation of tenants paying an ascertained rent of Rs. 103 for plaintiff's share; that being so, the plaintiffs demanded damages at that rate on account of the loss they had sustained from the wrongful possession of the defendant. It would have been better if the first Court had not reserved the ascertainment of the mesne profits for execution, and our decision is, that the plaintiffs can recover no more than Rs. 309 for the years 1280-82.

The appeal will, therefore, be decreed with costs, which we assess at two gold-mohurs.

*Appeal allowed.*

#### NOTES.

##### [AMOUNT OF MESNE PROFITS—

*Whether the plaintiff could recover in execution more than that claimed in the plaint.*

The rule laid down in this case is not a general rule:—(1889) 9 Cal. 112 where the Judges allowed more than the amount claimed in the plaint after consulting the Judges who decided this case.]

The statement made in the plaint with reference to the amount is only evidence against the plaintiff: (*ibid.*) The rule will not apply when the plaintiff claims the amount approximately: (1882) 8 Cal., 295, where the Judges distinguished this case on the ground that the plaintiff here in had deliberately fixed the amount in the plaint.

Under the present Civil Procedure the determination of question of mesne profits is not left to the execution department.]

## [476] APPELLATE CRIMINAL.

*The 29th November, 1880.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE FIELD.

In the matter of the Petition of Mohamed Eshak.

Chundro Marwari

*versus*

Mohamed Eshak.\*

*Appeal—Jurisdiction—Time from which an order of appointment dates.*

An Assistant Magistrate convicted an accused on the 12th August, and by an order of even date, such Magistrate was invested with power to act as a Magistrate of the 1st class, although the fact, that he had been so invested with full powers, was not communicated to him until the 23rd idem. The accused appealed to the District Magistrate and was acquitted. On motion made to the High Court to set aside the acquittal, on the ground that, after the date of the order of the Lieutenant-Governor investing the Assistant Magistrate with further powers, no appeal lay to the District Magistrate—*held*, that even supposing the Lieutenant-Governor's order conferred first class powers upon the Assistant Magistrate from the moment it was made, it must be shown before the District Magistrate's decision could be set aside, that the order of the Lieutenant-Governor was signed before the conviction.

*Quere.*—Whether an order investing a Magistrate with 1st class powers, is of any force, or amounts to an authority to exercise such powers, until the order has been officially communicated to the Magistrate?

IN this case the accused, Chundro Marwari, was charged with criminal breach of trust under s. 408† of the Penal Code; and the Assistant Magistrate found him guilty, and sentenced him, on the 12th of August 1880, to four months' rigorous imprisonment.

The accused appealed to the Magistrate, who held, that he had not acted in such a manner as to bring him under the criminal law, and released him from imprisonment.

The prosecutor then applied to the High Court to have the District Magistrate's judgment set aside, on the ground that on the very day (the 12th

\*Criminal Motion, No. 280 of 1880, against the order of C. C. Stevens, Esq., Officiating Magistrate of Burdwan, dated the 24th August 1880.

†[Sec. 408.—Whoever, being a clerk or servant, or employed as a clerk or servant, and being in any manner entrusted in such capacity with property or with

Criminal breach of trust  
by a clerk or servant. in any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.]

August 1880) on which the accused was convicted by the Assistant Magistrate, the latter was, by an order of the Lieutenant-Governor, made a first class Magistrate, and consequently that the District Magistrate had no jurisdiction to entertain an appeal from his decision. It appeared from a letter from the Magistrate of Burdwan to the Registrar of the [477] High Court, that the Assistant Magistrate had been invested by Government with full powers to act as a Magistrate of the first class; but that the letter informing the Magistrate of Burdwan of the fact, was not received until the 21st of August, and was not communicated to the Assistant Magistrate until the 23rd. A rule was granted calling on the accused to show cause why the order made on appeal should not be set aside.

Mr. M. P. Gasper (with him Baboo Amarendronat Chatterjee) for the accused.

Mr. H. E. Mendies in support of the rule.

The **Opinion** of the Court (GARTH, C. J., and FIELD J.) was delivered by

**Garth, C.J.**—In this case one Mohamed Eshak applied to this Court to send for the papers in a case in which one Chundro Marwari has been acquitted by the District Magistrate, for the purpose of having the Magistrate's judgment set aside.

Chundro Marwari was convicted on the 12th of August last by Mr. Caspersz, who was the Assistant Magistrate, of criminal breach of trust, upon the prosecution of Mohamed Eshak, who was his employer. An appeal was preferred to the District Magistrate, who, after hearing the case, reversed the conviction and acquitted the prisoner.

We were asked to set aside this judgment of the District Magistrate, upon the ground that, on the very day on which Chundro Marwari was convicted by Mr. Caspersz, Mr. Caspersz was, by an order of the Lieutenant-Governor, made a first class Magistrate, and consequently that the District Magistrate had no jurisdiction to entertain an appeal from his decision.

But having now ascertained the true state of the case, I think that there is nothing in this objection. In the first place I have great doubt, whether the mere order of the Lieutenant-Governor, that a Magistrate shall be vested with first class powers, is of any force, or amounts to an authority to the Magistrate to exercise those powers until the order of the Lieutenant-Governor has been officially communicated to him—until in fact he [478] knows officially what the order of the Lieutenant-Governor is; and as the order, which was made on the 12th of August, could not have been received by Mr. Caspersz until after that day, there is no reason whatever why his decision of the 12th of August should not have been made the subject of appeal to the District Magistrate.

But even supposing that the order of the Lieutenant-Governor conferred upon the Magistrate first class powers from the moment when it was made, it does not appear that in this case the order, making Mr. Caspersz a first class Magistrate, was signed before the conviction. It may well be that the conviction took place in the early part of the day, and that the order, making Mr. Caspersz a first class Magistrate, was made afterwards, and unless we are satisfied that the District Magistrate had no power to hear the case upon appeal, I think it clear that we ought not to interfere.

But then it is said that, as the case is now before us, we ought to set aside the judgment of the District Magistrate, if we find that it is erroneous in point of law. I confess, I entertain some doubt as to what our powers may be in



that respect ; but assuming that we had the power, I certainly should be unwilling, under the circumstances of this case, to set aside a judgment of acquittal. These cases of criminal breach of trust often involve very nice questions ; and I think that the materials before the Magistrate may well have justified him in holding that, having regard to the confidential relation which existed between the prosecutor and the prisoner, the acts committed by the latter might make him answerable to his master civilly, but not criminally. That being so, I am of opinion, that we ought not to interfere, and that the rule must be discharged.

*Rule discharged.*

## [479] APPELLATE CIVIL.

*The 3rd December, 1880.*

PRESENT :

MR. JUSTICE MORRIS AND MR. JUSTICE PRINSEP.

Ramkishore Chuckerbutty and another.....Objectors

*versus*

Kallykanto Chuckerbutty.....Decree-holder.\*

*Execution of decree—Civil Procedure Code (Act X of 1877), s. 234—Representative of deceased husband's estate—Form of Decree against Hindu widow.*

A Hindu widow instituted a suit to recover possession of certain property belonging to her deceased husband, and that suit was dismissed with costs. The widow having died before execution for the costs was taken out, the decree-holder sought to take out execution against the next heirs of the late widow's deceased husband. *Held*, that the fact, that the widow did not in her suit seek to recover any interest personal to herself, but that she contracted the judgment-debt in the effort to recover a portion of her husband's estate, to which in its entirety the next heirs of her late husband had succeeded, was sufficient to make the whole estate liable, and would entitle the decree-holder to satisfy his decree against "the legal representatives" of the late widow's husband, under s. 234 of Act X of 1877 ‡

*Mohuna Chunder Roy Chowdhury v. Ram Kishore Acharjee Chowdhury* (15 B. L. R., 142) distinguished.

In a decree against a Hindu widow, it should be stated whether the decree is a personal decree, or one against her as representing her deceased husband.

ONE Bissessuree Debia, a Hindu widow, sued to recover a share in certain immoveable property, which she claimed as forming a portion of her husband's ancestral estate, from which she had been deprived, since her husband's death,

\* Appeal from order No. 230 of 1880, against the order of T. M. Kirkwood, Esq., Judge of Mymensing, dated the 1st May 1880, reversing the order of Baboo Kanee Lall Mookerjee, Munsif of Nicklee, dated the 14th July 1879.

If judgment-debtor die before execution, application may be made against his representative. ‡[Sec. 234.—If a judgment debtor dies before the decree has been fully executed, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.]

Such representative shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of ; and for the purpose of ascertaining such liability, the Court executing the decree may of its own motion, or on the application of the decree-holder, compel the said representative to produce such accounts as it thinks fit.]

by two of the defendants; the remaining two defendants were the next heirs of her husband, and were joined as parties to the suit as holding another share in the property in question.

The suit was dismissed with costs in favour of the first two defendants, who alone appeared. The decree-holder attached certain property in the hands of the widow, but whilst execution was being taken out, the widow died, and the decree-holder took out [480] execution against the next heirs of her husband. The decree-holder admitted that the widow left no property of her own, and that the property sought to be attached was held by her in her capacity as a Hindu widow. In examination it appeared that one of the objectors, who was one of the reversionary heirs, stated, that he had advised the widow to bring the suit, and had looked after it for her. The Munsif held, that the widow's life-interest having come to an end, nothing remained to be sold at auction, and he therefore dismissed the application.

The decree-holder appealed to the District Judge, who held that the debt under the decree was not a personal debt of the widow, but was one binding on the estate of her husband. He therefore allowed the appeal.

The objectors appealed to the High Court.

Baboo *Jogesh Chunder Roy* for the Appellants.

Baboo *Bama Churn Banerjee* for the Respondent.

The Judgment of the Court (MORRIS and PRINSEP, JJ.) was delivered by

**MORRIS, J.** (who, after stating the facts, continued):—In special appeal it is contended that the Judge has put a wrong construction upon the decree, which by its terms purports to be against Bissessuree Debia personally, and that they, special appellants, are not, within the meaning of s. 234 of the Civil Procedure Code, "legal representatives of the deceased." In support of this contention they cite as an authority the case of *Mohima Chunder Roy Chowdhry v. Ram Kishore Acharjee Chowdhry* (15 B. L. R., 142). They also refer to a recent, but unreported, case, decided in special appeal by a Division Bench of this Court. The judgment of Sir RICHARD COUCH in the first quoted case supplies two reasons, which militate against the argument of the special appellants. Sir RICHARD COUCH says:—"In the present case the debt was not due from the husband, and if the estate of the husband is to be charged either for the arrears of rent becoming due after his death, or for the bond which was given by the [481] widow, it can only be upon the ground that the debts were necessarily contracted by the widow, or under such circumstances as to make the whole estate liable, and not merely the interest in it of the person who contracted them." And again: "Here the suits were against the widow only, she cannot be said to have been defending them as representing the reversioner, or as protecting his interest."

Now it is manifest in this case, from the summary of the plaint which is embodied in the decree now sought to be executed, that the widow did not seek by her suit to recover any interest personal to herself, but that she contracted this judgment-debt in the effort to recover a portion of her husband's estate. It was only in her character as representative of that estate that she did, or indeed could have, instituted that suit, and any land which she might recover in it would necessarily form portion of her husband's ancestral estate which she enjoyed during her lifetime, and to which, at her death, the special appellants, as next heirs, have succeeded. But if we had any doubt regarding the nature of that decree, it would be removed by the conduct of the reversionary heirs, the special appellants before us. They were made parties to the suit, but made no opposition to the claim of the widow. On the contrary, the Judge points out that

one of them admitted that he advised the widow in the conduct of the suit. There, it seems to us, are, to use the words of Sir RICHARD COUCH, "circumstances which make the whole estate liable," and which render this case clearly distinguishable from the one which was then before him.

As to the unreported case referred to, the facts of it are not before us, and it seems to us from the judgment which has been read to us, that the learned Judges never intended to decide that, under no circumstances, could the estate in which a widow has only a life-interest be rendered liable in satisfaction of a decree obtained against her, unless such liability was expressly declared in the decree.

It would no doubt be more satisfactory if our Courts were always to be careful in recording whether a decree against a Hindu widow is a personal decree or one against her as representing her husband's estate and chargeable thereon—and such [482] a practice would materially diminish litigation; but in our experience this has not been hitherto the practice of our Courts.

Having regard, therefore to these considerations, we are of opinion that the decree was against the widow Bissessuree as representing her husband's estate; and that, therefore, the special appellants, as succeeding to that estate by right of inheritance, are liable to satisfy that decree as the legal representatives within the meaning of s. 234.

We, therefore, dismiss the appeal with costs.

*Appeal dismissed.*

#### NOTES.

#### [HINDU WIDOW REPRESENTING THE ESTATE OF HUSBAND—LEGAL REPRESENTATIVES—

Civil Procedure Code s. 234 of Act X of 1877=s. 234 of Act X of 1882=s. 50 (of 1908).

Decree for mesne profits against the widow in a suit where she claimed certain properties as belonging to her husband's estate could be enforced against the estate in the hands of reversioners: (1903) 7 C.W.N., 678.

See also (1904) 8 C.W.N., 943, where the parties were the same and where Justice WOODROFFE discusses the question elaborately.

It ought to be construed liberally: WOODROFFE, J. (*ibid.*) The sale in execution of decree for costs against the widow representing her husband's estate passes the whole interest in the properties sold: (1908) 9 C.L.J., 346. If a widow conducting suit on behalf of her husband's estate dies, her husband's reversionary heirs are proper legal representatives to carry on the suit under s. 365 of C.P.C. (1882).

The principle laid down in this case was applied to a Mohemadan family in (1895) 20 Bom. 338 where it was held that if the debt was binding on the estate the sale in execution of a decree against the widow passed the interest of other heirs.

Referred to in (1907) 34 Cal. 642 F.B.=11 C.W.N. 593 F.B.=5 C.L.J. 491 F.B. There it was held that a decree against father could be executed in respect of ancestral estate in the hands of his sons though they take by survivorship. The C.P.C. of 1908 has given effect to this rule.]

[6 Cal. 482.]

## APPELLATE CRIMINAL.

*The 3rd December, 1880.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE FIELD.

In re Mir Ekrar Ali.

The Empress v. Mir Ekrar Ali.\*

*Penal Code (Act XLV of 1860), ss. 192, 464, cl. 2—Fabricating False Evidence—Forgery—Alteration of Date of Document.*

Where the date of a document, which would otherwise not have been presented for registration within time, is altered for the purpose of getting it registered, the offence committed is not forgery, where there is nothing to show that it was done "dishonestly or fraudulently," within cl. 2, s. 464 of the Penal Code, but fabricating false evidence within s. 192.†

THE facts sufficiently appear in the **Judgment** of the Court (GARTH, C.J., and FIELD, J.), which was delivered by

**Garth, C.J.**—The accused presented a bond for registration on the 18th December 1879. This bond is said to have been originally dated the 6th August 1879. If this date had remained, the instrument was presented after the time within which such an instrument must be by law presented for registration. The accused is said to have altered the date to the 26th August in order to bring the bond within time; or to have presented it for registration, knowing that the date had been so altered. It appears to us that the alteration of [483] the date under these circumstances is not forgery, as there is nothing to show that it was done "dishonestly or fraudulently" within the meaning of cl. 2, s. 464‡ of the Penal Code.

It is not contended that the bond itself was not genuine, or that the accused intended to support a false claim by a false bond. It is clear that his intention in altering the date of the bond was to cause the registering officer to entertain an erroneous opinion touching a point material to the result of the registration proceedings; and this being so, his acts constituted fabricating false evidence (ss. 192, 193, Penal Code), and using fabricated evidence (s. 196, Penal Code)

\* Criminal Revision, No. 289 of 1880, called for by the High Court on Sessions Statement of Bhagalpore.

† [Sec 192—Whoever causes any circumstance to exist, or makes any false entry in any book or record, or makes any document containing a false statement intending that such circumstance, false entry, or false statement may appear in evidence in a Judicial proceeding, or in a proceeding taken by law before a public servant as such, or before an arbitrator, and that such circumstance, false entry, or false statement, so appearing in evidence, may cause any person who in such proceeding, is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding, is said to fabricate false evidence."]

Making a false document

‡ [Sec. 464—: A person is said to make a false document

Cl. 2.—Who, without lawful authority, dishonestly, or fraudulently, by cancellation or otherwise, alters a document in any material part thereof, after it has been made executed either by himself or by any other person, whether such person be living or dead at the time of such alteration.]

In this view of the Law, and as the Sessions Judge did not take a serious view of the offence committed, we reduce the sentence of imprisonment to two months' rigorous imprisonment. The sentence of fine will stand.

*Sentence modified.*

[6 Cal. 483.]

# ORIGINAL CIVIL.

*The 4th December, 1880.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE  
PONTIFEX, AND MR. JUSTICE MORRIS.

In the Goods of Grish Chunder Mitter, deceased.

*Letters of Administration—Estate of Deceased Hindu, consisting of Immoveable and Moveable Property.*

Except under special circumstances, letters of administration to the estate of a deceased Hindu must be taken out in respect of the immoveable as well as the moveable property forming part of such estate.

THIS was a reference to the Chief Justice under s. 5\* of the Court Fees Act (VII of 1870), under the following circumstances:—An application was made on the Original Side of the High Court, before BROUGHTON, J., for the grant of letters of administration to the estate of one Grish Chunder Mitter, deceased, limited to certain Government securities. In addition to these securities, the deceased had left landed property, but the applicant expressly omitted any request for letters of administration in respect of such property. In the opinion of the learned Judge, the question whether letters of administration for such limited purpose could be granted in respect of the estate of a Hindu [484] deceased, was a fit one for reference, under s. 5 of the Court Fees Act (VII of 1870), to the Chief Justice.

This question was accordingly referred to the Chief Justice by the Taxing Officer. In the letter of reference the attention of the Chief Justice was directed to the following cases: *Mancharji Pestanji v. Narayan Lakshumanji* (1 Bom. H. C. Rep. 77 at p. 83), *In the goods of Ram Chandra Dass* (9 B. L. R., 30), as also to a note on the subject by Mr. Collis, the then Officiating

\* [Sec. 5.—When any difference arises between the officer whose duty it is to see that any fee is paid under this chapter and any suitor or attorney as to the necessity of paying a fee or the amount thereof, the question will, when the difference arises in any of the said High Courts, be referred to the taxing-officer, whose decision thereon shall be final, except when the question is, in his opinion, one of general importance, in which case he shall refer it to the final decision of the Chief Justice of such High Court, or of such Judge of the High Court as the Chief Justice shall appoint either generally or specially in this behalf.

When any such difference arises in any of the said Courts of Small Causes, the question shall be referred to the clerk of the Court, whose decision thereon shall be final, except when the question is, in his opinion, one of general importance, in which case he shall refer it to the final decision of the first Judge of such Court.

The Chief Justice shall declare who shall be taxing officer within the meaning of the first paragraph of this section.]

Administrator-General, in which note the following cases were also quoted :—*Kadumbinee Dossee v. Koylash Kaminee Dossee* (I. L. R., 2 Cal., 431), *Jebb v. Lefevre* (Montriau's Morton, 152), *Freeman v. Fairlie* (1 Moore's I. A., 305), *Naoroji Beramji v. Rogers* (4 Bom. H. C. Rep., O. C., 1, at pp. 68, 71), *Doe dem Savage v. Bancharam Tagore* (Montriau's Morton, 105), *In the goods of Bibee Muttra* (Montriau's Morton 191), *Mohar Ranee Essadah Bye v. East India Company* (1 Tay. and B., 299), *Lallubhai Bapubhai v. Mankuvarbai* (I. L. R., 2 Bom., 388), *Srimati Jaykali Debi v. Shibnath Chatterjee* (2 B. L. R., O. C., 1) *Nilkant Chatterjee v. Peari Mohun Dass* (3 B. L. R., O. C., 7), *Gopal Narain Mozoomdar v. Shosheebhushun Mozoomdar* (13 B. L. R., 21), *Lal Chand Ramdayal v. Guntibai* (8 Bom. H. C. Rep., O. C., 140), *Brajanath Dey v. Anandamayi Dasi* (8 B. L. R., 208, at p. 220), and *Mussamut Bhoobunmoyi Debia v. Ram Kishore Acharji* (10 Moore's I. A., 279, at p. 308).

The point being a very important one, the Chief Justice requested PONTIFEX and MORRIS, JJ., to hear the case with him.

The Advocate-General (Mr. Paul) for the Secretary of State.

Mr. Piffard for the Petitioner.

The Opinion of the Court was delivered by

**Garth, C. J.**—We think it quite clear that, in this case, and as a rule in all cases, general letters of administration of a Hindu's estate must be taken out for the immoveable as well as the moveable property, and that duty must be paid upon the value of the [485] whole. Limited administration can only be granted under special circumstances.

The real point in the case decided by KENNEDY, J., in the case of *Kadumbinee Dossee v. Koylash Kaminee Dossee* (I. L. R., 2 Cal., 430), is beside the present question; and the opinion there expressed by the learned Judge seems not to have been necessary for the purposes of his decision.

Attorney for the Secretary of State : *The Government Solicitor* (Mr. Upton).

Attorney for the Petitioner : Baboo Shamoldhone Dutt.

[6 Cal. 435]

The 7th December, 1880.

PRESENT.

MR. JUSTICE WHITE.

Kristo Mohiney Dossee and others

versus

Kally Prosonno Ghose and another.\*

*Execution—Relief asked for in accordance with statements in plaint not forming a separate prayer in the plaint—General prayer for relief—Control of execution.*

A, a joint owner of an estate with B, saved the joint estate from sale for arrears of Government revenue in payment of which B had made default, for such purpose mortgaging her share in the estate to E. A then sued B for contribution. Pending that suit, B again made default, and the estate was sold and purchased by C, subject to incumbrances. Subsequently, A obtained her decree against B, and assigned her decree to D, who obtained an order for execution and attached certain property belonging to B. D and E then entered into an agreement with C, that they would release C and the share charged with payment of A's decree, from all liability, and that they would entrust the whole conduct of the execution-proceedings to C, in consideration of his granting a perpetual lease of part of the property to D and E. In pursuance of this agreement, D and E granted a release to C, and C granted a lease to E for himself, and it was contended, also, as benamidar of D. The agreement contained a proviso that should the Court, in which the decree should be executed, of its own accord or on the petition of B, or his legal representative, notwithstanding objection on the part of D and E, make any order directing the decree to be executed against the estate, then in such case D and E should not be bound by the release, and that it should be open to C to cancel the agreement. D applied for execution against the estate of the adopted son of B (who had died), but subsequently abandoned all proceedings and transferred his decree to the High Court to obtain execution against a house belonging to C, in Calcutta. The adopted son and widow of B, [436] in a suit brought against C and D, objected to the execution-proceedings, and after paying the sum due to D into Court, asked for an injunction staying all further proceedings in execution until the hearing of the suit.

*Held*, that D had obtained, out of the lien directed by the decree, some benefit or advantage, which the plaintiffs might have a right to have valued at the hearing, and that, notwithstanding this did not form the subject of a separate prayer in the plaint, the Court would grant the injunction.

THE facts of this case, which gave rise to the motion made before the Court, were that two persons, Khelut Chunder Ghose and Kaminee Soondery Dossee, were the joint owners of a certain estate, registered No. 1 in the Towjee of the Nuddea Collectorate; that the Government revenue, through default on the part of Khelut Chunder, fell into arrears, and Kaminee, in order to prevent a sale of the estate, borrowed a sum of money at high interest, mortgaging her share of the estate to one Hurry Churn Bose, and paid off the sum due, as revenue; she, on the 5th June 1872, sued Khelut Chunder, for contribution of his share of the revenue so paid by her as aforesaid, asking that the property for which revenue had been paid might be made a first charge for the debt. Pending this suit, Khelut Chunder again defaulted, and Kaminee being unable to raise sufficient money to save the estate, it was sold by public auction, and purchased, on the 23rd March 1874, by one Kaliprosonno Ghose, subject to the incumbrances thereon; and he, on 9th April 1874, took an assignment of the mortgage from Hurri Churn Bose. On

\*Application in suit No. 632 of 1880, Original Side.

the 11th January 1873, Kaminee's suit against Khelut Chunder was dismissed, but was eventually, on the 18th January 1876, finally decided in her favour in the Court of appeal. On the 16th January 1877, Kaminee assigned her decree to one Rutnessur Biswas, who, on the 13th July 1877, after placing his name on the record in the stead of Kaminee, applied for and obtained an order for execution of Kaminee's decree, and attached certain properties belonging to Khelut Chunder. Some time in the month of July 1877, Rutnessur and Hurry Churn Bose entered into an agreement with Kaliprosunno Ghose, "that they should not proceed to realize the charge against the zamindari which formerly belonged to Khelut and Kaminee, and that they would release Kaliprosunno and the share so charged with the payment of the decree, from all liability, and [487] that they would not take any proceedings in any Court against Kaliprosunno and the share charged under the decree, and that they would entrust the whole conduct of the execution-proceedings to Kaliprosunno in consideration of the latter granting a perpetual lease of part of the said property to Rutnessur and Hurry Churn Bose at a low rental." There was, however, a proviso in this agreement to the effect that should the Court, in which the decree should be executed of its own accord, or upon petition of Khelut Chunder, or his legal representatives, and notwithstanding objections on the part of Rutnessur and Hurry Churn Bose, make any order directing the decree to be executed in the first instance against the estate formerly belonging to Khelut and Kaminee, then Rutnessur and Hurry Churn Bose should not be bound by the covenant for release, nor be bound to indemnify Kaliprosunno as therein agreed; but that in such case it should be open to Kaliprosunno to cancel the agreement. In pursuance of the agreement, on the 4th August 1877, Rutnessur and Hurry Churn Bose executed a release in favour of Kaliprosunno; and on even date with such release, Kaliprosunno executed a patni lease in favour of Hurry Churn Bose.

On the 1st August 1877, Rutnessur took certain steps to execute his decree, which, however, were subsequently abandoned. But, after the death of Khelut Chunder, Rutnessur, on the 13th June 1878, applied for execution against certain property of Romanath Ghose, the adopted son of Khelut Chunder, but an objection was successfully taken that execution should first be taken out against the property which formerly belonged jointly to Khelut and Kaminee, and an order passed in accordance with such objection; this order was, however, reversed by the High Court, and Rutnessur, however, subsequently, abandoned all previous execution-proceedings, and transferred his decree to the High Court for execution against certain properties of Kaliprosunno in Calcutta.

The plaintiffs in this suit, the widow of Khelut Chunder, and the next friend of Khelut Chunder's adopted son, Romanath Ghose, objected to execution being taken out, and after paying the sum due to Rutnessur under the decree into Court, asked for an injunction to stay all further execution-proceedings.

[488] On the 15th September 1880, a rule nisi was obtained, calling upon Rutnessur to show cause why all further execution-proceedings should not be stayed.

Mr. Branson (with him Mr. Mittra), for the defendant Rutnessur Biswas, showed cause against the rule.—The rule has been obtained on the facts set out in the plaint alone: no verified petition or affidavit has been filed by the plaintiffs. The Court will not make absolute the rule, seeing that it has been obtained in such an irregular manner. [WHITE, J.—I find that the practice in



the offices of the Original Side of the Court is to allow in taxation the costs of affidavits in such motions as the present, but inasmuch as such an affidavit would be but an echo of the plaint, I do not think I can refuse to hear the rule because there happens to be no petition or affidavit.] Plaints are verified on *information and belief*, and no Court would grant an injunction on an affidavit made merely on *information and belief*. [WHITE, J.—The Court having granted the rule on the plaint, I shall allow the rule to be heard.] The only point raised by the other side as against our right to take out execution is, that we entered into an agreement with Kaliprosunno, which has partially satisfied the decree. Now there has been no part satisfaction, the plaintiff makes no such allegation in his plaint, and no patni has been granted to my client. [Mr. Kennedy.—The prayer for general relief is large enough to include the allegation.] The question as to whether there has been partial satisfaction ought to have been raised in the execution-proceedings, and not in a separate suit: s. 244\* of Act X of 1877. Where an injunction is applied for on one ground, it will not be granted on another which has not been put forward: Joyce on Injunctions, p. 1030.

Mr. Kennedy (with him Mr. Evans, Mr. Bonnerjee, and Mr. Henderson) in support of the rule.—We have paid the money due under the decree into Court, and the defendants should only be allowed to take it out on giving security; we say that Kaliprosunno ought to pay the money, and not Khelut Chunder's estate. Rutnessur and Hurry Churn agreed to release the charge on Kaliprosunno and also the charge on the [489] estate; the patni potta was executed in pursuance of the agreement, and we say that Hurry Churn executed it as for himself and benami for Rutnessur; we, therefore, seek to have the equities between Khelut and Kaliprosunno determined. Rutnessur has not been compelled to go against Allumpore, the estate formerly belonging to Khelut and Kaminee; therefore, the saving clause of the agreement is not put in force.

White, J.—I have come to the conclusion, after some doubt, to make this rule absolute.

The object of the suit is to compel Kaliprosunno Ghose to pay, to the extent of the value of his share in a particular zamindari, the amount of a decree which has been passed against this estate.

It is unnecessary to consider the doubts as to whether the plaintiffs will be entitled at the hearing to that relief or any other relief in some qualified form, because, assuming that they could establish their right to any such relief, I consider that the plaintiffs have failed to show that the defendant Rutnessur Biswas, who is now executing the decree, ought to be stayed in consequence, supposing even that such an equity at all exists. The Appellate Court having decided that Rutnessur may execute his decree against the estate of Khelut, and not against the estate upon which a lien was declared by the decree, he

Question to be decided by Court executing decree. \* [Sec. 244:—The following questions shall be determined by order of the Court executing a decree and not by separate suit, (namely)—

(a) questions regarding the amount of any mesne profit as to which the decree has directed inquiry;

(b) questions regarding the amount of any mesne profits or interest which the decree has made payable in respect of the subject-matter of a suit between the date of its institution and the execution of the decree, or the expiration of three years from the date of the decree;

(c) any other questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution of the decree:—

Nothing in this section shall be deemed to bar a separate suit for mesne profits accruing between the institution of the first suit and the execution of the decree therein, where such profits are not dealt with by such decree.]

cannot, in my opinion, be restrained from executing his decree, because he is exercising his own right, but when he does exercise that right, the plaintiffs can ask Kaliprosunno to recoup. The prayer of the plaint is not one upon which they can take this point, but I am not prepared to say that the plaintiffs may not at the hearing get the benefit under the prayer for general relief against the defendant Kaliprosunno Ghose.

It is objected that, having regard to the rules which govern this Court in granting injunctions, the rule should be discharged, because the Court is of opinion that the injunction could only be sustained where there is a specific prayer—*Castelli v. Cook* (7 Hare, 89). I am not prepared to give full effect to the rule asked for, but there are statements in the 18th and the follow-[490]ing paras of the plaint, which show that certain transactions have taken place between Kaliprosunno and Rutnessur, the result of which appear to me to be that Rutnessur has, out of the lien directed by the decree, derived some benefit or advantage, which benefit or advantage the plaintiffs ought to have valued, and such value set against the amount which they are bound to pay Rutnessur under the decree. This, however, does not form the subject of a separate prayer in the plaint.

It appears to me that there is a case made out that the defendant Rutnessur's execution should be controlled. I think this Court ought to control it and make the circumstance alluded to by Mr. *Branson* a consideration in dealing with the costs.

It is also objected, that as it appears that Rutnessur has been only executing the decree, the question raised by the plaintiffs as to partial discharge of the decree should be dealt with under s. 204 of the Civil Procedure Code. This is no doubt an argument to be adduced at the hearing, and I cannot at this stage of the case be called upon to decide that, nor could I dismiss the suit at this stage while this point is not decided. The money has been paid into Court by the plaintiffs, and that was one of the terms upon which this rule was obtained.

Now the question is, whether the execution-creditor is to be put upon some terms if he takes out the money before the final determination of the case.

Upon the fact appearing in the plaint that Rutnessur obtained a benefit which the plaintiffs ought to have in reduction of what is payable under the decree, *viz.*, the value of an eight-anna share in patni lease in five villages without salamee, it may be that they are only entitled to whatever the amount of money was in the payment of which Khelut Chunder made default, and for which his estate was sold; but all this should be decided at the hearing. At all events, some benefit has been obtained which ought to go in reduction of the amount decreed.

Mr. *Branson's* client ought to have his costs.

The plaintiffs having paid into Court the amount of the decree and costs, *plus* Rs. 500 for costs of execution, this rule should be made absolute, and Rutnessur be restrained from prosecuting his execution-proceedings until the hearing of the [491] suit or further order of this Court. Rutnessur to be at liberty to take the amount out of Court on furnishing security to the satisfaction of the Registrar. He will have his costs of showing cause against the rule.

*Rule absolute.*

Attorney for the Plaintiffs : *J. Remfry.*

Attorney for the Defendant Rutnessur : *Baboo Troyluckonauth Roy.*

[6 Cal. 491]

APPELLATE CRIMINAL.

*The 7th December, 1880.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND

MR. JUSTICE FIELD.

In the matter of the petition of the Legal Remembrancer.

The Empress

*versus*

Nobo Gopal Bose.\*

*Transfer of Criminal Case to another District—Criminal Procedure Code (X of 1872), s. 64—Grounds necessary to obtain transfer when application is opposed by accused.*

Before the transfer of a case from one Criminal Court to another can be made, in cases in which the accused objects to the transfer, the prosecution must bring forward the very best evidence to prove that a fair trial cannot be had in the district in which the case is ordinarily triable.

THIS was an application for the transfer of a criminal case under s. 64† of Act X of 1872.

On the 19th November 1880, the Crown obtained a rule calling upon the accused to show cause why the case should not be transferred from the Court of Burdwan to Hooghly, or to such other district as the Court might direct.

The grounds on which the rule *nisi* was obtained were set out in an affidavit of Mr. Stevens, the District Magistrate of Burdwan, and were to the effect that he had been informed, and believed, that the case was causing considerable excitement in the district, that the prosecutor and one of the accused were persons of influence in the locality; and that most of the inhabitants of the district had their sympathies enlisted on one side or the other.

The rule came on for hearing on the 7th December 1880.

[492] Mr. M. P. Gasper appeared to show cause against the rule. The grounds set out in the affidavit of Mr. Stevens (who has only lately been appointed the Magistrate of Burdwan) are insufficient; his statements are all based on information and belief, and in no one instance is the name of any informant given. My client, in his affidavit, states that he has little or no influence in

\* Criminal Rule, No. 31 of 1880, against the order of C. C. Stevens, Esq., District Magistrate of Burdwan, dated the 30th November 1880.

High Court may transfer case or direct trial in district other than that in which offence was committed.

† [Sec. 64 :—Whenever it appears to the High Court that such order will promote the ends of justice, or tend to the general convenience of the parties or witnesses, it may direct the transfer of any particular criminal case, or appeal, or class of cases or appeals from a criminal Court, subordinate to its authority, to any other such criminal Court of equal or superior jurisdiction,

or may order that any offence shall be inquired into or tried in any district or division of a district other than that in which the offence has been committed,

or that it shall be tried before itself. If the High Court withdraws any case from any other Court for trial before itself, it shall observe the same procedure which that Court would have observed if the case had not been so withdrawn.

Provided that the orders issued under this section shall not be repugnant to orders issued by the Local Government under the last preceding section.]

Burdwan ; that he had, under an order of Court, summoned thirty-two witnesses, and had been compelled to deposit 300 rupees in Court for the expenses of their attendance, and that the greater portion of such witnesses lived in Burdwan itself, and that if the case is transferred, he would be put to great expense ; that but of the 290 jurors on the jury list of Burdwan, he is only intimately acquainted with at most fourteen, and entirely unacquainted with 180 others. There is further no precedent in any of the reports which admits of a transfer on the grounds put forward by the Crown. They have numerous safeguards against the grounds they rely on.

Baboo *Jugodanund Mookerjee* in support of the rule.

The **Judgments** of the Court (GARTH, C.J., and FIELD, J.) were as follows :—

**Garth, C.J.**—I think that this rule should be discharged.

It was granted at the instance of the Legal Remembrancer calling upon Nobo Gopal Bose and the other prisoners to show cause why the case against them, which now stands for trial in the Sessions Court of Burdwan, should not be transferred to Hooghly or to the 24-Parganas, or to some other jury district, upon the ground that a fair trial is not likely to be obtained at Burdwan.

The affidavit in support of this rule was made by Mr. Stevens, the District Magistrate of Burdwan, and it is certainly couched in very general terms.

Mr. Stevens says that he has been credibly informed, and believes, that the case is causing considerable excitement in the district ; that the prosecutor, and the prisoner Nobo Gopal Bose, are persons of influence in the locality ; and that most of the inhabitants of the town of Burdwan and its neighbourhood [493] have their sympathies enlisted on one side or the other. But he does not tell us from what sources his information is derived, nor, except in very general terms, the grounds of his belief.

But we were nevertheless induced to grant the rule, because having regard to the allegations in the affidavit, we thought it extremely probable that both sides might wish to have the case tried elsewhere, and that it would be at least as desirable for the prisoners as for the Crown that the trial should not take place at Burdwan.

It now appears, however, that all the prisoners, and especially Nobo Gopal Bose, object very strongly to the transfer, both upon the ground of expense and otherwise ; and it therefore becomes our duty to determine whether, under the circumstances disclosed in the affidavits on either side, we are justified in removing the case from the Court where it is legally triable.

I am clearly of opinion that before we transfer a criminal case to another district against the wish of the accused party, we ought to require the very best evidence that a fair trial cannot be had, or, in other words, that the jury cannot be trusted to do their duty impartially.

Now, as I said before, Mr. Stevens' affidavit is very general in its language. It seems that he himself has only been in the district about three months. He does not tell us what are his sources of information or the grounds of his belief, and it may be, as Mr. Gasper has suggested, that he has acted upon the report of the Police, who may be desirous of having the case tried in another district.

On the other hand, we have an affidavit from the prisoner Nobo Gopal Bose, in which he says, in the first place, that he has made arrangements for the trial at Burdwan, and incurred considerable expense in so doing ; and in

the next place he says that there are upwards of 290 jurymen in the district of Burdwan, that with at least 180 of those persons he is not acquainted, and that, to the best of his belief, he does not know any one who is acquainted with them; and lastly, he directly contradicts the statements of Mr. Stevens as to the case having caused any public excitement.

Then we must also bear in mind, in dealing with applications [494] of this kind to transfer a case from one district to another, that there are many safeguards in this country against any undue bias on the part of the jury.

In the first place, there is the right to challenge any of the jurymen who are known to be partizans of either party, if there is any real ground for supposing that they are likely to be unduly biased. Then another safeguard, as Mr. Gasper very properly observes, is that the Judge may, if he pleases, disregard the verdict of the jury altogether, and there is also the High Court as a last resource in case of any miscarriage of justice. So that there is less reason here than there might be in England for transferring a case for trial to another district, upon the ground that an impartial jury is not likely to be obtained.

If, therefore, the Crown considers it desirable that the trial should take place elsewhere, the application should have been made upon much more cogent grounds and better materials than those which we have now before us, and we cannot accede to the suggestion of the learned Government Pleader, that we should postpone our decision upon their rule, in order that some fresh materials may be obtained.

I should also add that, if I had more doubt about the matter than I have, I confess that what we have just now heard from my learned brother, and from the Government Pleader, would have influenced my mind very materially. We are informed by the latter (although he has had a large experience in this Court for many years) that he is unable at present to mention a single instance in which such a transfer in a criminal case has been made. And my learned brother, who, we all know, has had a very large experience in the mofussil both as a District Judge and a Magistrate, does not remember any case of such a transfer, although in many instances criminal trials have been held under circumstances which have caused considerable public excitement.

The rule must, therefore, be discharged.

**Field, J.**—I concur in thinking that this rule should be discharged.

[495] This is an application, under s. 64 of the Code of Criminal Procedure, to have a criminal trial before the Court of Sessions transferred from the Burdwan District to the district of Hooghly, Howrah, or the 24-Parganas.

The grounds upon which such a transfer can be made under s. 64 are—(1) that it will promote the ends of justice, or (2) that it will tend to the general convenience of the parties or their witnesses.

Now the second ground may be disposed of at once, for in the present case it is not attempted to be shown that the transfer of the trial from Burdwan will tend to the convenience of the parties or witnesses, while on the part of the accused, it is strongly urged that the transfer, if allowed, will cause considerable inconvenience and expense to him in procuring the attendance of the witnesses whom he wishes to call for the defence. Then as to the first ground it appears to me that, in order to obtain such a transfer, there should be shown to this Court something more tangible and something more definite than is disclosed in the affidavit made by Mr. Stevens. It may be that this gentleman entirely believed what he has stated in his affidavit, and I have no doubt that he did believe it. But what he has stated is stated not upon his own personal knowledge, but upon his belief and upon

information received from third parties, who are not mentioned, and as to whose means of knowledge or good faith we have no means of forming an opinion.

I think that this affidavit, unsupported by other matter, even under the system of criminal law in force in England, would be considered insufficient; and I think that in this country it is *ex majore vi* insufficient, and for this reason. The system of criminal law in force in India differs in three essential respects from that in force in England. In the first place, the jury must not necessarily be agreed in the verdict. The verdict of a majority is sufficient. In the second place, the accused must not necessarily be acquitted, if the jury or the majority of them find him not guilty. The Sessions Judge can, if he differs in opinion from the jury, refer the case for the consideration of the High Court, and it has been decided that upon such a reference the High Court can consider the case as well upon the facts as [496] upon the law. In the third place, the Local Government, if dissatisfied with the verdict of acquittal, can appeal against it to the High Court.

Having regard to these essential points of difference between the law in India and the law in England, it appears to me that, in order to succeed in an application of this nature when opposed by the person committed for trial, at least as strong a case should be made out in this country as in England, and, speaking for myself, I should say a stronger case.

It may be observed that in the affidavit upon which this rule was granted, it was stated that Giridhari Mohunt, upon whose prosecution the accused have been committed, has a strong party in Burdwan opposed to Nobo Gopal, accused, while Nobo Gopal has influence with persons opposed to Giridhari. It, therefore, appeared quite possible that Nobo Gopal would himself wish to be tried in another district; but as he desires to be tried at Burdwan, and is willing to risk the influence of Giridhari being exerted against him, an order for the transfer of the trial can be made only if we are satisfied that Nobo Gopal may, or may be able to, exert his influence with the jury so as to defeat the ends of justice, and of this I am not satisfied on the affidavit, which is the only evidence before us. I concur in discharging the rule.

*Rule discharged.*

#### NOTES.

[This case was distinguished in (1897) 25 Cal. 727, where it was held that the difficulty of obtaining an impartial jury was a legal ground for transfer of the case.]

[8 Cal. 496]

*The 9th December, 1880.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE  
FIELD.

The Government

versus

Karimdad.\*

*Penal Code (Act XLV of 1860), s. 211—Prosecution for making a False  
Charge—Opportunity to Accused to prove the Truth of Charge.*

Before a person can be put upon his trial for making a false charge under s. 211† of the Penal Code, he must be allowed an opportunity of proving the truth of the complaint made by him ; and such an opportunity should be afforded to him, if he desires to take advantage of it, *not before the Police, but, before the Magistrate.*

[497] Magistrates should clearly understand that whilst the Police perform their proper duty in collecting evidence, it is the function of the Magistrate alone to decide upon the sufficiency or credibility of such evidence when collected.

ON the 26th July 1880, one Karimdad laid a complaint before the head constable in charge of Kubdia outpost, against one Doorga Churn Ghose, a Government officer, and against his peon, under s. 342‡ of the Penal Code. The Police enquired into the case and reported that the charge was false.

On the 20th August, the Deputy Magistrate in charge of the sub-division recorded his order on the Police report to the effect, that the charge laid was utterly false, and recommended the Magistrate of the District to order the prosecution of Karimdad under s. 211 of the Penal Code. The Magistrate had previously summoned Karimdad to make his statement at head-quarters before one of the Deputy Magistrates ; he, however, neglected to attend.

On the 31st August, the Magistrate sanctioned the institution of proceedings against Karimdad under ss. 211 and 198§ of the Penal Code, and directed the Deputy Magistrate to take up the case.

\* Criminal Reference, No. 198 of 1880, from the order of A. Manson, Esq., Officiating Magistrate of Chittagong, dated the 20th November 1880.

†[Sec. 211 :—Whoever, with intent to cause injury to any person, institutes or causes to be instituted any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished with imprisonment of either description for a term which may extend

to two years, or with fine, or with both ; and if such criminal proceeding be instituted on a false charge of an offence punishable with death, transportation for life, or imprisonment for seven years or upwards, shall be punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.] •

‡[Sec. 342 :—Whoever wrongfully confines any person shall be punished with imprisonment of either description, for a term which may extend to one year, or with fine which may extend to one thousand Rupees, or with both.]

Using as a true certificate one known to be false in a material point.

§[Sec. 198 :—Whoever corruptly uses or attempts to use any such certificate, as a true certificate, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.]

On the 21st September, the Deputy Magistrate, without going into the case, passed the following order :—"As without first hearing the case in which Karimdad is the complainant, a case under s. 211 of the Indian Penal Code cannot proceed, it is therefore ordered that the Police be directed to send up witnesses and Golok Sing, peon, as accused in the case in which Karimdad is the complainant, and the case be fixed for the 30th September. The witnesses present to appear on that day."

On the 30th September, Golok Sing was not present, and the Deputy Magistrate addressed the District Magistrate on the subject, and postponed the case until a reply was received.

The District Magistrate, considering that the course pursued by the Deputy Magistrate was wrong, transmitted the record, under s. 296 of Act X of 1872, to the High Court.

No one appeared before the High Court.

**[498]** The Opinion of the Court (GARTH, C. J., and FIELD, J.) was as follows :—

We are unable to see that the orders passed by the Deputy Magistrate in this case are irregular or illegal. Whatever opinion may have been formed by the Magistrate upon the Police report as to the truth of Karimdad's complaint, when he appeared with his witnesses and asked to be allowed to prove his case, we think that the Magistrate could not, without hearing him and his witnesses, and deciding upon the truth or falsehood of his charge, proceed to put him on his trial under s. 211 of the Penal Code. It is manifest justice that a man ought not to be tried for making a false complaint until he has had an opportunity of proving the truth of the complaint made by him; and such opportunity should be afforded him, if he desire to take advantage of it, not before the Police, but before the Magistrate. If persons are to be prosecuted under s. 211 of the Penal Code upon the mere report of a Police officer that their complaints are not true, the Police are made the judges, whether a complaint is true or false. Such a delegation of magisterial functions is not contemplated by the law, and it requires but little experience of this country to understand how dangerous it would be to the best interests of justice. Magistrates of all grades cannot understand too clearly that, while the Police perform their proper duty in collecting evidence, it is the function of the Magistrate alone to decide upon the sufficiency or credibility of this evidence when collected.

We decline to interfere (see *Empress v. Irad Ally*, I. L. R., 4 Cal., 869; *Empress v. Salik* I. L. R., 1 All. 527; *Empress v. Abul Husain*, I. L. R. 1 All. 497; *Bhokteram v. Heera Kholita*, I. L. R. 5 Cal. 184: and *Ashruf Ali v. The Empress*, I. L. R., 5 Cal., 181).

#### NOTES.

##### **[PENAL CODE S. 211—**

*Opportunity to be given to complainant for proving his case before charging him under s. 211—*

Magistrate ought not to give sanction upon Police Report alone :—(1886) 10 Mad. 282 F.B.; (1882) 5 All. 36; (1885) 8 All. 38; (1887) 14 Cal. 767 F.B.

But a conviction without giving such opportunity is not illegal :—(1884) 7 Mad. 292; (1896) 22 Bom. 596. But *See* (1881) 7 Cal. 87 where it was held contrary.

But if complainant is examined, it is sufficient and the conviction is legal :—(1881) 7 Cal. 308.]



[499] APPELLATE CIVIL.

*The 9th December, 1880.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE  
AND MR. JUSTICE FIELD.

In the Matter of the Petition of Hameedoollah.

Hameedoollah.....Plaintiff

*versus*

Mahomed Asghur Hossein and another.....Defendants.\*

*Copyright Act (XX of 1847), s. 7—Small Cause Court Acts (IX of 1850 and XI of 1865)—Zilla Court—Act XII of 1876.*

As the class of cases provided for by s. 7† of the Copyright Act (XX of 1847) was transferred to the jurisdiction of the Calcutta Court of Small Causes by Act IX of 1850, notwithstanding the express language used in s. 7 of the Copyright Act, so by analogy the jurisdiction in the same class of cases arising in the mofussil was transferred to the jurisdiction of the Mofussil Courts of Small Causes by Act XLII of 1860 and Act XI of 1865.

But sched. i of Act XII of 1876, amending Act XX of 1847, has now re-transferred the jurisdiction in such suits to the District Courts.

THIS was a rule calling upon Mahomed Asghur Hossein and Syeddeen Ahmed to show cause why an order of the Officiating Judge of the Small Cause Court of Sealdah, dated 29th May 1880, should not be set aside, and the Judge directed to entertain the suit.

The facts of the case were that, on the 25th July 1878, one Sheikh Hameedoollah instituted a suit in the Civil Court of the District Judge of the 24-Parganas to recover Rs. 375 as damages against one Mahomed Asghur Hossein and another for infringement of copyright arising out of the publication of a certain Bengali book. On the 4th September 1878, the District Judge directed the plaint to be returned, on the ground that the ordinary Civil Court had no jurisdiction, the suit being one for damages; and that the suit should have been brought in the Small Cause Court.

\* Rule No. 939 of 1880, against an order of Baboo Balloram Mullick, Officiating Judge of the Small Cause Court at Sealdah, made in suit No. 1589 of 1880, dated the 29th May 1880.

†[Sec. 7 :—And it is enacted, that if any person shall after the passing of this Act, print, or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright, without the consent in writing of the proprietor thereof, or shall have in his possession for sale or hire any such book so unlawfully printed without such consent as aforesaid, such offender, if he shall have so offended, within the local limits of the jurisdiction of any of the Courts of judicature established by Her Majesty's. Charter, shall be liable to a special action on the case in such Court, and if he shall have so offended in any other part of the territories subject to the Government of the East India Company, to a suit in the Zillah Court within the jurisdiction of which he shall have so offended, which shall and may be prosecuted in the same manner in which any other action of damages may be brought and prosecuted there, and if he shall have so offended in any such last mentioned part of the territories subject to the Government of the East India Company in which there is no Zillah Court, to a suit in the highest local Court exercising original civil jurisdiction in such part of the said territories.]

Sheikh Hameedoolah thereupon filed his suit in the Small Cause Court of Sealdah; and, on the 28th December 1878, the Judge of the Small Cause Court passed a decree in his favour.

The plaintiff took out execution of this decree and attached certain property of the defendants. The defendants paid up Rs. 450, which was received in full satisfaction of the decree, and at the same time a petition dated 4th March 1879 was filed in Court by the judgment-debtors, stating that the plaintiff had relinquished all claim to damages, and had received Rs. 450 in satisfaction of the decree, and that they, the judgment-debtors, agreed for the future to abstain from publishing and selling any book registered in the name of the decree-holder, and of which he had acquired the copyright; and further stated that, should they break this agreement, they would be liable to be sued for damages, and also for the damages already relinquished.

The defendants having again infringed the plaintiff's copyright in a second book, the plaintiff, on the 29th March 1879, instituted a suit for damages, and the damages relinquished under the petition of the 4th March 1879, against defendants in the Small Cause Court. On the 29th May 1880, the Judge of the Small Cause Court dismissed the suit, on the ground that he had no jurisdiction to entertain a suit of such a nature. As regards the question of jurisdiction, the Judge stated as follows:

"It appears to be pretty clear that prior to the passing of Act XX of 1847, it was extremely doubtful whether the right called "copyright" could be enforced in British India at all, and the Legislature had doubts as to the applicability of the English Common law to Indian cases. To remove these doubts the Act was passed with a view to afford relief to the wronged, so that the relief which the owner of an infringed copyright is entitled to, in this country is purely statutory. That being so, the plaintiff must conform to the Statute regarding the form of his action. Sections 1 and 13 enumerate the remedies,—i. e., he may sue to recover the books printed without authority or for damages for the detention thereof, or sue for damages for the conversion thereof in trover. The present action is neither one of detinue or trover so far as the language of the plaint goes, but it is the former by implication, plus a claim for damages for the detention of the book. Section 7 defines the Courts empowered to try such suits,—viz., 1, the Supreme Court; 2, the Zillah Courts. Where the second class of Courts does not exist, the suits are triable in the highest local Court exercising original civil [501] jurisdiction. So that when s. 13 speaks of the institution of cases in other local Courts, the definition given in the 7th section should not be overlooked. . . . It was further contended that the defendants have, by the solenamah, dated 4th March 1879, contracted not to infringe the copyright, and that therefore the case is one for breach of contract, which the Small Cause Court is competent to try under s. 6 of Act XI of 1865. The solenamah is no contract at all; it is merely a recognition of the plaintiff's copyright, the defendants promising to abstain from printing books in which the plaintiff had a copyright. . . . But supposing it to be a breach of contract case, jurisdiction to try it has been taken away by s. 11 of the Civil Procedure Code from the constituted Civil Courts. Section 11 has not been extended to the Small Cause Court, but s. 47 \* of Act XI of 1865 extends the provisions of the

Provisions of Section 26 of Act IX of 1862, and of Act VI of 1859, made applicable to cases cognisable under this Act.

\* [Sec. 47 :—The twenty-sixth Section of Act X of 1863 to consolidate and amend the Law relating to stamp duties, and, except as hereinbefore provided, the provisions of the Code of Civil Procedure shall, so far as the same are or may be applicable, extend to all suits and proceedings under this Act.]

Procedure Code of Small Cause Court cases as far as they are applicable ; it cannot be the intention of the Legislature to give the Small Cause Court power to try cases which, under s. 11 of the Civil Procedure Code, are within the exclusive jurisdiction of other Courts. I, therefore, hold that the Small Cause Court has no jurisdiction."

At the hearing of the rule

Moonshee Mahomed Yusooff appeared for the Plaintiff.

Baboo Umesh Chunder Banerjee for the Defendants.

The **Judgment** of the Court (GARTH, C. J., and FIELD, J.) was delivered by

**Garth, C. J.**—I think that this rule should be discharged.

The plaintiff in the first instance brought a suit against the defendants in the District Court of the 24-Parganas for an alleged infringement of his copyright. The Judge of the 24-Parganas dismissed the suit, upon the ground that, being a suit for damages, it ought to have been brought in the Small Cause Court.

The plaintiff then brought a suit in the Small Cause Court at Sealdah, and there the defendants took the objection that the suit could not be brought in the Small Cause Court, but should [502] have been brought in the District Court of the 24-Parganas. The Small Cause Court dismissed the suit upon that ground, and this rule was then obtained by the plaintiff to set aside the order of the Small Cause Court, dismissing his suit and directing that Court to try the cause upon the ground that it was properly cognizable there.

In support of the rule, the learned pleader has now called our attention to a case decided in the year 1859 by Sir B. PEACOCK and two other judges, *Jodoonath Mullick v. Yawarally* (Gasper's Rep., 185).

In that case it was no doubt decided that, since the passing of the Small Cause Court Act of 1850, a suit for the infringement of copyright in Calcutta must be brought in the Court of Small Causes, and not on the Original Side of this Court; and the grounds of the decision were these. the Copyright Act (XX of 1847) had in effect provided in s. 7 that "if any person infringed a copyright, the offender, if the offence was committed within the local limits of the jurisdiction of any of the chartered High Courts, should be liable to an action in such Court; and that if he offended in any other part of the British territories, he should be liable to a suit in the highest local Court exercising original civil jurisdiction."

That being the law in 1847, the Presidency Small Cause Courts' Act was passed in 1850, giving the Small Cause Court exclusive jurisdiction in all suits for damages up to a certain amount; and Sir B. PEACOCK and the other Judges held in that case that, by that Act, the jurisdiction, which had been given to the High Court by the Act of 1847, was transferred to the Small Cause Court in suits up to the prescribed amount for infringement of copyright.

By that decision, which appears to me quite correct, we are of course bound; and by a parity of reasoning, the Mofussil Small Cause Courts, when they were established in 1865, obtained exclusive jurisdiction in the mofussil to try suits for damages for infringement of copyright up to a certain amount.

\* [Sec. 11 :—The Court shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is barred by any enactment for the time being in force.]  
Court to try all civil suits unless specially barred.

But since these Small Cause Court Acts were passed, s. 7 of Act XX of 1847 has been amended by Act XII of 1876 ; and that section now [503] in effect runs thus :—" If any person shall infringe any copyright, the offender shall be liable to a suit *in the highest local Court exercising original civil jurisdiction.*" As, therefore, by the Act of 1865 the Legislature transferred the jurisdiction in cases for infringement of copyright up to a certain amount from the District Courts to the Small Cause Courts, so the Act of 1876 has re-transferred the jurisdiction in such suits back again to the District Courts.

This appears to me the plain meaning of the Legislature, and it is certainly founded on much good reason ; for these suits for infringement of copyright involve questions of great difficulty, and should be tried by the Court most competent to deal with them.

It is hard in this particular case that the plaintiff should have had to pay the costs of both Courts , and although we must discharge this rule, we do so without costs.

**Field, J.**—I am of the same opinion. The effect of the decision quoted from Gasper's Reports is that the class of cases provided for by s. 7 of the Copyright Act, XX of 1847, was transferred to the jurisdiction of the Calcutta Small Cause Court by Act IX of 1850, notwithstanding the express language used in s. 7 of the former Act. By analogy the jurisdiction in the same class of cases arising in the mofussil was transferred to the jurisdiction of the Mofussil Small Cause Court by Acts XLII of 1860 and XI of 1865. Had the law remained in the position in which it then stood, there can be no doubt but that this case would have been cognizable in the Small Cause Court ; but in 1876 the Legislature stepped in and repealed a considerable portion of s. 7 of Act XX of 1847.

Eliminating the matter thus repealed, the section now stands as follows :—  
" If any person shall print, or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright, without the consent in writing of the proprietor thereof, or shall have in his possession for sale or hire any such book so unlawfully printed without such consent as aforesaid, such offender shall be liable to a suit in the highest local Court exercising original civil jurisdiction."

[504] It appears to me that the section as so altered must be regarded as a fresh enactment of the Legislature ; and this being so, there can be no doubt that the intention of the Legislature is that these cases arising in the mofussil should now be tried in the Court exercising the highest original civil jurisdiction, which in the present instance is the Court of the District Judge.

*Rule discharged.*

[6 Cal. 504]

ORIGINAL CIVIL.

The 19th and 20th, December, 1880.

PRESENT :

MR. JUSTICE WHITE.

Ashootosh Dutt

versus

Doorga Churn Chatterjee.

*Limitation Act (XV of 1877), sched. ii, art. 180—Execution of Decree—Revivor—Civil Procedure Code (Act X of 1877), ss. 230, 245, 248—scire facias, Writ of.*

The plaintiff obtained a decree in 1864. The first application for execution was made in September 1869 under s. 216\* of the Civil Procedure Code (Act VIII of 1859); and after notice to the defendant as provided thereby, an order was made under that section for execution to issue. In September 1880 an application for execution was made under s. 230 of the Civil Procedure Code of 1877, which repealed Act VIII of 1859

*Held*, that the order, after notice, had the effect of reviving the decree within the meaning of art. 180† sched. ii, Act XV of 1877, and therefore the decree was not barred by the law of limitation.

An order for execution under the Code made after notice to show cause has on the Original Side of the Court, the same effect as an award of execution in pursuance of a writ of *scire facias* had under the Procedure of the Supreme Court *v. e.*, it creates a revivor of the decree.

\* [Sec. 216:—If an interval of more than one year shall have elapsed between the date of the decree and the application for its execution, or if the enforcement of the decree be applied for against the heir or representative of an original party to the suit, the Court shall issue a notice to the party against whom execution may be applied for requiring him to show cause, within a limited period to be fixed by the Court, why the decree should not be executed against him: Provided that no such notice shall be necessary in consequence of an interval of more than one year having elapsed between the date of the decree and the application for execution, if the application be made within one year from the date of the last order passed on any previous application for execution; and provided further that no such notice shall be necessary in consequence of the application being against an heir or representative if upon a previous application for execution against the same person, the Court shall have ordered execution to issue against him.]

In certain special cases notice to show cause why the decree should not be executed shall be issued

him: Provided that no such

Proviso.

one year from the date of the last order passed on any previous application for execution; and provided further that no such notice shall be necessary in consequence of the application being against an heir or representative if upon a previous application for execution against the same person, the Court shall have ordered execution to issue against him.]

† [Art. 180:—

Description of Application.

Period of Limitation.

Time from which period begins to run,

To enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction or an order of Her Majesty in Council.

Twelve years.

When a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right. Provided that when the judgment, decree or order has been revived, or some part of the principal money secured thereby, or some interest on such money

has been paid, or some acknowledgment of the right thereto has been given in writing, signed by the person liable to pay such principal or interest or, his agent, to the person entitled thereto or his agent the twelve years shall be computed from the date of such revivor, payment or acknowledgment, or the latest of such revivor, payments, or acknowledgments, as the case may be.]

The clause of s. 230 of Act X of 1877, which prohibits a subsequent application for execution, only applies where the previous application has been made under that section, and not where such previous application has been made under Act VIII of 1859.

In this case the plaintiff obtained a money-decree in the High Court against the defendant on the 16th of November 1864. The first application for execution of this decree was made on the 18th September 1869, when the Court ordered a writ of attachment to issue against the person of the defendant. After several fruitless attempts to execute this and other subsequent similar writs, the plaintiff ultimately succeeded in arresting the defendant on the 28th of January 1873, and he was committed to jail. The defendant lay in jail for two years without satisfying the decree; and at the end of that time was released under the provisions of the Code of 1859, which limited imprisonment under a decree to two years.

In the meanwhile, the plaintiff had the decree transmitted for execution to the District Court at Hooghly, and that Court, upon an application made on the 20th of August 1874, ordered the right, title, and interest of the defendant in certain property within its jurisdiction and in the possession of the defendant to be attached.

When this was done, the defendant and his brother preferred a claim, on the ground that the property attached was *debutter* property. The claim was disallowed; and the defendant and his brother, on the 4th December 1874, brought a suit to establish that the property was *debutter*, and therefore not liable for the defendant's debts. This suit was carried through the various Courts of this country to the Privy Council, where it was finally decided, on the 6th of July 1879, that the defendant had, subject to the trusts for the idol, a saleable interest in the property attached. This interest was accordingly sold in July 1880 and realized Rs. 273-11. With the exception of this sum, no money was realized by the plaintiff under the decree, and there remained a balance due of Rs. 11,977-7. The plaintiff having, as he alleged, recently ascertained that the defendant possessed some immoveable property within the original jurisdiction of the High Court, procured the decree to be brought back to that Court; and, on the 15th September 1880, obtained the present rule, calling on the defendant to show cause why the decree should not be executed.

Mr. T. A. Apcar now showed cause and contended, that if s. 230 of the Civil Procedure Code applied to this application for execution, the application was barred, inasmuch as more than twelve years had elapsed from the date of the decree, and no fraud or force had been shown on the part of the judgment-debtor to prevent the execution of the decree within that time; see [506] cl. (a), s. 230. That was the only exception in that section which could apply under the circumstances of the present case, and that exception did not apply here. But if s. 230 does not apply, the application is barred by art. 180, sched. ii of Act XV of 1877, which provides a period of limitation of twelve of years from the time when the right to enforce the decree accrued. There were several provisions, two of which, it would be contended, were applicable here, as giving a fresh period from which the twelve years could be calculated,—namely, that the decree had been revived, or some part of the money secured by the decree had been paid or the debt acknowledged; but it is submitted there has been no revivor of the decree in the sense intended. The order of the 18th September 1869 was merely a continuation of the proceedings, and did not give a fresh point from which limitation could be computed, nor has there

been any such payment as to give a fresh period of departure. It is submitted the payment contemplated by the proviso to art. 180 is a voluntary payment by the judgment-debtor or any one representing him, and not a payment enforced by execution-proceedings: no acknowledgment of the debt has been given. The present application for execution is therefore barred.

Mr. Kennedy (with him Mr. Bonnerjee), in support of the rule, contended, that there had been both payment and revivor within the meaning of art. 180 of Act XV of 1877. Any payment would be sufficient, and the plaintiff had admittedly received a portion of the debt since taking out execution. [WHITE, J.—That was not a payment, but an exaction.] But even if this is not sufficient, there has been a revivor of the decree by the order of the 18th September 1869. That was an order made after more than a year from the date of the decree, and must be taken to have been made under the then existing procedure, namely, ss. 215 and 216 of Act VIII of 1859. Now those sections were merely an express enactment continuing the procedure by *scire facias* as it existed in the Supreme Court as part of the law of England. That law is laid down in Tidd's Practice, vol. ii, p. 1103, which shows that one of the cases in which writs of *scire facias* were issued was where a [507] judgment was more than a year old, in which case the judgment-creditor had to cause the writ to be issued, calling on the debtor to show cause why execution should not be allowed. There were two cases in which writs of *scire facias* were in general use, the other being where the judgment-debtor was dead. With respect to a writ issued after the death of the judgment-debtor, it was held that it created a new right and was not a mere continuation of the suit—*Farrell v. Gleeson* (11 Cl. and Fin., 702) and *Farran v. Beresford* (10 Cl. and Fin., 319). These cases were afterwards cited before the Privy Council in Ireland in *In the matter of Blake* (2 Ir. Ch. Rep., 643) and *Griffin v. Blake* (2 Ir. Ch. Rep., 645), where the question was, whether there was any distinction between the effect of a writ of *scire facias* issued after the death of the debtor, and one issued because the judgment was more than a year old, and it was there held there was no distinction, and that the latter equally created a new present right to receive the debt. What was meant by a revivor is shown too in Fitzherbert's *Natura Brevium*, p. 266. Without this procedure the judgment could not be enforced. This then was the procedure in force in the Supreme Court in 1859, when the Civil Procedure Code and the Limitation Act of that year were passed. It is submitted that the Legislature intended to substitute the procedure laid down in ss. 215, 216 of the former Code for the proceeding by *scire facias*, and that the effect of a notice under the latter section should have the same effect as the issue of the writ. The words used in s. 19 of the Limitation Act of 1859 have been continued down to the present time—see art. 180, sched. ii of Act XV of 1877; and the procedure in ss. 215, 216 of Act VIII of 1859 is continued in ss. 245\*, 248 of Act X of 1877. [WHITE, J.—There is nothing about revivor in s. 248 of the Civil Procedure Code. Does the taking proceedings under s. 248 have the effect of reviving the decree, notwithstanding that omission?] It is submitted it has; the notice gives a new right, just as the *scire facias* did. The Civil Procedure Code was passed prior to the Limitation Act; so, supposing there is an error, the latter Act should guide the Court.

\* [Sec. 245 :—The Court, on receiving an application for the execution of a decree, shall ascertain whether it contains the particulars mentioned in Section 235, or such of them as may be applicable to the case, and whether it is accompanied by the inventory mentioned in Section 236; and if such particulars or inventory are or is wanting, it shall reject the application or return it for amend-

Procedure on receiving application for execution of decree.

[WHITE, J.—Section 230 of the Code seems to prohibit the [508] Court altogether from entertaining the application.] As to s. 230 of the Procedure Code of 1877 it is submitted it does not apply. Act X of 1877 does not apply to “any proceedings after decree that may have been commenced and were still pending” on the 1st October 1877, when the Act came into force; see s. 3\* as amended by Act XII of 1879. This section was altered on account of the Full Bench ruling in *Runjit Singh v. Meherban Koer* (I. L. R., 3 Cal., 662). These proceedings were prior and pending at that time. Besides, s. 230 says, that the prior application must have been made under that section, otherwise the section does not apply. [WHITE, J.—It was made under the provisions of the then Code of Civil Procedure, which were to the same effect as s. 230.] The words are express “under this section,” not “under the Procedure Code,” which would have been probably used if the intention of the Legislature had been other than I contend it was. As to fraud on the judgment-debtor’s part, it is submitted that his saying his property was *debutter* amounted to fraud. It was really concealing his property. [WHITE, J.—I can’t say he had no ground for saying so. Two Courts decided in his favour.]

Mr. T. A. Apcar was allowed to reply.—The proviso in s. 3 of Act X of 1877 does not apply. This proceeding had not commenced, nor was it pending, before 1st of October 1877. What was pending was the proceeding in execution against the *debutter* property, which has been satisfied. Though the Limitation Act received the assent of the Governor-General subsequently to the Civil Procedure Code, yet both Acts came into force together. The means by which execution is to be obtained is the Civil Procedure Code alone, and the Court is bound by the words of that Code. If it was intended to introduce the writ of *scire facias* into the Code of 1859, the intention would have been made clear. The introduction of the word “revive” in the Limitation Act may well have been to exclude the writ of *scire facias*, inasmuch as that writ had been done away with by the common Law Procedure Act of 1852. It is submitted that s. 230 of the Code of Civil Procedure is not [509] limited to cases in which a previous application has been made under that section, but is applicable to the present case. [Mr. Kennedy referred to *Byradli Subbareddi v. Dasappa Rau* (I. L. R., 1 Mad., 403), *Sohan Lal v. Karim Buksh* (I. L. R., 2 All., 281), and *Ram Krishen v. Sedhu* (I. L. R., 2 All., 275), to show that unless a previous application has been made under s. 230 that section does not apply.]

*Cur. adv. vult.*

ment or for the addition of the inventory, as the case may be or amend it then and there. Every amendment made under this section shall be attested by the signature of the Judge.

When the application is admitted, Court shall enter in the register of the suit a note of the application and the date on which it was made, and shall order execution of the decree according to the nature of the application provided that, in the case of a decree for money, the value of the property attached shall as nearly as may be correspond with the amount for which the decree has been made

\*[Sec. 3.—The enactments specified in the first Schedule hereto annexed are hereby

Enactments repealed. repealed to the extent mentioned in the third column of the same Schedule.

But when in any Act, Regulation or Notification passed or issued prior to the day on which this Code comes into force reference is made to Act VIII of 1859, Act XXIII of 1861, or the Code of Civil Procedure or to any other Act hereby repealed, such reference shall so far as may be practicable, be read as applying to this Code or the corresponding part thereof.

References in previous Acts.  
Saving of procedure in suits instituted before 1st October 1877.

Nothing herein contained shall affect the procedure prior to decree in any suit instituted or appeal presented before the Code comes into force.]



**White, J.** (after stating the facts as above, continued):—The decree is more than twelve years old, and as such execution would be barred under art. 180, sched. ii of the Indian Limitation Act, 1877. But Mr. Kennedy, for the plaintiff, has contended with much ability and learning, that the order of this Court of the 18th of September 1869 was a revivor of the decree within the meaning of the proviso attached to the foregoing article, and which is in these words, "provided that when the judgment or decree has been revived . . . the twelve years shall be computed from the date of such revival, or the latest of such revivals."

The petition does not state how the order of the 18th of September 1869 came to be made. But it was, made long after the Code of 1859 had been applied to this Court on its Original Side. It also appears to have been the first order from execution which issued upon the decree, and to have been made after the lapse of more than a year from the date of the decree; so I must take the order to have been made under ss. 215 and 216 of the Code of 1859, and, therefore, after notice to the defendant to show cause why the decree should not be executed against him.

The corresponding sections to those in the Code of 1877 are ss. 245 and 248, the latter of which enacts that notice to show cause must issue, "if more than a year has elapsed between the date of the decree and the application for its execution."

In neither of the Codes is an order for execution made after notice under these foregoing sections, described as reviving the decree. The question is, whether it has that effect, [510] and is what the Legislature had in mind when it speaks in the present Limitation Act of the revival of a decree.

The proviso in question is a transcript of one in the repealed Limitation Act of 1871, and in tracing back to its source, the language used in the proviso, we find the words first used in s. 19\* of Act XIV of 1859, which enacts, that "no proceeding shall be brought to enforce a judgment or decree of a Court established by Royal Charter but within twelve years from the decree, unless in the meantime such decree shall have been duly revived. . . . and in such case no proceeding shall be brought to enforce the decree but within twelve years after such revival or the latest of such revivals."

This was the first Limitation Act of the Legislature of India which applied to the Chartered Courts at the three Presidencies. In 1859, these Courts were governed by their own procedure. It was part of that procedure that execution could not issue upon a judgment more than a year old without suing out a writ of *scire facias* against the defendants. The 195th of the repealed rules of 1851 on the Plea Side of the old Supreme Court of Calcutta recognises the procedure to be such.

\*[Sec. 19:—No proceeding shall be taken to enforce any judgment, decree, or order of any

Proceedings for enforcing judgments, &c., of Supreme Courts to be taken within twelve years.

Court established by Royal Charter but within twelve years next after a present right to enforce the same shall have accrued to some persons capable of releasing the same unless in the mean-time such judgment, decree, or order shall have been duly received, or some part of the principal money secured by such judgment, decree or order or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable or his agent, to the person entitled thereto or his agent; and in any such case no proceeding shall be brought to enforce the said judgment, decree, or order, but within twelve years after such revivor, payment or acknowledgment, or the latest of such revivors, payments, or acknowledgments, as the case may be, provided that for three years next after the passing of this Act every judgment, decree, and order which may be in force at the date of the passing of this Act, shall be governed by the law now in force, anything therein contained notwithstanding.]

Proviso as to the judgment now in force.

The writ of *scire facias* was introduced into the Chartered Courts from the English law, and that law governed its operation and effect. By the common law of England, in the case of judgments in personal actions, if more than a year and a day passed without execution, the plaintiff's only remedy was an action of debt upon the judgment. The Statute of Westminster the 2nd, 13 Edward 1, c. 45, gave the plaintiff the alternative remedy of suing out a *scire facias* (4 Comyn's Digest, Title Execution, A. 4 and I. 4; Tidd's Practice, p. 1102). The effect of an award of execution in pursuance of the *scire facias* was to revive the judgment, It is so stated in Tidd's Practice, p. 1103; and the point is placed beyond controversy *Farrell v. Gleeson* (11 Cl. and Fin., 702) and *In the matter of Blake* (2 Ir. Ch. Rep., 643), before the Judicial Committee of the Privy Council in Ireland. These cases decide that *scire facias* upon a judgment is not a mere continuation of a former suit, but creates a new right. It would appear from Tidd's Practice, p. 1106, citing a case [511] from 2 Salkeld, 598, that although subsequent writs of *scire facias* may be taken out, and it may be necessary to take them out, it is the first *scire facias* which revives the judgment. It is unnecessary, however, to determine in this case how that may be, as the first order for execution in the present case is less than twelve years old.

There was then, at the date when the Limitation Act of 1859 came into force, a proceeding in the Supreme Court which had unquestionably the effect of reviving a judgment. This proceeding has since been displaced by a new proceeding, which in substance is the same as the old proceeding. It commences with a notice to show cause why the decree should not be executed, and terminates with an order for execution, which is tantamount to the award of execution under the *scire facias*. Inasmuch as the legislature has, notwithstanding the change in procedure, retained in the present Limitation Act the language of the Act of 1859, and prescribed a fresh point of departure for the twelve years in the case of a judgment that has been revived, and inasmuch as I am bound to give effect, if possible, to every part of the language of the Legislature in the Limitation Act, I must hold that an order for execution under the Code made after notice to show cause has, on the Original Side of this Court, the same effect of reviving the judgment as the *scire facias* had.

It is contended for the defendant that though the order of the 18th of September 1869 may have revived the judgment, I am precluded from granting the present application by that part of s. 230 of the Code now in force which prohibits this Court from granting, except under certain circumstances, a subsequent application where the decree is more than twelve years old.

Section 230 of the Code, as it stood when the Code was passed in 1877, prohibited the granting of a subsequent application for execution of a decree more than twelve years old, unless the Court was satisfied that due diligence had been used to obtain satisfaction under the previous order for execution. As the section now stands, amended by the Act of 1879, it prohibits the grant of a subsequent application, no matter what diligence may have been used, unless the judgment-debtor has, by [512] fraud or force, prevented the decree from being executed within the twelve years. The consequence is, that if from the mere impecuniosity of the judgment-debtor a decree remains unsatisfied for twelve years, no further order for execution can be made. No fraud or force has been found to exist in the present case, but Mr. Kennedy argues that this part of s. 230 only applies where the previous application for execution was actually made under s. 230, and not where, as here, the previous application was made under the Code of 1859. The language employed in

s. 230 is this, "Where an application to execute a decree has been made under this section and granted, no subsequent application to execute the same decree shall be granted after the expiration of twelve years, &c."

The natural meaning of the foregoing language is, that the previous application must be one made under s. 230. Mr. Kennedy has cited the cases of *Byraddi Subbareddi v. Dassappa Rau* (I. L. R., 1 Mad., 403) and *Ram Kishen v. Sedhu* (I. L. R., 2 All., 275), in which these Courts considered that the restriction upon the subsequent application only applied where the previous application had been made under s. 230. The effect of this new provision in s. 230 is to cut down the right of a judgment-creditor to procure execution to issue upon an unsatisfied judgment.

I am of opinion that the restriction does not effect the present application, and that, consequently, I am not prevented from making this rule absolute.

When the case occurs of a subsequent application for execution after the grant of a previous application under s. 230, a somewhat difficult question may arise how to reconcile the language of that section with the proviso in art. 180 of sched. ii of the Limitation Act of 1877; but it is unnecessary now to pronounce any opinion upon the point.

The rule will be made absolute with costs, and execution will issue for the balance remaining due under the decree.

*Rule absolute.*

Attorney for the Plaintiff : Mr. *Hechle*.

Attorneys for the Defendant : Messrs. *Ghose* and *Bose*.

#### NOTES.

##### [REVIYOR OF DECREE

The correctness of the ruling in this case was doubted in (1890) 17 Cal. 491 but it has since been followed as an authority :—(1892) 20 Cal. 551 ; (1884) 7 Mad. 540 · (1895) 22 Cal. 921 ; (1896) 24 Cal. 244 ; (1903) 30 Cal. 979.

The subject is dealt with by *Mookerjee, J.* in (1909) 36 Cal. 543=9 C. L. J. 271. If there is no order for execution after issuing notice under s. 248 (C. P. C.) there is no revivor :—(1903) 30 Cal. 543=7 C. W. N. 798.

An application for transmission of certified copy of decree amounts to revivor :—(1895) Cal. 921.

See also *Mitra on Limitation*, Vol II (1911) p. 1241.]

## [513] APPELLATE CIVIL.

*The 10th December, 1880.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE FIELD.

Latchman Pundeh.....Decree-holder

*versus*

Maddan Mohun Shye and others.....Judgment-debtors.\*

**Execution of Decree**—Court which passed the Decree—Civil Procedure Code (Act X of 1877, as amended by Act XII of 1879), ss. 223, 649—Imitation Act (XV of 1877), sched. ii, art. 179, cl. 4.

*Per* GARTH, C.J.—Section 649 of the Civil Procedure Code as amended by Act XII of 1879, which explains the meaning of the expression the “Court which passed the decree,” does not *exclude* the Court which originally passed the decree as being a Court in which an application for execution should be made, but merely *includes* another Court.

When, therefore, a Court which has passed a decree has ceased to have jurisdiction to execute it, the application for execution may be made either to that Court, although it has ceased to have jurisdiction to execute the decree, or to the Court which (if the suit wherein the decree was passed were instituted at the time of making application to execute it) would have jurisdiction to try the suit.

*Per* FIELD, J.—A Court does not cease to be “the Court which passed the decree” merely by reason that the head-quarters of such Court are removed to another place, or merely because the local limits of the jurisdiction of such Court are altered.

An application for the transfer of a decree under the provisions of s. 223 and the following section of Act X of 1877, is a step in aid of the execution of the decree within the meaning of cl. 4, art. 197, sched. ii of Act XV of 1877.

THE facts of this case are sufficiently stated in the Judgments.

Baboo *Trailokanauth Mitra* for the Appellant.

Baboo *Rash Behary Ghose* for the Respondents.

**Garth, C.J.**—A suit was brought in the Court of the Munsif of Manbazaar, to recover the sum due upon a mortgage-bond, and to realize that sum by sale of the mortgaged [514] property; and a decree was made accordingly. That decree was dated the 5th of December 1876, and on the 5th of December 1879 an application was made to the same Munsif, who had then removed his Court to Barabazaar, for execution of the decree.

In the meantime the particular area in which the mortgage-property was situate had been removed from the Munsifi of Manbazaar to the Munsifi of Katra.

The Munsif of Manbazaar entertained the application for execution, and, considering that he had jurisdiction to deal with it, he sent it with the usual certificate to the Court of the District Judge of Bancoora to be executed, and that Judge sent it on to the Munsif of Katra for execution.

It was then objected that the application for execution had not been made to the proper Court, and that the execution-creditor was bound to apply,

\* Appeal from order No. 226 of 1880, against the order of Baboo Brojendro Coomar Seal, Additional Judge of Bancoora, dated the 26th June 1880, affirming the order of Baboo Hemanga Chundro Bosu, Munsif of Katra, dated the 22nd March 1880.

under s. 230 of the Code of the Civil Procedure, to the Munsif of Katra, within whose jurisdiction the mortgaged property then was, he being the proper officer, as it was contended, to whom the application should have been made; and that as the application had been made to the Munsif of Manbazaar, the decree could not be executed; and moreover, the Munsif of Katra appears also to have held, that as three years had gone by from the time when the decree was obtained, no fresh application could be made to him as the Munsif of Katra. He accordingly refused to execute the decree on those grounds.

That decision was then appealed to the District Judge of Bancoora, and he held that the Munsif was right, and that the plaintiff was under a mistake in making his application originally to the Munsif of Barabazaar.

The consequence is, that the application for execution has been refused by both the Courts.

The case now comes before us on appeal, and it seems to depend upon the proper construction of the execution sections of the Code of Civil Procedure, the real point being, whether the Court of the Munsif of Barabazaar was the Court to which, under the circumstances, the plaintiff had a right to apply.

Now s. 223<sup>\*</sup> of the Code of Civil Procedure provides, that [515] a decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution, and by the Amending Act XII of 1879, an addition has been made to s. 649 of the Code to the effect, that the words "the Court which passed the decree," as used in Chap XIX of the Code, is to be deemed to include, where the Court which passed the decree to be executed has ceased to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed were instituted at the time of making the application for execution of the decree, would have jurisdiction to try the suit.

Court by which decree may be executed      <sup>\*</sup>[Sec 223 —A decree may be executed either by the Court which passed it or by the Court to which it is sent for execution under the provisions hereinafter contained.

The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court

(a) If the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or

(b) If such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and his property within the local limits of the jurisdiction of such other Court, or

(c) If the decree direct the sale of immoveable property situate outside the district within which the Court which passed it is situate, or

(d) If the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

The Court which passed a decree may of its own motion send it for execution to any Court subordinate thereto

The Court to which a decree is sent under this section for execution shall certify to the Court which passed it, the fact of such execution, or where the former Court fails to execute the same, the circumstances attending such failure. If the decree has been passed in a case cognizable by a Court of Small Causes and the Court which passed it wishes it to be executed in Calcutta, Madras, Bombay or Rangoon, such Court may send to the local Court of Small Causes the copies and certificate respectively mentioned in clauses (a) (b) and (c) of section 224; and such Court of Small Causes shall thereupon execute the decree as if it had been passed by itself.

If the Court to which a decree is to be sent for execution is situate within the same district as the Court which passed such decree, such Court shall send the same directly to the former Court. But if the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed.]

Now it is to be observed that this clause, which explains the meaning of the expression "the Court which passed the decree," *does not exclude* the Court which originally passed the decree as being a Court to which the application should be made, but only *includes* another Court; and I take the meaning of the clause to be this, that where the Court which passed the decree has ceased to have jurisdiction to execute it, the application for execution may be made either to that Court, although it has ceased to have jurisdiction to execute the decree, or to the Court which, if the suit wherein the decree was passed were instituted at the time of making application to execute it, would have jurisdiction to try the suit.

Now there is no doubt that if this suit had been instituted at the time of making the application for executing the decree, it must have been brought in the Court of the Munsif of Katra. But then the applicant, as I take it, has a right to apply either to that Court or to the Court which passed the decree, which is the Court of the Munsif of Barabazaar. The Court of the Munsif of Barabazaar is not less the Court which passed the decree, merely because that Court has changed its name from the Court of Manbazaar to the Court of Barabazaar. It is the self-same Munsif and the self-same Court, and it is not less the Court of the Munsif of Manbazaar because its position or its name has been changed.

It seems to me, therefore, that the plaintiff had a right to apply to the Munsif of Barabazaar to execute the decree, and that Court having entertained the application, and having sent it to the District Court of Bancoora, and the District Court having [516] sent it in due course to the Munsif of Katra for execution, the Munsif of Katra was bound to execute it.

Even supposing it had been necessary to make a fresh application to the Munsif of Katra, I still consider that the plaintiff would be in time, because the application which he made was made to the proper Court within three years from the date of the decree, and thus he would have three years more from the date of that application. But it really is not necessary to decide this, because I consider that the plaintiff made the application to the proper Court within the proper time, and that the Court to which it was sent is bound to execute it.

The appeal must, therefore, be decreed, and the case must go back with directions to the Munsif of Katra to execute the decree. The appellant will have his costs in all the Courts; the hearing fee for this Court being fixed at two gold-mohurs.

**Field, J.**—The decree which forms the subject of these proceedings was passed on the 5th of December 1876 by the Munsif of Manbazaar. Subsequent to the passing of that decree, the head-quarters of the Manbazaar Munsifi were transferred from Manbazaar to Barabazaar, and the local limits of the jurisdiction of the same Munsifi were altered by transferring certain thanas to the district of West Burdwan and forming them into, or uniting them with, another Munsifi, termed the Katra Munsifi.

On the 5th of December 1879, the decree-holder applied to the Munsif of Manbazaar, then stationed at Barabazaar, to have his decree executed. The decree was a money-decree, which also declared a lien on certain immoveable property. This immoveable property was, at the time of making the decree, within the jurisdiction of the Manbazaar Munsifi; and by reason of the transfer, to which I have adverted, became subsequently, and was on the 5th of December 1879, a portion of the local jurisdiction of the Katra Munsifi.

The lower Courts appear to be of opinion that because this immoveable property was no longer within the jurisdiction of the Manbazaar Munsif, this Munsif had no jurisdiction to execute or to entertain an application for the execution of the decree.

[517] It appears to me that this view is an erroneous one. The jurisdiction to execute a decree is given by s. 223 of the Code of Civil Procedure; and according to that section a decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution under the provisions of the Act thereafter contained.

Now it appears to me that the Munsif's Court at Manbazaar did not cease to be "the Court which passed the decree" merely by reason that the headquarters of the Munsif had been moved to another place, or merely by reason that the local limits of the jurisdiction of the Munsif were altered. This being so, it is clear that the execution of the decree might have been had in the Court of the Munsif of Barabazaar.

A good deal of discussion has taken place during the argument in this case about the meaning of s. 649 of the Amended Code of Civil Procedure. That section provides that the expression in Chap. XIX of the Code, "Court which passed the decree," or words to that effect, shall, unless there be anything repugnant in the context, be deemed to include, where the decree to be executed is passed in appeal, the Court which passed the decree against which the appeal was preferred; and where the Court which passed the decree to be executed has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed were instituted at the time of making application for execution of the decree would have jurisdiction to try such suit."

It has been contended, that because the immoveable property included in the decree is now situated within the jurisdiction of the Katra Munsif, therefore the application for the execution of the decree must be made to the Katra Munsif's Court, because if a suit were now to be brought in respect of such immoveable property, such suit must be instituted in the Katra Munsif's Court. It appears to me that this contention is untenable, for the Court which passed the decree has not ceased to exist or ceased to have jurisdiction to execute it.

The words of the section (649) are, it may be observed, in extension of the original and literal meaning of the expression "Court which passed the decree." The definition contained [518] in s. 649 was not intended by the Legislature to limit or confine the natural meaning of the expression "Court which passed the decree" to the exact instances stated in the new section. This is the usual interpretation put upon the word "include" when employed in the definition portion of a Statute. See *Rej v. Kershaw* (6 E. and B., 999, at p. 1007); *Ex parte Ferguson* (L. R., 6 Q. B., 280, at p. 291); *Pound v. Plumstead Board of Wards* (L. R., 7 Q. B., 188); and *Doed Edney v. Benham* (7 Q. B., 976, at p. 979). It follows, therefore, that the expression "Court which passed the decree" must in this case still include the Court of the Munsif of Barabazaar.

The words in s. 649, which have reference to the Court which passed the decree ceasing to exist, refer to a class of cases not uncommon in these provinces, in which a Small Cause Court having been in existence for a certain number of years has afterwards been abolished by an order of the Local Government (see s. 3\* of Act XI of 1865). The application for execution of a decree passed

Constitution of Small Cause Courts.

\*[Sec. 3:—The Local Government may, with the previous sanction of the Governor-General of India in Council, constitute for the trial of suits under this Act, Courts of Small Causes with such establishment of Officers as may be necessary, at any

by such an abolished Court must now be made to the Munsif who would have jurisdiction to entertain the suit in which such decree was made, if such suit were instituted at the time when application for such execution is made. Another example is, where the Sudder Ameen who had jurisdiction throughout the whole of the district with a pecuniary limit exceeding that of a Munsif was abolished as such, the officer who was Sudder Ameen becoming the Munsif at head-quarters with a local jurisdiction limited to a single Munsif usually that at head-quarters. See cl. 2, s. 4,\* read with s. 8† of the repealed Act XVI of 1868. A decree passed by such a Sudder Ameen who had a local jurisdiction over the whole district could, therefore, be executed in the Court of the Munsif before whom a suit would now be instituted in respect of the claim for which the decree was passed by the Sudder Ameen. In the absence of these provisions, and after the repeal of Act XVI of 1868, there was doubt as to the Court which had jurisdiction to execute such a decree. While cl. 2 of s. 4 and s. 8 of Act XVI of 1868 remained in force, application for execution must have been made to the Court of the [519] Sudder Munsif; but in this case, if the decree-holder sought to attach and sell property situate within the existing local limits of jurisdiction of another Munsif, it would have been necessary to transfer the decree to such Munsif for execution under the provisions on this behalf contained in the Code.

The words "cease to have jurisdiction to execute it" in s. 649 were intended to meet such a case as the following,—for example, where an Additional or Subordinate Judge, attached to more than one district, having passed a decree in one district, leaves this district and sits in another district under the provisions of s. 15 of the Bengal Civil Courts Act, such Additional or Subordinate Judge is a Court. When such a Court is sitting in a district other than that in which the decree was passed, it has not ceased to exist, but it has ceased to have jurisdiction to execute that particular decree. Under the provisions of s. 649, application for execution can then be made to the Court which at the time of making the application would have jurisdiction to entertain the suit in which the decree was passed.

It being thus clear that an application for the execution of the decree in this case could be made to the Munsif of Manbazaar or Barabazaar, whose Court was, in the literal sense of the term, the Court, which passed the decree, it was competent to the Manbazaar Munsif to transfer this decree for execution under the provisions contained in s. 223 to the Katra Munsif. When the decree was so transferred, it was the duty of the Katra Munsif to proceed under the provisions of the Code to effect the execution thereof.

places within the territories under such Government. Whenever a Court of Small Causes shall be so constituted, the Local Government shall fix the territorial limits of the jurisdiction of such Court, and may from time to time alter the limits so fixed. The Local Government may abolish any Court of Small Causes ]

\*[Sec. 4 cl. 2.—The present Sudr Amins and Munsifs, shall be the first Munsifs, and (subject to any alteration of the limits of their local jurisdiction which may be made by the Local Government) shall severally exercise the jurisdiction of Munsifs under this Act within the local limits within which, immediately before the passing of this Act, they respectively exercised the jurisdiction of Munsif.]

Subordinate Judges and Munsifs to be a Civil Court. †[Sec. 8:—Every Subordinate Judge and Munsif under this Act shall be deemed to be a Civil Court within the meaning of the Code of Civil Procedure and of this Act.]



I may here observe that there is a distinction between the jurisdiction of the Court to execute the decree and the circumstances under which effective execution can be had. Clause (c) of s. 223 appears to me to have direct reference to a case like the present. The Munsif of Manbazaar could not make a decree directing the sale of the immoveable property included in the present decree, unless at the time when the plaint was filed in the case in which such decree was made that property was situate within the local limits of the jurisdiction of his Court. The fact of the site of this property having been, subsequent to [520] the making of the decree, placed outside the local limits of his jurisdiction, brings the case within cl. (c).

There is one more point in the case which it is necessary to notice, and that has reference to the Limitation Act. I have pointed out that, in my opinion, the Munsif of Barabazaar, as being the Court which passed the decree, was competent to execute it. Execution might have been had against the person or moveable property of the Judgment-debtor, if at any time found within the jurisdiction of the Barabazaar Munsif. But if no such execution could be had, because the Judgment-debtor did not reside or come within, and had no moveable property within, such Munsif's jurisdiction, it is clear that the only course open to the decree-holder to obtain effective execution would be to apply to the Court of the Barabazaar Munsif under s. 230 to have the decree sent for execution to the Katra Munsif. Now if the application to the Barabazaar Munsif be taken to be not an application for the execution of the decree, but merely an application for the transfer of the decree under the provisions contained in s. 223 and following sections, it appears to me that such an application for transfer is a step in aid of the execution of the decree within the meaning of cl. 4, art. 179 of the second schedule of the present Limitation Act, and that, therefore, the decree-holder would have a fresh period of three years from the date of such application for transfer. Were it otherwise—were the date of the application made under s. 230 to enforce a decree sent to another Court to be taken as the date up to which the period of limitation may extend, inasmuch as no such application can be made until the decree has been sent, a decree-holder would often be barred through no laches of his own, but merely because, although he had applied in time under s. 223 to have the decree sent to the other Court, delay in transmitting it had occurred in consequence of some one of the many causes which retard the completion of office work.

For these reasons, I concur in thinking that the order of the lower Court must be reversed.

*Appeal allowed.*

#### NOTES.

#### [I. TRANSFER OF JURISDICTION OF COURT SUBSEQUENT TO DECREE—WHICH COURT IS TO EXECUTE?—

The rule laid down in this case that both the Court which passed the decree and the Court to which the jurisdiction over the subject matter has been transferred have powers to execute the decree was applied in (1887) 15 Cal. 667 where it was held that the Court which passed the mortgage decree could sell the property though the jurisdiction had been transferred subsequent to the decree.

Again in (1900) 28 Cal. 238=5 C. W. N. 150 and (1908) 35 Cal. 974=12 C. W. N. 859 it was held that "the Court which passed the decree" includes the Court to which the jurisdiction has been transferred.

See also (1880) 6 Cal. 201, (1887) 11 Bom. 153; (1897) 25 Cal. 315; (1907) 30 Mad. 537; (1890) 17 Cal. at 703.

Sec. 38 of the C. P. C., 1908, corresponds to s. 649 of the repealed Code of 1882.

#### II. LIMITATION—STEP IN AID OF EXECUTION—

An application for transfer of decree is a *step in aid of execution*:—(1892) 20 Cal. 29; (1895) 22 Cal. 375.]

[521] *The 14th December, 1880.*

PRESENT:

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Luchman Lall.....Plaintiff

*versus*

Ram Lall.....Defendant.\*

*Suit for Adjustment of Accounts of a Partnership—Jurisdiction—Contract Act  
(IX of 1872), s. 265.*

Section 265 of the Contract Act, while it enables a partner, after the termination of a partnership, to apply to the District Court to wind up the business, does not take away the ordinary right of suit in any Civil Court having jurisdiction to have the accounts of the partnership taken.

THIS was a suit for the adjustment of account of a partnership, and to recover a sum of money alleged to be due:

The plaint, *inter alia*, stated, that the plaintiff and defendant entered into partnership for the purpose of carrying on a trade in grain, upon the agreement that each partner should supply a moiety of the capital, and that the profit, should be divided equally between them; that the said partnership continued from the 15th May 1877 to the 3rd October of the same year; that during the continuance of the said partnership the plaintiff purchased grain at Royapura, and despatched it for sale to a Calcutta firm, and that part of the grain so purchased was sold at Royapura; that the grain sent to Calcutta was sold under the management of the defendant; that the value of the grain purchased by the plaintiff, together with the price of the bags, amounted to Rs. 3,230-8-3; that the defendant being liable for a moiety of this sum, paid Rs. 1,542-4-1½, leaving a balance of Rs. 73 still due, which sum was paid by the plaintiff in excess of the sum due and paid by him as his moiety of the capital expended; that the plaintiff incurred a further expense of Rs. 193-15-3 for certain additional bags despatched by him to Calcutta; and that the two last-mentioned sums, together with the share of the profit due to him on the sale of the grain in Calcutta, amounted to Rs. 949-5-4½, the subject of the present suit.

[522] The defendant, in his written statement, denied the allegation in the plaint in all material particulars, and set out his own version of the partnership transactions, which went to show that the plaintiff was indebted to the defendant. A cross-suit was filed by the defendant against the plaintiff.

The Court of first instance on the facts dismissed the plaintiff's suit. The lower Appellate Court was of opinion that the present suit was not one for a balance due on a mutually adjusted account, but (the partnership having been already dissolved) an application for winding up the business of the firm under s. 265 of the Contract Act; and that such application could, under that section, only be entertained by a Court not inferior to the Court of a District

\* Appeal from Appellate Decrees, Nos. 1726 and 1888 of 1879, against the decree of J.F. Stevens, Esq., Officiating Judge of Patna, dated the 5th June 1879, affirming the decree of Baboo Chuckerdhar Proshad, Second Sudder Munsif of that district, dated the 30th December 1878.

**Judge.** The suit having been instituted in the Court of the Munsif, therefore failed on the plea of jurisdiction. For this reason the lower Appellate Court dismissed the appeal.

The plaintiff thereupon appealed to the High Court.

Baboo *Hem Chunder Banerjee* and Baboo *Umakali Mookerjee* for the Appellant.

Baboo *Umbika Churn Ghose* and Baboo *Pran Nath Pundit* for the Respondent.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by

**Mitter, J.**—These are two cross-suits between persons who at one time were carrying on a partnership business in grain. The object of the suits was for adjustment of account, and for recovery of the money due to each other. The suits were instituted in the Court of the Munsif of Patna. The Munsif dismissed both these suits. There were two appeals; and the District Judge on appeal held, that the Munsif had no jurisdiction to entertain the suit, because, under s. 265 of the Contract Act, it was the District Judge's Court which had sole jurisdiction to grant relief in a case like this. We think that the District Judge is wrong in this view. It has been decided by [523] the Madras High Court in the case of *Javali Ramasami v. Sathambakam Theruvengadasami* (I. L. R., 1 Mad., 340) that s. 265 is only an enabling section,—that is to say, it leaves to the option of the plaintiff either to institute proceedings under that section in the District Judge's Court, or to pursue his ordinary civil remedy by instituting a regular suit in the Court which has jurisdiction having regard to the pecuniary value of the suit. We entirely concur in this view of the section, and think that it does not oust the Civil Court from its jurisdiction.

We, therefore, set aside the decisions of the lower Appellate Court, and remand the two cases to that Court for retrial. Costs to abide the result.

*Appeal allowed—Case remanded.*

#### NOTES.

##### [PARTNERSHIP SUIT—STATUTORY CHANGE—

While this case laid down that a suit might lie in any Court having jurisdiction—a view which was followed in (1881) 6 Bom. 165; (1883) 5 All. 500—it was laid down that the proper Court was the District Court, in (1881) 7 Cal. 157; (1881) 7 Cal. 428; (1884) 10 Cal. 669. See also (1882) 5 Mad. 256.

The Indian Contract Act Amendment Act IV of 1886 s. 1 did away with the explanation to Sec. 265 of the Contract Act as originally enacted.]

APPELLATE CRIMINAL.

The 5th January, 1881.

PRESENT :

MR. JUSTICE MORRIS AND MR. JUSTICE PRINSEP.

The Empress on the Prosecution of Jogendronath Bose

versus

Thompson.\*

*Presidency Magistrates' Act (IV of 1877), s. 194 High Courts' Criminal Procedure Act X of 1875, s. 147—Dismissal of Complaint after partial hearing for want of attendance of Complainant—Institution of fresh Proceedings.*

An order of dismissal under s. 124 of Act IV of 1877 does not operate as an acquittal.

THIS case came before the High Court under s. 147† of Act X of 1875, on the application of one James Augustus Thompson (who carried on business as Thompson and Coondoo), who had been charged on the 5th August 1880, before the Presidency Magistrate of Calcutta, with having fraudulently retained and kept a telegraphic message sent by the Executive Engineer of Debrooghur, which message ought to have been delivered to one Jogendronath Bose, (who carried on business under the name of Thompson, Coondoo, & Co.), and with having [524] dishonestly misappropriated such message to the use of his firm, thereby, committing offences under s. 22 of the Indian Telegraph Act (I of 1876), and s. 403‡ of the Penal Code.

\* Criminal Rule, No. 301 of 1880, from a decision of Mr. B. L. Gupta, Presidency Magistrate of Calcutta, dated 25th October 1880.

†[Sec. 147.—Whenever it appears to the High Court of Judicature at Fort William, Madras, or Bombay that the direction hereinafter mentioned

Power of Presidency High Court to transfer to itself cases from Police Magistrates.

will promote the ends of justice, it may direct the transfer to itself of any particular case from any criminal Court situate within the local limits of its ordinary original criminal jurisdiction, and the High Court shall have power to determine the case so transferred, and to quash or affirm any conviction or

other proceeding which may have been had therein, but so that the same be not quashed for want of form, but on the merits only.]

Dishonest misappropriation of property.

‡[Sec. 403 :—Whoever dishonestly misappropriates or converts to his own use any moveable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

*Explanation 1.* A dishonest misappropriation for a time only is a misappropriation within the meaning of this section. -

*Explanation 2.*—A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence; but he is guilty of the offence above defined, if he appropriates it to his own use, when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner, and has kept the property a reasonable time to enable the owner to claim it.

What are reasonable means, or what is a reasonable time in such a case, is a question of fact.

It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it; it is sufficient if at the time of appropriating it, he does not believe it to be his own property, or in good faith believe that the real owner, cannot be found.]

It appeared that James Augustus Thompson was formerly a partner in the firm of Thompson, Coondoo, & Co., and that, during the year 1879, he broke off connection with that firm, and sold his share in the goodwill and stock-in-trade to Jogendronath Bose, his partner in the firm, and he himself set up business under the name and style of "Thompson and Coondoo." The places of business of the two firms were in the same street. It was admitted that James Augustus Thompson had received and opened, some time in August 1880, a telegram addressed to Thompson, Coondoo, & Co., and the defence put in was, that the telegram was received and retained by a mistake and in good faith.

The case came on before the Presidency Magistrate on the 15th September 1880, and part of the evidence was taken; but the hearing was adjourned until the 22nd September, to enable certain witnesses to appear, who were unable to do so on the 15th. On the 22nd the case was called on, and the complainant being absent, the case was dismissed. Shortly after such dismissal, the complainant and his witnesses appeared; and the Magistrate being of opinion that he could not revive the trial, directed the complainant to bring a fresh complaint. This was done on the following day; the accused was again summoned and the trial held on the 20th October, and on the 25th October the Magistrate convicted the accused and sentenced him to pay a fine of Rs. 200.

On the 29th November, a rule under s. 147 of Act X of 1875 was obtained by the accused, calling upon the complainant to show cause why the order of the Presidency Magistrate should not be set aside.

Mr. Branson for the Accused.

Baboo Gurudas Banerjee for the Complainant.

The arguments sufficiently appear from the judgment of PRINSEP, J.

[525] The following **Judgments** were delivered :—

**Prinsep, J.**—On a complaint made before the Presidency Magistrate under s. 22 of the Telegraph Act, a summons was issued on the 4th September last, fixing the 15th for the trial. The complainant and two witnesses (the Telegraph clerk and peon) were then examined, and, apparently to enable the complainant to prove that he had purchased the goodwill of the firm who were the addressees of the undelivered telegram, the trial was postponed until the 22nd, summonses being granted to procure the attendance of Mr. C. T. Davis, an officer of the High Court, at 1 p.m. of that day.

The case was called on towards the commencement of the Presidency Magistrate's sitting, and the complainant being absent "when his name was called six times," the case was dismissed. Within a very short time the complainant appeared, accompanied by Mr. Davis. The Magistrate at once saw the unfortunate result of his precipitate action, and thinking that he could not revive the trial, adopted an alternative course, and directed the complainant to bring a fresh complaint. This was done on the following day, the accused was again summoned, the trial was held on the 20th October, and on the 25th he was convicted and sentenced to pay a fine of Rs. 200.

The matter has now come before us under s. 147 of the High Courts' Criminal Procedure Act (X of 1875), it being contended that the order of the 22nd September last, dismissing the case, amounted to an acquittal, and that, on the facts found by the Presidency Magistrate, the accused has been wrongly convicted under s. 22 of the Telegraph Act.

I observe that the Presidency Magistrates' Act (IV of 1877) practically provides for only one mode of procedure in the trial of offences before a Presidency Magistrate, no distinction being drawn between cases which are appealable to the High Court and those in which the Magistrate's orders are final, except in the manner of recording evidence (s. 115), the preparation of a charge (s. 116), and in the addition to an order of conviction and sentence which is appealable "of a brief statement of the reasons for the conviction" (s. 126). It seems, therefore, that the sections of the Act which provide [526] for an order dismissing a complaint apply equally to all trials held by a Presidency Magistrate. The exact effect of an order of dismissal is not declared, except in a case dealt with under s. 32,—i.e., when, after examining a complainant, the Magistrate considers that there are "no sufficient grounds for proceedings." In such cases it is expressly provided that the "dismissal of a complaint shall not prevent subsequent proceedings against the person complained against."

The Act, however, permits a Magistrate to dismiss a complaint in consequence of the absence of the complainant at the commencement of the proceedings and upon the day appointed "for the appearance of the accused person, or on any day subsequent thereto on which the case may be called on" (s. 118), or on the day to which the hearing may have been adjourned "in order to secure the attendance of witnesses or for any other reason" (s. 124). In both instances it is left to the discretion of the Magistrate either to dismiss the complaint or again to adjourn the hearing. He is to determine whether he should impose upon the complainant the extreme consequences of his neglect to attend, or whether a further adjournment should be granted.

Mr. Branson, who supports the rule granted in this case, argues that, as s. 32 provides that an order of dismissal passed under certain circumstances shall be no bar to further proceedings, it must be presumed that it was intended by the Legislature that in all other cases such an order shall have the same effect as an acquittal.

On the other hand, Baboo Gurudas Banerjee contends with considerable force, that an order of acquittal can be passed only under s. 126, when in a trial the Magistrate "finds the accused person not guilty;" that the law declares that it is only when a complaint is withdrawn with the permission of the Magistrate (s. 125) that any other order operates as an acquittal of the accused person, and that this is borne out by the terms of s. 113.\*

\* [Sec. 113:—A person who has once been tried for an offence and convicted or acquitted of such offence, shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence; nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Section 108, or for which he might have been convicted under section 109.

A person convicted or acquitted of any offence may be afterwards tried for any offence for which a separate charge might have been made against him on the former trial under section 107, paragraph 1.

A person acquitted or convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that for which he was acquitted or convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was acquitted or convicted.

A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts, which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.]

It is to be regretted that the Legislature, having prominently before it the precise terms of s. 221\* of the Code of Criminal Procedure, left any doubt regarding the exact effect of an order of dismissal passed by a Presidency Magistrate. However, [527] having carefully considered all that has been said on both sides, the terms of the law, and the inference that may legitimately be drawn from any omissions as already noticed, I am of opinion, that an order of dismissal under s. 124 does not operate as an acquittal of the accused. No inference can in my opinion be properly drawn from the express terms of s. 32 that in all other cases an order of dismissal "shall prevent subsequent proceedings against the persons complained against." The rule that *expressio unius est exclusio alterius* cannot be applied when in subsequent sections the law (s. 126) has provided that an order of acquittal shall be passed "if, in any case tried" by a Magistrate, he finds "the accused person not guilty," with only one exception, *i.e.*, where a case has been withdrawn with the Magistrate's permission (s. 125), and when s. 113, in providing for the plea *autrefois acquit*, declares that it should only be raised when a person has "once been tried for an offence, &c., &c." We have, I observe, no definition of what constitutes a trial such as is conveniently given in the Code of Criminal Procedure, but it seems clear to me that when all the evidence which is required by a Magistrate is, as we have in the case before us, not given, and when the Magistrate dismisses the complaint on account of the absence of the complainant before the time fixed for the recommencement of the hearing and the production of that evidence, it cannot be said that the trial has been completed.

Some remarks have been made regarding the inconvenience which would arise if an accused person, after the dismissal of the complaint, was again required to attend to answer it; but it appears to me that, on the renewal of the complaint, the Magistrate can, before he grants a process, consider under s. 32 whether there is any sufficient ground for proceeding, and unless the complainant can satisfy the Magistrate that by reason of the offence complained of being of a serious character, and that the original complaint should not have been dismissed, the Magistrate would be fully justified in declaring that there was "no sufficient ground for proceeding" and in summarily dismissing the complaint.

Under these circumstances I am of opinion that there was [528] no legal impediment to the institution of fresh proceedings by the presentation of a fresh complaint, and that, therefore, the objection taken before us should be disallowed. I trust, however, that the injustice which has resulted from the precipitate order, of the Magistrate dismissing the complaint will be a sufficient warning to him to exercise the discretion given to him by the law sparingly. In the present instance it was an unjust order, not only because the case had been fixed for trial at a later hour, but because the attendance of the complainant does not appear to have been necessary in order to proceed with the hearing. The serious nature of the offence, it being punishable with imprisonment for two years as well as fine, should also have made the Magis-

\*[Sec. 221 —In any trial before a Magistrate, in which it may appear at any stage of the proceedings that from any cause the case is one which the

How the Magistrate is to proceed when, after commencement of trial, he finds the case beyond his jurisdiction.

Magistrate is not competent to try, or one which, in the opinion of such Magistrate, ought to be tried by the Court of Session or High Court, the Magistrate shall stop further proceedings under this chapter and shall, when he either cannot or ought not to make the accused person over to an officer empowered under

Section thirty-six, commit the prisoner under the provisions herein before contained. If such Magistrate is not empowered to commit he shall proceed under Section forty-five.]

trate hesitate before he terminated the proceedings in so summary a manner, instead of at least allowing it to be called on at a later hour.

As regards the legality of the conviction of the accused person on the facts found by the Magistrate, I see no valid ground of objection. I am, therefore, of opinion that the rule should be discharged.

**Morris, J.**—It is much to be regretted that the Legislature have not declared what is the effect of an order of dismissal under s. 124 of Act IV of 1877. As has been pointed out, the case under consideration before the Presidency Magistrate was one which, under the Code of Criminal Procedure, would be called a warrant case. There had been already one hearing in the presence of the accused, and evidence had been taken. A second hearing was fixed for the 22nd September, but though the accused appeared on that date, the complainant did not appear, and so, under the discretion allowed him by the section, the Magistrate dismissed the complaint. It would have been satisfactory had the law made it perfectly clear that in such a case, in spite of the accused appearing twice to hear, and if necessary to answer to, the complaint made against him, and in spite of that complaint being dismissed, he is liable at any future time to fresh proceedings being taken against him on the same subject of complaint. In s. 32, which deals with a complaint being dismissed upon its presentation after the examination of the complainant, a special provision is inserted that [529] such "dismissal shall not prevent subsequent proceedings against the person complained against." And in cases under chap. viii, that is of inquiry by the Magistrate into cases triable by the High Court, express provision is made in the event of the absence of the complainant after examination of witnesses in the presence of the accused. The Act declares (s. 87) that the absence of the complainant, except when the offence may be lawfully compounded, shall not be deemed sufficient for a discharge, and a discharge is described as "not equivalent to an acquittal, and no bar to the revival of a prosecution for the same offence."

In a case of lesser gravity under chap. x, triable by the Magistrate himself, when the circumstances are precisely similar,—that is when the accused has appeared and witnesses have been examined, but the complainant has absented himself,—the words of the section (124) are, the "Magistrate may dismiss the complaint." It might reasonably, therefore, be thought that a distinction is purposely drawn by the Legislature between the order to dismiss and the order to discharge, and that the former carries finality with it, whereas the latter does not. At the same time, whatever may have been the real intention of the Legislature in making this distinction of terms, and in the absence of any qualifying provision to the term "dismiss" in s. 124, I am unable to disregard the other considerations which have been pointed out by my learned colleague. The succeeding section (125) deals with the case of a withdrawal of a complaint of a certain description, and contains an express provision that the withdrawal under this section of a complaint shall operate as an acquittal of the accused person. The question naturally suggests itself why, if the Legislature intended a dismissal under s. 124 to operate as an acquittal, it did not make an express provision to that effect, as in the case of a withdrawal under the subsequent section. Again, s. 126 prescribes,—“If the Magistrate in any case tried under this chapter finds the accused person not guilty, he shall record an order of acquittal. If the accused person is convicted, the Magistrate shall pass sentence upon him.

In the particular case before us the Magistrate, on the 22nd [530] September, came to no finding at all, and recorded no order of acquittal or



conviction. Having regard to the language of s. 119, \* I understand the trial of the case to have commenced on the occasion of the first appearance of the accused,—that is, the date fixed for the hearing, and it was not brought to its legitimate conclusion because of the absence of the complainant—a circumstance which is specially contemplated and provided for in s. 124. When, therefore, these sections (124 and 126†) are looked at in conjunction with s. 113, which prescribes that a person who has once been tried for an offence and convicted or acquitted of such offence, shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, the conclusion seems to be, that unless the antecedent trial has resulted in a conviction or acquittal, there is nothing in the law which prevents a person being tried again for the same offence. Consequently, an order of dismissal is not a bar to the revival of fresh proceedings.

On the merits I agree in thinking that there is no ground in law for disturbing the decision of the Magistrate. There is evidence which goes to show that the accused Thompson did not act “in good faith,”—that is, with due care and attention,—in retaining and keeping the telegraph message, which on the face of it was addressed to a rival firm.

*Rule discharged.*

#### NOTES.

[Referred to in (1882) 9 Cal. 397 for the position that an application under s. 147 of Act X of 1875 (Criminal Procedure Code) could be disposed of by a Division Bench though application under s. 14 of the Act should be made to the High Court in the exercise of its ordinary original criminal jurisdiction.]

Referred to in (1890) 13 Bom. 384 for the position that dismissal of complaint is no bar to fresh trial for the same offence.

See on this point (1905) 29 Mad. 126 F. B. which overruled 28 Mad. 255 ; also (1901) 28 Cal. 652 ; (1902) 29 Cal. 726.]

Procedure on appearance of parties. \* [Sec. 119 :—On the appearance of both parties on the day fixed for the trial the substance of the complaint shall be stated to the accused person, and he shall be asked if he has any cause to show why he should not be convicted.]

Acquittal. † [Sec. 126 :—If the Magistrate, in any case, tried under this chapter, finds the accused person not guilty, he shall record an order of acquittal.]

If the accused person is convicted, the Magistrate shall pass sentence upon him ; and, in all cases in which the Magistrate inflicts imprisonment, or fine exceeding two hundred rupees, or both, he shall add to the final order mentioned in section 114, clause (g), a brief statement of the reasons for the conviction.

Sentence. When the personal attendance of the accused person during the trial has been dispensed with, the sentence of the Magistrate shall be pronounced in his presence, except where the sentence is for fine only, in which case it may be pronounced in the presence of the accused person's advocate, attorney or pleader.]

[6 Cal. 530]  
ORIGINAL CRIMINAL.

*The 29th January, 1881.*

PRESENT :

MR. JUSTICE PRINSEP.

The Empress

*versus*

Dabee Pershad.

*Admission made to Police Officer before Arrest—Evidence Act (I of 1872), ss. 25, 26.*

An admission made by an accused person to a Police officer before arrest is admissible in evidence.

IN the course of the trial in this case, the *Standing Counsel* (Mr. Phillips) asked a witness on behalf of the Crown, Police Inspector Kristo Chunder Bannerji to state what the accused [531] had stated to him on an occasion when the witness had already said that the accused was not under arrest.

Mr. Sale, for the accused, objected, on the ground that the accused at the time was under arrest. Ultimately Mr. Sale being permitted to cross-examine the witness on this point, the Court decided that the accused was not at the time under arrest.

The *Standing Counsel* then repeated his previous question to the witness.

Mr. Sale again objected. It is immaterial whether the accused was under arrest or not—*In the matter of Hiran Miya* (1 C. L. R., 21). No statement or admission of any kind made by an accused to a Police officer can be given in evidence. The prohibition contained in s. 25 of the Evidence Act applies to cases where the accused is under arrest or not, while s. 26 deals with cases where the accused is in custody. Section 25 says,—“No confession” (not no confession by an accused person) “to a Police officer shall be proved against an accused person.” The section is wide in its terms, and draws no distinction between admissions and confessions; see *In the matter of Hiran Miya* (1 C. L. R., 21). Section 25 must be construed in the widest and most literal sense; see *The Queen v. Hurribole Chunder Ghose* (I. L. R., 1 Cal., 207). Nor is it restricted in any way by s. 26. The word “confession” is not defined in the Evidence Act, while the word “admission” is defined. Hence it may be inferred that no distinction was intended to be drawn between them, and that the words were intended to be synonymous for purposes of the Act. See s. 121 of the Criminal Procedure Code (Act X of 1872) passed almost simultaneously with the Evidence Act. There confession embraces confession, admission, and confession of guilt: see also *The Empress v. Rama Birapa* (I. L. R., 3 Bom., 12) and *Reg v. Jora Hasri* (11 Bom. H. C. Rp., 242). The decision by PHEAR, J., in *The Queen v. Macdonald* [10 B. L. R., (App.), 2] was not prefaced by argument at the bar, and the report itself is a most meagre one

Police not to record statement or confession.

Provided that nothing

Proviso.

\* [Sec. 121 :—No Police Officer shall record any statement or any admission or confession of guilt, which may be made before him by a person accused of any offence :

in this section shall preclude a Police Officer from reducing any such statement or admission or confession into writing for his own information or guidance, or from giving evidence of any dying declaration.]

[532] The *Standing Counsel* (Mr. Phillips) was not called upon.

**Prinsep, J.**—The question may be put. I agree in the opinion expressed by PHEAR, J., in *The Queen v. Macdonald* [10 B.L.R., (App.) 2] that the Evidence Act draws a distinction between an admission and a confession of guilt. The other cases quoted are not altogether on the point.

#### NOTES.

[See (1898) L. B. R. (1898—1900) 42 (45); (1906) 3 N. L. R. 51 (53); also *Muthukumarasawmi Pillai v. Emperor* (1912) 1 M. W. N. 552 also reported in 14 I. C. 896 and 35 Madras; 37 Cal. 467 = 14 C. W. N. 1114.]

[6 Cal. 532]

*The 31st January, 1881.*

PRESENT :

MR. JUSTICE PRINSEP.

The Empress

{versus

Dabee Pershad.

*Evidence of witness taken upon Commission when admissible in Criminal Trial—High Court's Criminal Procedure Act (X of 1875) s. 76—Presidency Magistrates' Act (IV of 1887), s. 158—Evidence Act (I of 1872) s. 33.*

The evidence of a witness taken upon commission is not admissible in a Criminal trial held before the High Court, unless it can be shown that such evidence was so taken upon an order made by that Court under s. 76 of Act X of 1875, or unless it is admissible under s. 33\* of Evidence Act.

In the course of the trial in this case, Mr. Phillips (The *Standing Counsel*) tendered, and proposed to read, the evidence of one Wayed Mabal Begum, taken upon commission issued by the Committing Magistrate under s. 158 of the Presidency Magistrates' Act (IV of 1877).

Mr. Sale for the prisoner objected. Before evidence taken on commission can be read in this Court in a criminal trial, it must be shown that the taking of such evidence was upon an order issued to that effect by the High Court under s. 76 of Act X of 1875. Here the order was made by the Committing Magistrate

\*[Sec. 33.—Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable.]

Provided

that the proceeding was between the same parties or their representatives in interest :

that the adverse party in the first proceeding had the right and opportunity to cross-examine ;

that the questions in issue were substantially the same in the first as in the second proceeding.

*Explanation.*—A criminal trial or enquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.]

and not by the High Court. The reason which induced the Magistrate to issue that commission may have ceased to operate in the time between the commitment and the trial of the accused in the High Court. Further, if the evidence attempted now to be put in is admissible, it would practically have the effect of subordinating the discretion given to the High Court under s. 76 of Act X of 1875 to the decision of the Magistrate on the same matter; in short, that the opinion of the Magistrate would be binding on this Court. Section 75 [533] of the High Courts' Criminal Procedure Act (X of 1875) authorizes the Court to refer to the evidence of an absent witness, only in cases in which such is admissible under the Evidence Act or some other law on the same subject. There is no law under which the evidence now tendered can be admitted.

The *Standing Counsel* (Mr. Phillips) for the Crown.—There is evidence in the case that the witness Wayed Mabal Begum is one of the wives of the ex-King of Oudh, and therefore a *pardanashin*. It may, therefore, be presumed that the reasons which induced the Magistrate to grant the commission still exist, and would equally weigh with this Court. Further, s. 158\* of the Presidency Magistrates' Act says, that the deposition once taken on commission shall "form part of the record." Section 76 of the High Courts' Criminal Procedure Act only refers to cases where cause has arisen for obtaining evidence on commission after commitment. [PRINSEP, J.—Section 33 of the Evidence Act appears not to be applicable to a case of this kind.]

**Prinsep, J.**—The deposition is inadmissible. Section 76 of the High Courts' Criminal Procedure Act contemplates that evidence, when taken upon commission, if intended to be used in the High Court, must be taken upon an order made by that Court under that section. The terms of s. 158 of the

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\*[Sec 158.—Such Magistrate may direct a commission to any Magistrate of the District, or Magistrate of the first class, within the local limits of whose jurisdiction such witness may be.

The Magistrate to whom the commission is directed, or, if he be the Magistrate of the District, such Magistrate of the first class as he appoints in this behalf, shall proceed to the place where such witness is, or shall summon such witness before himself, and shall take his evidence in the same manner, and may for this purpose exercise the same powers, as in trials of warrant-cases under the Code of Criminal Procedure.

If the witness is within the local limits of the jurisdiction of any Presidency Magistrate, other than the Magistrate dispensing with his attendance, the latter Magistrate may direct a commission to the former Magistrate, who thereupon shall have the like power to compel the attendance of, and examine, such witness as he possesses for that purpose in cases pending before himself.

The complainant and the accused person may respectively forward interrogatories, in writing, upon which the Magistrate to whom the commission is directed shall examine the witness, or the complainant and the accused person (if on bail) may appear before such Magistrate, or the complainant and the accused person may so appear respectively by advocate, attorney or pleader,

and may examine, cross-examine and re-examine (as the case may be,) the said witness.

After any commission issued under this section has been duly executed, it shall be returned, together with the deposition of the witness examined

**Return of commission.** thereunder, to the Magistrate by whom it was issued; and the commission, the return thereto, and the deposition of such witness, may be used as evidence in the case and shall form part of the record.]

Presidency Magistrates' Act, quoted by Mr. Phillips, refer only to the record of the trial or enquiry before the Magistrate. The evidence taken by a commission issued by order of a Magistrate could not here be admissible under s. 33 of the Evidence Act.

### NOTES.

[Evidence taken on commission issued by the Presidency Magistrate is inadmissible in the trial before the High Court.

Followed in (1891) 19 Cal., 113.

See also (1888) 15 Cal., 595 as to the distinction between *admission* and *confession*.]

## [534] APPELLATE CIVIL.

*The 9th September, 1880.*

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Nemai Charan Dhabal and others.....Defendants

*versus*

Kokil Bag.....Plaintiff.\*

*Specific Performance—Registration Act (III of 1877), ss. 49 and 50—Oral Agreement, Evidence of—Effect of Oral Agreement as against subsequent Registered Conveyance.*

A, by an oral agreement, agreed to grant two mokurari leases of certain properties upon certain terms to B, and thereupon executed two mokurari leases in favour of B, which were not however registered. Afterwards A, granted two mokurari leases of the same mouzas, upon terms more favourable to himself, to C and D, who, at the time of such grant, had notice of A's previous agreement with B. *Held*, in a suit for specific performance brought by B against A, and to which C and D were added as defendants, that, notwithstanding the provisions of ss. 49† and 50‡ of Act III of 1877, B could obtain a decree for specific relief, and declaration that the leases to C and D were void as against him.

\* Appeals from Appellate Decrees, Nos. 1594 and 1595 of 1879, against the decree of R. Towers, Esq., Officiating Judicial Commissioner of Chota Nagpore, dated the 28th April 1879, affirming the decree of Baboo Syamchand Dhur, Munsif of Manbazar, dated the 26th June 1878.

†[Sec. 49 :—No document required by Section 17 to be registered, shall affect any immovable property comprised therein, or confer any power to adopt, or be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered in accordance with the provisions of this Act.]

‡[Sec. 50 :—Every document of the kinds mentioned in clauses (a), (b), (c) and (d) of Section 17, and clauses (a) and (b) of Section 18, shall if duly registered, take effect as regards the property comprised therein, against every unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not.]

Nothing in the former part of this section applies to leases exempted under the proviso in Section 17, or to the documents mentioned in clauses (e), (f), (g), (h), (i), (j), (k), and (l) of the same section.

*Explanation.*—In cases where Act No. XVI of 1864 or Act No. XX of 1866 was in force in the place and at the time in and at which such unregistered document was executed, "unregistered" means not registered according to such Act, and, where the document is executed after the first day of July 1871, not registered under Act No. VIII of 1871 or this Act.]

THE plaintiff in this case, which was instituted on the 10th December 1877, sought to enforce specific performance of an oral agreement made between him and the defendant, Raja Nemaï Dhabal, under which the latter, in consideration of the payment to him by the plaintiff of a bonus and fees amounting in all to Rs. 270, agreed to grant to him two mokurari pottas of two mouzas in Zilla Manbhum. This agreement, the plaintiff alleged, had been made with him orally on the 13th Assin 1284, corresponding with the 28th September 1877, by the defendant, at his cutcherry; and on that occasion, he, the plaintiff, had paid to the defendant Rs. 32, in advance, as a part-payment of the consideration. The plaintiff further alleged, that, on the 16th of Assin 1284, corresponding with the 1st October 1877, two mokurari papers were drawn up on stamped paper, and executed by the defendant; and that he, the plaintiff, paid on that day a [535] further sum of Rs. 138 on account, it being agreed that the balance of Rs. 100 should be paid at the time when the pottas and kabuliats were registered. These mokurari papers were not put in as evidence.

The raja-defendant denied the oral agreement and the part-payments alleged by the plaintiff. He said, that two persons, named Madhub Mondul and Narain Mondul, had, previous to Assin 1284, been in possession of the two mouzas in question under a temporary lease, and that he, being anxious to let the mouzas upon receipt of an adequate bonus, had invited offers from all directions; that, among other offers which he had received, he had received an offer from the plaintiff to accept a mokurari lease at Rs. 140 per annum, and pay a bonus of Rs. 280 as consideration-money, that, while this offer was under consideration, and before it had been finally accepted, and before a single rupee had been paid on account of bonus, the Monduls had offered to accept a mokurari lease at Rs. 155 per annum, to pay a bonus of Rs. 700, and further to lend him Rs. 500 at a low rate of interest; that no better offer having been made by the plaintiff, he had accepted that of the Monduls, and having received the consideration-money of Rs. 700 from them, made a mokurari settlement with them, and granted them a registered potta, under which they were in actual possession.

The raja-defendant further contended, that the Monduls being in possession of the mouzas, and interested either legally or equitably in the subject-matter and result of the suit, ought to have been joined as defendants.

The Munsif found, first, that the Monduls were not necessary parties, and that the plaintiff had satisfactorily proved his case, and gave him a decree directing that, on payment by him of the balance of the premium or consideration, leases and counterparts should be exchanged.

On appeal from this decision, the lower Appellate Court found it was necessary that Madhub Mondul and Narain Mondul should be made defendants in the suit. This was done, and the suit was remanded to the Munsif to try the following issues:—

1.—Whether the lease given to them was given in good faith, and for value?

[536] 2.—Whether they had notice of the original contract with the plaintiff?

The Munsif on these issues found that Madhub Mondul and Narain Mondul had given value for their lease, and that they had notice of the previous contract. The lower Appellate Court affirmed this finding and dismissed the appeal.

Against this decree all the defendants appealed to the High Court.

*Baboo Rash Behary Ghose* for the Appellants.

*Baboo Sreenath Doss* and *Baboo Bamachurn Mookerjee* for the Respondent.

*Baboo Rash Behary Ghose*.—This is not a case for specific performance. Taking the case of the plaintiff to be true, that, on the 13th Assin, the raja-defendant promised to execute two mokurari leases in favour of the plaintiff, the plaintiff himself asserts, whether truly or falsely, that the raja-defendant did execute the two mokurari leases; if so, and there was a difficulty about registration, the plaintiff should not have proceeded by separate suit, but should have taken proceedings under parts vii and xii of the Registration Act (III of 1877). If his statement is true, the terms of the oral agreement were reduced into writing on the 16th Assin; if so, the Courts below were wrong in law, when they admitted secondary evidence of the terms of an agreement which had admittedly been reduced into writing; and if that evidence was wrongly admitted there is absolutely no evidence to support the findings of the Courts below. The case is really one in which the plaintiff is endeavouring to evade the operation of the registration law, and by falling back upon a pretended anterior oral agreement to use and give effect to two documents, which, if they exist, cannot be received in evidence, and which, if they could be received in evidence, could not legally, being unregistered, take effect as against registered documents relating to the same property. It was also contended that even if the Courts below had the power in this case to grant specific performance of the alleged oral agreement, the [537] special circumstances of the case did not warrant such an exercise of their discretion.

*Baboo Sreenath Doss*.—This is a case for specific performance. The meaning and intention of the oral agreement of the 13th Assin must be taken to have been, not that the raja-defendant would sign any particular papers, but that he would put the plaintiff in the position of a mokuraridar, and till that has been done, the agreement has not been fully performed. 2. There is no proof that the terms of the oral agreement were reduced into writing. The secondary evidence admitted, was evidence, not of the contents of the two leases, but of the terms of the oral agreement. 3. If the Mondul-defendants have been ill-treated, they, in their turn, can sue the raja-defendant. 4. If the Court below had the power in its discretion to make a decree for specific relief, this Court will not rightly control it in the exercise of such discretion.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by

**Mitter, J.** (who, after stating the facts, continued).—The Rajah and Madhub and Narain Mondul have appealed against the result of the case. It is contended on their behalf that specific performance cannot be decreed, and that the agreement with the plaintiff having been reduced into writing cannot be proved by oral evidence. It is further contended, that the oral agreement cannot prevail against the latter registered lease.

Now the plaintiff sues on an oral contract to execute a mokurari lease, which has never been reduced into writing. It is true that the raja, at first intending to carry out that contract, had the lease drawn up in writing; but the transaction was not completed by delivery and registration. Therefore, under the circumstances, the objection that parol evidence is not admissible, does not arise; in fact, it was not seriously pressed on behalf of the appellant.

Taking it then as established, that the raja-defendant entered into an oral agreement to execute a lease in the plaintiff's favour, the next question is,

whether specific performance can be enforced. If the case were governed by the Specific Relief Act, we [338] should have no hesitation in saying that s. 27\* would apply to this case. Madhub and Narain Mondul are clearly, on the finding of the lower Court, transfers under a subsequent title with notice of the original contract to the plaintiff. But although that Act (I of 1877) is not in force in the district of Manbhoom, we may fall back upon the general rules of equity, which are undoubtedly, in the plaintiff's favour

It has indeed been argued that, under s. 48† of the Registration Act, the oral agreement with the plaintiff not being accompanied or followed by delivery of possession, cannot be enforced against the registered lease held by Madhub and Narain Mondul. No doubt, the words of that section (48) are positive, and they have been interpreted by PONTIFEX, J., as meaning "that the only oral alienations of which the law can take notice in competition with registered instruments, are those which are properly established by evidence of possession"; and again "unless the oral alienee was in possession, the Courts would now be excluded from considering any equity which he might have against a subsequent alienee by registered deed"—*Fuzludeen Khan v. Fakir Mahomed Khan* (I. L. R., 5 Cal., at pp. 346, 347). But that case turned upon the construction of s. 50 of the Registration Act, and the issue was between two deeds conveying the same property, one registered and the other not; and GARTH, C. J., in his judgment, expressly states, that no question of equity arose, and also that the equitable doctrine of notice might have been applied if it could be shown that the subsequent purchaser had notice of the prior unregistered conveyance.

In this case we have a finding that the alienee under the registered lease had notice of the oral agreement to execute a lease in favour of the plaintiff, and having looked at the evidence, we see that they were present when he paid a portion of the consideration-money.

It appears to us, that if we adopt the principle that no equity is to be considered where on oral agreement to alienate is not followed by possession, the 27th section of the Specific Relief Act, as illustrated (b), would be rendered a dead letter wherever it applies, when competition arises between an oral agreement to [339] alienate unaccompanied by possession, and an alienation by registered

Relief against parties and persons claiming under them by subsequent title.

\*[Sec. 27 — Except as otherwise provided by this chapter, specific performance of a contract may be enforced against.

- (a) either party thereto,
- (b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract,
- (c) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;
- (d) when a public company has entered into a contract and subsequently becomes amalgamated with another public company, the new company which arises out of the amalgamation;
- (e) when the promoters of a public company have, before its incorporation, entered into a contract, the company: provided that the company has ratified and adopted the contract and the contract is warranted by the terms of the incorporation.]

Registered documents relating to property when to take effect against oral agreements.

† [Sec. 48:—All non-testamentary documents duly registered under this Act, and relating to any property whether moveable or immovable, shall take effect against any oral agreement or declaration relating to such property, unless where the agreement or declaration has been accompanied or followed by delivery of possession.]



deed with notice of the previous agreement ; but we are not compelled to adopt this conclusion. The subject has been fully considered in the case of *Waman Ramchandra v. Dhondiba Krishnaji* (I. L. R., 4 Bom., 126), and the judgment of WESTROPP, C. J., at pp. 146 to 154, discusses the effect of actual notice and the application of the English rules of equity to mofussil cases, and that too in a case to which the Specific Relief Act did not apply, as it does not in these cases before us. It is unnecessary to recapitulate the reasons upon which the judgment of WESTROPP, C. J., are founded. It is sufficient to say that we follow them, and consider that they apply to these cases.

The foregoing remarks apply equally to Appeal No. 1595. We therefore dismiss these appeals with costs ; but we think that the decree of the Munsif must be amended, for in its present form it will not have the effect that the cases require. We think that it should declare the leases by the raja-defendant to Madhub Mondul and Narain Mondul void as against the plaintiff ; and that, on the plaintiff paying Rs. 100 to the raja-defendant, the latter shall execute mokurari pottahs to the plaintiff, receiving from him kabuliats in the terms of the agreement between them.

*Appeals dismissed.*

#### NOTES.

##### [ORAL AGREEMENT TO LEASE—

Can be enforced against persons claiming under subsequent registered conveyance with notice of prior agreement.

This was applied in (1886) 13 Cal. 76 where the purchaser was held to have taken subject to unregistered mortgage as he bought with notice of it.

Oral agreement to sell can be enforced against subsequent purchasers claiming under registered deeds with notice of prior agreement.—10 Cal 710 ; 13 Mad 324, where MUTTUSAMI IYER, J., held that as the purchaser was in possession as mortgagee before the contract of sale, the case may also fall within sec. 48 of the Registration Act.

See as to possession (1902) 27 Bom 452, (1880) 6 Bom. 668.]

#### [6 Cal. 539]

*The 23rd November, 1880.*

PRESENT.

MR. JUSTICE PONTIFEX AND MR. JUSTICE McDONELL.

In the matter of the Petition of Bhoopendra Narain Roy.

Bhoopendra Narain Roy

*versus*

Greesch Narain Roy and another.\*

*Application under Act XXXV of 1858—Interference of Court—Ill-treatment of Lunatic—Accounts of Joint Property—Mitakshara.*

The husband of a lunatic's daughter applied to the Court to declare his father-in-law who was a member of a joint Mitakshara family, to be a lunatic, and appoint a manager of his property and guardian of his person under Act XXXV of 1858. The lunatic had an interest both in joint ances-[540]tral property and in property inherited collaterally, which might, but was not shown to, belong to him separately. The lower Court found that the application was made with a view to taking consequent proceedings for partition.

\* Appeal from order, No. 197 of 1880, against the order of A. J. R. Bainbridge, Esq., Judge of Moorshedabad, dated the 7th April 1880.

*Held* that, it appearing that he had remained for sixteen years in the same house under the same guardians, and there being no allegation of ill-treatment, no sufficient grounds were shown for the Court's interference, or the appointment of another guardian of his person. Before any action can be taken under the Act in this respect, there ought to be a strong case made out that the change of custody would be for the lunatic's benefit. *Held* also, that as his daughter could not inherit his ancestral property, and as it was doubtful if the collaterally inherited property was the separate property of the lunatic, the Court would not, under such circumstances, appoint a manager of the property: but that the guardians of the lunatic, who were managers of the joint family, should, on her request, furnish accounts to the daughter, of the management of the collaterally inherited property.

*Semle*.—Act XXXV of a 1858 applies to the members of Mitakshara family.

*Quere*.—Assuming the application to be made with a view to a partition of property, and that the lunatic was declared a lunatic under the Act, whether a partition could be had.

THE facts material to the report are sufficiently stated in the **Judgment** of the Court (PONTIFEX and McDONELL, JJ.)

Baboo Hem Chunder Banerjee, Baboo Gurudass Banerjee, Baboo Srish Chunder Chowdhry, and Baboo Saroda Prosaud Roy for the Petitioner.

Baboo Mohesh Chunder Chowdhry and Baboo Mohiny Mohun Roy for the Respondent.

**Pontifex, J.**—The District Judge in this case has refused to grant an application under Act XXXV of 1858, to declare that one Kasinath Roy is a lunatic, and to appoint a manager of his estate and guardian of his person. The application was made by the husband of the lunatic's daughter. The family is a Mitakshara family, and consequently the daughter would not inherit the interest of her father in the ancestral property. The Judge has found that in reality the application has been made with a view to taking consequent proceedings for partition. Now it appears, according to the statements of the applicant, that there are two qualities of property in which the lunatic [541] is interested,—first, ancestral estate, which under the Mitakshara law his daughter would not inherit, and secondly, estate said to have been inherited from collaterals, and to have been inherited, not by the family as a joint family, but by the two senior members of the family at the time the inheritance fell in, to the exclusion of members of the family of a lower degree. It has been objected before us, and apparently the Judge seems to have been of opinion, that Act XXXV of 1858 cannot and does not apply to members of a Mitakshara family. We are unable, as at present advised, to admit that as a correct proposition. It appears to us that there may be cases where it is essentially necessary that a guardian should be appointed for a member of a Mitakshara family as much as for a member of any other family. It is not necessary, however, for us to decide that question, because we think the application fails on other grounds. We agree with the Judge that no sufficient cause has been made out for putting the Act into operation. In the first place, there is no suggestion, and certainly no evidence whatever, as to any ill-treatment of the lunatic. It is not even suggested that he has been improperly taken care of, or that he is not treated in a proper and considerate manner. He has been a lunatic for the space of some sixteen years, and during the whole of that period he has lived with his nephews in this joint family. No allegation is made that he has ever received ill-treatment. It is no doubt true that till quite recently his wife was living in the family and was capable of protecting and taking care of him. But we think

that before any action can be taken under this Act, before we should be justified in removing the lunatic, who has been living for the last sixteen years in this house, to some other place and custody, there ought to be a strong case made that it would be for the lunatic's benefit.

Secondly, with respect to the management of the lunatic's property. The persons who are now in the management of the property are his two nephews, sons of deceased brothers. There is some allegation that they have not conducted the management with sufficient care; and indeed extravagance has been imputed from the fact that within the last five years the debt upon the property has materially increased. The only evidence of [542] that consists in recitals in the various documents put in, and in an admission made by one of the nephews in his examination. We think that the admission does not go far enough. It was a mere statement that, in consequence of litigation and numerous law-suits to which the family was subjected, the debt was so increased that it was necessary to raise a considerable sum of money. Now, with respect to the supposition of the Judge that these proceedings were taken with the intention of ultimate proceedings for a partition, without deciding whether or not a partition could be had under such circumstances, if the lunatic were declared a lunatic under the Act, it may be not improper to refer to the policy of the Lunacy Enactments in England. Under these Acts, it has always been the policy of the Legislature not to interfere with the course of inheritance of the lunatic's property, and provisions for that purpose have been inserted into these Acts; so that even where it is necessary for payment of debts or otherwise that the lunatic's real property should be sold, it is provided that the surplus monies should be considered as in the same condition as if invested in land, leaving them heritable as if they were land; possibly, therefore, even if an application for partition were made, it might be refused in accordance with that policy.

One difficult question, however, remains, and that is with respect to the property which was inherited from collaterals. It seems to us, that that property, if it vested in the lunatic, might be on a different footing altogether from strictly ancestral property, and that the lunatic might be entitled to a separate share in that property; and if so entitled, his daughter might be his heir, and it might be material that a manager should be appointed for it. But the circumstances relating to that property are as follows:—Before his lunacy, as we must assume, Kasinath had made a *hiba* of his share of the ancestral property, as also of his share of this collaterally inherited property, to his wife. That *hiba* had been in operation until about the year 1280 (1873), when the High Court held, that so far as it related to ancestral property it was void, and subsequently the wife relinquished her interest under the *hiba* in consideration of the nephews paying her the monthly sum of [543] Rs. 150. Now if the *hiba* passed the lunatic's interest in the property inherited from collaterals, then there is nothing before us to show that such interest became revested in the lunatic; and, under these circumstances of doubt, we think we ought not to allow the Act to be put into operation, but that it ought to be left for the natural heir of the lunatic, if so disposed, to institute a suit as next friend of the lunatic to have that matter cleared up. If such a suit is instituted, and if it shall appear that this property is separate property belonging to the lunatic, then, if necessary, a further application might be made under the Act. But we wish to observe that the nephews who now, as members of the joint undivided family, have the custody of the lunatic and are managing the estate, ought, in our opinion, when requested thereto by the daughter of the lunatic as the natural heir, to produce and furnish her with

accounts of the management of the property. We think it would be sufficient, if such accounts were produced yearly. If such accounts are refused, or if the lunatic's daughter is refused proper access to him, then a case might perhaps be made, which might influence the Court to interfere under the Act. At present we are of opinion that no sufficient case has been made, but, under the circumstances, we think there ought to be no costs of this application.

*Appeal dismissed.*

#### NOTES.

#### [LUNATIC ACT XXXV OF 1858—MANAGER FOR THE ESTATE—

Ordinarily a manager should not be appointed in respect of a lunatic's interest in joint family properties :—(1888) 13 C. L. R. 86 ; (1895) 20 Bom. 659.

Even if he be appointed, he is not bound to render account under sec. 15 or the Act.

In (1895) 18 Mad. 472, the course indicated in this case was adopted, SUBRAHMANYA IYER, J., requiring the co-heirs to produce accounts to those who would be heirs of the lunatic.

In (1889) 13 Bom. 656, this case was referred to for the position that a suit could not be brought by the next friend of lunatic unless he has been adjudged so under the Act.]

[6 Cal. 543]

*The 10th December, 1880.*

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE FIELD.

Newaj Bundopadhyia.....Defendant

*versus*

Kali Prosonno Ghose.....Plaintiff.\*

*Suit for Enhancement of Rent—Plea that certain of the Lands included in Notice are not enhanceable—Onus of proof of such Fact—Notice of Enhancement.*

In suits for enhancement of rent, where the tenant pleads that a portion of the land sought to be enhanced is held by him rent-free, the onus is on the tenant to prove *prima facie* that such portion of the land is so held by [544] him; and if he be successful in this, the onus is then shifted upon the landlord to rebut such *prima facie* evidence.

A notice for enhancement, otherwise sufficient, is not invalidated because a portion of the lands claimed as enhanceable in such notice turns out to be rent-free land ; but is good so far as it is applicable to the portion of the land which is liable to enhancement.

ONE Kali Prosonno Ghose, a taluqdar, sued one Ram Sarun Banerjee for enhancement of rent.

The defendant pleaded that only  $3\frac{1}{2}$  kanis of the land held by him were rent-paying ; that a portion of the land was rent-free debutter and lakhiraj, and a further portion held at a quit-rent ; and that the rate of rent paid by him was the same which had been paid for the last 150 years.

The Deputy Collector held, that the onus was on the plaintiff to prove that the lands which were claimed as rent-free were mal lands ; and further held, that as to the rent-paying lands the defendant had failed to prove a uniform rate of payment for upwards of twenty years, and that, therefore, such

\* Appeal from order, No. 143 of 1880, against the order of H. L. Oliphant, Esq., Judicial Commissioner of Chota Nagpore, dated the 2nd February 1880, reversing the order of Baboo Akhoy Coommar Bose, Deputy Collector of Manbhoom, dated the 5th May 1879.

lands were liable to enhancement, but inasmuch as the plaintiff in his notice of enhancement made no distinction between mal lands and rent-free lands, he held the notice to be illegal, and dismissed the suit.

The plaintiff appealed to the Judicial Commissioner, who remanded the case to the lower Court, on the ground that the tenant was bound to have given some *prima facie* proof that a portion of the lands held by him was rent-free, and that the lower Court should have tried the question as to whether the mal lands were liable to enhancement, notwithstanding that the notice to enhance included both rent-free and mal lands.

The defendant appealed to the High Court.

Baboo Bama Churn Banerji for the Appellant.

Baboo Taruk Nath Dutt for the Respondent.

The following **Judgments** were delivered:—

**Garth, C. J.**—I think that this appeal should be dismissed.

A suit was brought by the zamindar to enhance the rent of certain lands after notice. The defence in respect of one portion [545] of these lands was, that it was lakhiraj; and the defendant called two witnesses to prove that defence.

The first Court dismissed the suit upon this ground. It held that, as regards the lands said to be lakhiraj, *prima facie* case had been made out by the defendant that they were lakhiraj; and that the plaintiff had failed to show that the whole of the lands in suit were rent-paying lands; and as the notice of enhancement was a general one applicable to all the lands in suit, not distinguishing the rent-free from the rent-paying lands the notice was bad even for the rent-paying portion; and therefore he dismissed the suit and declined to go into the question of enhancement at all.

The case then came before the Judicial Commissioner on appeal: and he has remanded it to the first Court upon the grounds;—1st, that as it is admitted that the defendant holds some lands in the plaintiff's zemindari, and pays him an entire rent, he was bound, if he wanted to show that a portion of the lands was rent-free, to have given some *prima facie* proof to that effect, showing what particular lands were rent-free; and as the Judicial Commissioner considered that the evidence offered by the defendant did not make out a *prima facie* case that any lands were lakhiraj, he sent the case back to the Court below to have the question of enhancement tried.

Then, secondly, with regard to the notice, the Judicial Commissioner held, that even if the defendant had succeeded in proving a portion of the lands to be lakhiraj, still there was no reason why the first Court should not have tried the question, whether the mal lands were liable to enhancement, and whether the rent ought to be enhanced.

It has now been contended before us that the learned Judicial Commissioner was wrong upon both those points.

It was argued that, in the case of *Huryhur Mookerjee v. Goomanee Kaze* (Marshall's Rep., 523; s. C., B. L. R., Sup. Vol., 15) it was decided by a Full Bench of this Court, that in all cases where a plaintiff brings a suit for enhancement, the onus is upon him to show that the whole of the lands, the rent of which he seeks to enhance, are rent-paying. But that case does not decide anything of the kind. There a certain part of [546] the land, the rent of which the plaintiff sought to enhance was assumed by the lower Court, to be

lakhiraj; and what the Court held was, that the validity or invalidity of the defendant's title to that land could not be tried in that suit. The headnote of that case is rather calculated to mislead.

In another Full Bench case *Gooroo Persad Roy v. Juggobundoo Mozoomdar* (W. R., Sp. No. 15), it was distinctly held by Sir BARNES PEACOCK and two other Judges that, in a suit for a kabuliat, where the defendant had acknowledged himself to be the plaintiff's ryot as to a portion of the lands in suit, the onus was on him to prove the defence which he set up, viz., that he was not the plaintiff's ryot as to the rest of the land.

SIR BARNES PEACOCK, in delivering judgment says :—" We find that the defendant admitted that, as to a certain portion of the land for the rent of which plaintiff sued, he (defendant) had given a kabuliat, or in other words, had acknowledged that he was plaintiff's ryot. With this *prima facie* evidence of the fact of defendant being plaintiff's ryot, the burden of proving the special plea raised by the defendant of his not being plaintiff's ryot for the rest of the land, was clearly upon the defendant, otherwise, indeed, every ryot might meet every rent case by a false plea of proprietary title."

The same principle appears to have been acted upon in the case of *Nehal Chunder Mistree v. Huree Pershad Mundul* (8 W. R., 183). Mr. JUSTICE KEMP, who delivered judgment in that case, being one of the Judges who composed the Full Bench in the above case, cited from Marshall's Reports.

And in another case, *Bebce Ashrufoomissa v. Umang Mohun Deb Roy* (5 W. B., Act X Rul., 48), the learned Judges (SETON-KARR and SUMBHOONATH PUNDIT, JJ.) held, that " it could never have been the intention of the Full Bench that a bare allegation of a defendant of a rent-free holding was to bar the plaintiff's claim. The meaning must have been that there should be some *prima facie* evidence of an ostensible rent-free title in some portion of the land for which rent is sought. "

It seems to me that these decisions are quite conclusive upon the point which we have to decide ; and if the question were an [547] open one, I should undoubtedly hold that to be the law ; because I think it must be unreasonable, where a zemindar sues a tenant for enhancement, who undoubtedly holds and pays rent for lands within his zamindari, that the mere allegation by the tenant that a portion of those lands is rent-free, should throw the onus upon the landlord of proving what particular portion of the land which the tenant holds is rent-paying. The onus ought to be upon the tenant to prove *prima facie* that some and what part of the land is rent-free ; and when he has done so, the onus would then be thrown upon the landlord to rebut such *prima facie* evidence.

Then it is also contended in this case, that the Judicial Commissioner had evidence before him, which he ought to have considered sufficient to establish a *prima facie* case for the defendant. But it was for him to determine whether that evidence was sufficient or not, and I consider it no part of our duty upon this appeal to go into the question of its sufficiency.

Then, with regard to the notice, I am clearly of opinion that the Judicial Commissioner was right. Suppose a suit brought to enhance the rent of 100 bighas of land, and a notice given setting out the grounds of enhancement, surely the notice would not be at altogether bad because the defendant might prove that of those 100 bighas he holds 10 bighas rent-free. The notice would be perfectly good, so far as it was applicable to the remaining 90 bighas.

The appeal will, therefore, be dismissed with costs.

**Field, J.**—I also am of opinion that the Judicial Commissioner rightly laid the burden of proving a *prima facie* case of lakhiraj holding upon the defendant ryot, and I think that it is impossible to say that the evidence of the two witnesses examined amounted to sufficient proof of such a *prima facie* case.

*Appeal dismissed.*

# NOTES.

## [RENT-FREE LANDS—ONUS—

In (1906) 4 C. L. J. 548 it was held by MOOKERJEE J. that the onus lay on the tenant to prove that the lands are rent-free, observing that the rule laid down by the Privy Council in 14 M. I. A. 152 has no general application.

This case of 6 Cal. 543 was not followed in (1889) 9 Cal. 813 ; (1885) 12 Cal. 182 where it was held that the onus lay upon the plaintiff to prove that the lands are mal lands in a suit for resumption.

See also 6 Cal. 666.] - -

[548] *The 10th December, 1880.*

PRESENT :

MR. JUSTICE PONTIFEX AND MR. JUSTICE McDONELL.

Anunda Shaha Biswas, *alias* Nyomuddin Sha Biswas, and others.....

Judgment-Debtors

*versus*

Kema Bebee and others .....Decree-Holders.\*

*Appeal, ex parte—Application for rehearing—Civil Procedure Code (Act X of 1877), s. 560.*

An applicant, presenting a petition for the rehearing of an appeal decided *ex parte*, must, at the time of making such application, be prepared to satisfy the Court, that the notice of appeal was not duly served upon him, or that he was prevented by sufficient cause from attending when the appeal was called on for hearing.

IN this case the plaintiff having obtained a decree, the defendants appealed, the appeal was heard *ex parte*, and the decree of the Court of first instance modified to some extent. Subsequently the plaintiff presented a petition, applying for the rehearing of the appeal, under s. 560 of the Code of Civil Procedure. This application was rejected summarily. Thereupon the plaintiff appealed to the High Court, on the ground that his application for a rehearing should not have been summarily rejected, but that an opportunity should have been afforded him to prove the allegations contained in his petition.

Baboo Shoshee Bhoosun Dutt for the Appellants.

Baboo Mohiny Mohun Roy and Baboo Lal Mohun Das for the Respondents.

The Judgment of the Court (PONTIFEX and McDONELL, JJ.) was delivered by

**Pontifex, J.**—We think that, under s. 560 of the Code of Civil Procedure, when a petition is presented for rehearing of an appeal heard *ex parte* in the absence of the respondent, the applicant is bound to satisfy the Court that the

\* Appeal from Order, No. 196 of 1880, against the decree of P. Dickens, Esq., Judge of Nuddea, dated the 1st April 1880.

notice was not duly served, or that he was prevented by sufficient cause from [549] attending when the appeal was called on for hearing. If he is not prepared at the time to satisfy the Court in these particulars, his application is properly rejected. That is what seems to have happened in this case. The appeal is dismissed with costs.

*Appeal dismissed.*

[5 Cal. 549]

*The 18th December, 1880.*

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Ram Dutt Singh.....Defendant

*versus*

Horakh Narain Singh.....Plaintiff.\*

*Limitation Act (XV of 1877), sched. ii, arts. 99, 132—Suit for Share of Government Revenue, and for Declaration that Estate is charged with amount.*

A suit for recovery of Government revenue, which the defendant was bound to pay, but which has been paid by the plaintiff to save the whole estate from sale, where the plaintiff asks to have the amount so paid made a charge on the portion for which he paid it, is governed by art. 132, and not by art. 99 of Act XV of 1877.†

\* Appeal from Appellate Decree, No. 1028 of 1879, against the decree of A. V. Palmer, Esq., Judge of Shahabad, dated the 25th February 1879, affirming the decree of Baboo Lal Gopal Sen, Second Munsif of Arra, dated the 24th September 1878.

†[Art. 132 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
To enforce payment of money charged upon immoveable property. <i>Explanation.</i> —The allowance and fees respectively called malikana and haqqs shall for the purpose of this clause, be deemed to be money charged upon immoveable property.	Twelve years.	When the money sued for becomes due.

Art. 99 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
For contribution by a party who has paid the whole amount due under a joint decree, or by a sharer in a joint estate who has paid the whole amount of revenue due from himself and his co-sharers.	Three years. ...	The date of the plaintiff's advance in excess of his own share.]



THE plaintiff in this case sued for Rs. 439-6, being the Government revenue paid by him for a mouza called Mouza Tulsipore, from 13th September 1866 to 8th August 1878, on account of the defendant. Mouza Tulsipore was a portion of the talook of Beharpore Agarsanda, which was held by the defendant, the remaining portion being held under a ticca lease and a conditional deed of sale by the plaintiff. The portion of the Government revenue due for Mouza Tulsipore for the above period not having been paid by the defendant, the plaintiff was compelled to pay it in order to save his own portion from sale for the arrears.

The plaintiff prayed for a decree for the above sum with interest, and that it might be recovered by the sale of Mouza Tulsipore, and for a declaration that the said sum was a charge [350] on Mouza Tulsipore. The defendant contended (*inter alia*) that the suit was barred by limitation under art. 99, Act XV of 1877.

The Munsif held that art. 132, and not art. 99, of Act XV of 1877 was applicable, and gave the plaintiff a decree.

The Judge on appeal upheld that decree, and dismissed the appeal.

The defendant thereupon appealed to the High Court.

Baboo *Doorga Pershad* for the Appellant.

Baboo *Pran Nath Pundit* for the Respondent.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by

**Mitter, J.**—This is a suit to recover Rs. 439-6, being money paid by the plaintiff, between September 1866 and August 1878, as revenue of Mouza Tulsipore, belonging to defendant, with interest thereon. The plaintiff held the other mouzas of the defendant's estate under baibilwafa and lease, by the conditions of which he was to pay the revenue of them, there being no obligation on him to pay the revenue of Tulsipore. But his allegation is, that the defendant neglected to pay the revenue of Tulsipore, and that he, the plaintiff, was, therefore, compelled to do so.

The defence was, first, that, by art. 99, sched. ii, Act XV, 1877, the plaintiff's suit was wholly barred; second, that the plaintiff paid the revenue of Tulsipore by arrangement, receiving a corresponding reduction of his rent. This last plea was decided against the defendant in both the lower Courts, and although allusion is made to it in the last ground of appeal, it has not been mooted before us. Both the lower Courts have held that art. 132, and not art. 99, sched. ii, applies on the authority of *Enayet Hossein v. Muddun Moonee Shahoon* (14 B. L. R., 155; s.c., 22 W. R., 411) and *Deo Nandan Ojha v. Musst. Dulhun Bismath Koer* (Sp. Ap., No. 1913 of 1876, unreported). Before us it is again urged, that art. 99 applies, that art. 132 does not, and [351] that the plaintiff is not entitled to interest and to a declaration of lien on the mouza.

We think art. 99 has no application to the case, the plaintiff having paid the money, neither under a decree nor as a joint proprietor of the estate. The plaintiff is undoubtedly entitled to recover the money under s. 9,\* of Act

\*[Sec. 9:—The Collector or other Officer as aforesaid shall, at any time before sunset of the latest day of payment determined according to section III of

Deposits receivable from this Act receive as a deposit from any person not being persons not proprietors. proprietor of the estate or share of an estate in arrear, the amount of the arrear of revenue due, to be credited in payment of the arrear at sunset as aforesaid, unless before that time the arrear shall have been paid by a defaulting proprietor of the estate. And in case the person so depositing, whose

XI of 1889, and he might also, under that section, have retained his lien on the other mouzas of the estate till his money had been paid. He is equally entitled to recover his money under s. 69\* of the Contract Act, and we think that the liability to pay the revenue was not merely a personal liability of the defendant, but was also a liability imposed upon the defendant's estate.—*Mothooranath Chuttopadhya v. Kristo Kumar Ghose* (I. L. R., 4 Cal., 369).

As regards the period of limitation, we are unable to distinguish the case from *Deo Nandan Ojha v. Musst. Dulhun Bisnath Kooer* (Sp. Ap., No. 1913 of 1876, unreported); and we, therefore, concur in thinking that art. 132 applies. We see no reason why the plaintiff should not recover interest on the money, nor do we object to his obtaining a declaration that the money is recoverable by sale of Mouza Tulsipore, though it would have been better if he had asked for recovery by sale of the entire estate.

The appeal will, therefore, be dismissed with costs.

*Appeal dismissed.*

#### NOTES.

##### [ONE CO-SHARER PAYING REVENUE—WHETHER A CHARGE—

The ruling in this case that it was a charge was doubted in (1882) 8 Cal. 402 and was finally overruled by a Full Bench of the Calcutta High Court in (1887) 14 Cal. 809 F. B. where WILSON J. delivered the leading judgment and MITTER and NORRIS, JJ. dissented. The view that it was a charge was accepted by the Bombay High Court in (1886) 11 Bom. 313 but a Full Bench of that High Court in (1902) 26 Bom. 437 dissented from this view and followed the ruling of the Full Bench of the Calcutta High Court. The Madras High Court by a Full Bench in (1902) 26 Mad. 686 held that it was a charge. The Allahabad High Court accepted the view in this case in (1891) 12 All. 110; see also (1906) 26 All. 407 F. B.]

money shall have been credited in the manner aforesaid, shall be a party in a suit pending before a Court of Justice for the possession of the estate or share from which the arrear is due, on any part thereof, it shall be competent to the said Court to order the said party to be put into temporary possession of the said estate or share, or part thereof, subject to the rules in force for taking security in the cases of parties in civil suits. And if the person so depositing, whose money shall have been credited as aforesaid, shall prove before a competent Civil Court that the deposit was made in order to protect an interest of the said person, which would have been endangered or damaged by the sale, or which he believed in good faith would have been endangered or damaged by the sale, he shall be entitled to recover the amount of the deposit, with or without interest, as the Court may determine, from the defaulting proprietor. And if the party so depositing, whose money shall have been credited as aforesaid, shall prove before such a Court that the deposit was necessary in order to protect any lien he had on the estate, or share, or part thereof, the amount so credited shall be added to the amount of the original lien.]

Reimbursement of person paying money due by another in payment of which he is interested.

\* [Sec. 69.—A person, who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.]

**[6 Cal. 551]**

*The 21st December, 1880.*

**PRESENT:**

**SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE FIELD.**

**Ramtonu Acharjee  
versus  
Pearymohun Acharjee.\***

*Suit in Small Cause Court Accounts—Want of Jurisdiction.*

*A. B, and C, the joint owners of an estate, sued their tenant in the Munsif's Court for rent; the tenant defeated the suit by proving payment of the entire rent to B.*

*A then brought a suit in the Small Cause Court against B for damages equal in amount to the one-third of rent due to him and the costs incurred by [552] him and awarded against him in the rent-suit in the Munsif's Court. B pleaded that he had expended the share of rent due to A for the benefit of the joint estate, and that A had collected the rents of other mehals belonging to the joint estate, and had not accounted for such rents. Held, that the suit being one which involved questions of partnership account between the joint proprietors of an undivided estate, could not be entertained in a Court of Small Causes.*

**THIS was a rule to set aside a judgment of a Small Cause Court for want of jurisdiction. \***

The facts of the case were as follows :

One Pearymohun Acharjee, Ramtonu Acharjee, and a third person, being co-proprietors of a certain estate, sued their tenant in the Munsif's Court for rent. The tenant pleaded payment of the entire rent to Ramtonu Acharjee, who at the hearing admitted the same, and the suit was dismissed.

Pearymohun Acharjee then brought a suit in the Small Cause Court against Ramtonu Acharjee, to recover Rs. 14-4-1 as damages, made up from the following items : one-third of the rent due to him, the costs incurred by the plaintiff in the rent-suit, and the costs awarded against the plaintiff in the rent-suit in favour of the tenant-defendant in that suit.

The defendant Ramtonu Acharjee contended, that the Small Cause Court had no jurisdiction to entertain the suit, the suit being one virtually for an account of a partnership proceeding, inasmuch as he had expended sums out of the moneys collected as rent, for the benefit of his co-proprietors, and further that the plaintiff in the present suit had also collected the rents of other mehals belonging to the joint estate, and that he had not adjusted accounts although requested to do so. The Small Cause Court gave the plaintiff a decree for a portion of the amount claimed.

The defendant then applied to the High Court, and obtained a rule, calling upon the plaintiff to show cause why the decree of the Small Cause Court should not be set aside for want of jurisdiction.

Baboo *Bungshe Dhur Sen* in support of the rule.

Baboo *Grija Sunkar Mozoomdar* showed cause.

\* Rule No. 1044 of 1880, against the order of J. Weston, Esq., Judge of Small Cause Court at Narail, dated the 5th June 1880.

**[553]** The Judgment of the Court (GARTH, C.J., and FIELD, J.) was delivered by

**Garth, C.J.**—I think that this rule should be made absolute. It was obtained on the ground that the Small Cause Court had no jurisdiction to try the suit.

The facts were these: the plaintiff and defendant and a third person, being co-proprietors of certain lands, the plaintiff brought this suit to recover his share of the rent of a portion of those lands, which the defendant had received from the ryot.

The answer of the defendant was this, that he and the plaintiff and a third person, being co-proprietors of the lands, the defendant had, with the plaintiff's consent, received the rent not only of this particular jote, but of several other jotes; and that he had disbursed that money in various ways for the benefit of the three co-proprietors.

Under these circumstances it was contended, and it seems to me rightly contended, that it was impossible to try the case, so as to do justice to all parties concerned, except by taking an account. The sums which the defendant had disbursed could not properly be set off against the claim in this suit, and it would obviously be unjust to the defendant to allow the plaintiff to recover the share of the rent which he was asking for, and yet not to allow the defendant to set off against the plaintiff's claim the sums which he paid for the benefit of the plaintiff and other proprietors.

The suit was clearly one which involved questions of partnership account between the joint proprietors of an undivided estate; and therefore the Small Cause Court had no jurisdiction to try it.

Our attention has been called to the case of *Itam Coomar Chowdry v. Shama Churn Chowdry* (Suth., S.C.C. Ref., 33), in which the facts were substantially the same as those in the present case, and it was held, for the reason which I have just explained, that the Small Cause Court had no jurisdiction to try the suit. There is also another case, *Kandaree Joardar v. Mannik Joardar* (Suth., S.C.C. Ref., 23) to which our attention has also been called. There it appears **[554]** that one co-proprietor brought a suit against another co-proprietor for a portion of the produce of certain land which belonged to them both; and the Judges seem to have thought that case distinguishable from the general rule which is laid down in the other case at page 33. I confess, I feel some difficulty in recognizing the distinction. It seems to me that, under such circumstances, no suit could, with justice, be disposed of in the Small Cause Court.

I am of opinion, therefore, that this rule should be made absolute with costs.

*Rule absolute.*

[6 Cal. 555]

The 22nd December, 1880.

PRESENT:

MR. JUSTICE McDONELL AND MR. JUSTICE BROUGHTON.

Kadumbini Dabya.....Judgment-debtor

versus

Koylash Chunder Pal Chowdhry.....Decree-holder.

*Beng. Act VIII of 1869, s. 58—Limitation—Execution of Decree—Delay and Laches—Costs.*

In a suit for arrears of rent under Beng. Act VIII of 1869, a decree was obtained, on the 30th June 1876, for a sum which with costs amounted to less than Rs. 500. Application for execution was made, in December 1877, against property other than that for which the rent was due; but was, in the first Court, opposed successfully by the judgment-debtor, on the ground that the undertenure should first be proceeded against, though such undertenure had already been sold away in execution of another decree, and the execution-proceeding was struck off on the 15th March 1878, and the property released from attachment. The judgment-creditor appealed, and was successful both in the lower Appellate Court and the High Court, the latter decision being dated 26th February 1879. The costs awarded him in these proceedings, if added to the amount of the decree, would amount to a sum of more than Rs. 500. The next application for execution was made on 19th August 1879.

*Held*, that the costs of the appeals in the execution-proceedings should not be added to the decree; and, therefore, the decree being for less than Rs. 500, the provisions of s. 58, Beng. Act VIII of 1869, applied to it.

*Held* also, that the attachment having been removed in March 1878, the execution of the decree was barred under that section.

[555] The question of due diligence on the part of a judgment-creditor can be gone into on a second appeal.

THE respondent obtained a decree under Beng. Act VIII of 1869 for arrears of rent against the appellant. The decree was for Rs. 375 and costs, in all about Rs. 435, and was dated the 30th June 1876. In execution of that decree, an application was made on the 21st December 1877 by the decree-holder for the sale of certain property belonging to his judgment-debtor other than the undertenure on account of which the arrears of rent were due, such undertenure having been previously sold away in execution of another decree against the debtor.

The judgment-debtor opposed the application, on the ground that execution ought to proceed in the first instance against the undertenure from which rent was due. This objection was allowed on the 13th March 1878. The decree-holder appealed, and the Judge reversed the decision; and the Judge's decision was upheld by the High Court on appeal on the 26th February 1879. When the Court of first instance allowed the objection it released the property from attachment, and directed the decree-holder to proceed within two days against the undertenure, this he did not do, and consequently the whole proceeding in execution was struck off on the 15th March 1878.

The next application for execution was made on the 19th August 1879, after which there appeared to have been some delay, and a further application was

\* Appeal from order, No. 262 of 1880, against the order of P. Dickens Esq., Judge of Nuddea, dated the 8th July 1880, affirming the order of Baboo Rajendra Coomar Bose, Munsif of Banaghaut, dated the 15th April 1880.

made on the 20th January 1880. It was contended that the application was barred under s. 58, Beng. Act VIII of 1869, more than three years having elapsed from the date of the decree.

The Munsif held that it was not barred, as it was in substance an application to continue the proceedings already set on foot by the former application, referring to *Issurree Dassee v. Abdool Khalak* (I. L. R., 4 Cal., 415) and *Paras Ram v. Gardner* (I. L. R., 1 All., 355); and the interruption to the execution was not occasioned by any fault or laches of the decree-holder, but by the frivolous objection of the judgment-debtor. He held further, that, in calculating whether a judgment exceeds Rs. 500, all costs, whether incurred [556] before or after the decree, must be taken into consideration, referring to the case of *Campbell v. Huq* (6 W. R., Act X Rul., 8); and that, at the time when the application was made, the amount payable to the decree-holder, inclusive of costs, exceeded Rs. 500, and therefore the application for execution did not fall within s. 58 of Beng. Act VIII of 1869, but was governed by the ordinary law of limitation.

The Judge on appeal affirmed this decision.

The judgment-debtor appealed to the High Court.

Baboo Hurry Mohun Chuckerbutty for the Appellant.

Baboo Rash Behary Ghose for the Respondent.

The Judgment of the Court (McDONELL and BROUGHTON, JJ.) was delivered by

**Broughton, J.**—The question in this case arises on the construction of s. 58 of Beng. Act VIII of 1869, which enacts as follows:—

“No process of execution of any description whatsoever shall be issued on a judgment in any suit for any of the causes of action mentioned in ss. 27, 28, 29, or 30 of this Act, after the lapse of three years from the date of *such judgment*, unless the judgment be for a sum exceeding Rs. 500, in which case the period within which execution may be had shall be regulated by the general rules in force in respect to the period allowed for the execution of decrees of the Court.”

(After stating the facts, the learned Judge continued):—

There is some confusion in the case owing to the judgment of the Court of first instance deciding the case with reference to the application of the 19th August 1879, although the case (which is called No. 35 of 1880) apparently refers to the application of January 1880. This is, however, immaterial, because if the application of August 1879 was out of time, so was that of January 1880.

It is contended on behalf of the respondent that these applications were a continuation of the applications of 1877, and that the only question in the case is, whether the respondent acted [557] with reasonable diligence in applying for the renewal of the already existing process in execution; and this, it is said, is a question of fact which cannot be dealt with in a second appeal.

In support of the first branch of this argument, two cases decided by Mr. Justice AINSLIE and myself were cited.

In the first case—*Deodhary Singh v. Kunwar Dowlut Ram* (3 C. L. R., 189)—the application for execution was within time, but it took a few days for the Court to obtain the records, and they were not received until after the time had expired. That case was therefore analogous to the case of *Hera Loll-Seal v. Poran Matteah* (6 W. R., Act X Rul., 84), decided by Sir BARNES PEACOCK, C.J., and MARKBY, J., and was decided accordingly.

In the other case—*Golami Sahu v. Chutterbhooj Patuck* (3 C. L. R., 261.)—the application for execution was made on the 10th of October 1871, and on the 24th of February 1872, the creditor applied that the case should be taken off the file for the present, but that the attachment which had issued should be kept in force. His next application was made on the 8th February 1875, and it was held that it was within three years.

In both of these cases, therefore, the attachment was subsisting; in the present case it had been withdrawn on the 13th of March, and the execution-proceedings had also been struck off on the 15th. The second of the cases cited was not a case under this special provision of the Rent Law, but an ordinary case of execution of a decree, and the three years ran, not from the date of the decree, but from the date of the last application to enforce it.

In the course of the argument in the case of *Deodhary Singh* (3 C. L. R., 189), two cases were cited, which have been cited again in the present case—namely, *Rhudoj Krishna Ghose v. Karlas Chandra Bose* (4 B. L. R., F. B., 82; s. c., 13. W. R., F. B., 4) and *Lalla Ram Sahoy v. Dodraj Mahto* (20 W. R., 395). In the former of these two cases the Full Bench by a majority gave a wide interpretation to the expression “shall be issued,” but even in this case the applicant lost no time in applying for a sale of [558] the property as soon as the orders of the Court of the 24-Parganas staying the execution-proceedings of the Revenue Court ceased to be operative. That case, therefore, is not an authority for the validity of the execution in the present case, where there has been considerable delay. The case of *Lalla Ram Sahoy* (20 W. R., 395) is more in point, but in this case the execution was made within time, and an order was made for the sale of the property to take place on the 21st of November 1871, the decree being dated the 3rd of September 1868. On consent of the parties, and on a petition of the judgment-debtor dated the 18th of November 1871, the sale was stayed for two months, this period expired in February 1872, but the judgment-creditor waited until April 1872, when it was held that his application came too late. Here also the attachment was not removed although the sale was stayed. *A fortiori* the application in the present case was out of time.

This precedent also disposes of the objections that the question of due diligence cannot be gone into on a second appeal, for it was a case of a second appeal, and indeed no question of fact is involved in these cases, the facts are found, the only question is, whether on these facts the creditors can be considered to have used due diligence.

A further objection has been raised in this case on behalf of the creditor. He contends that the judgment cannot be held to come within the meaning of s. 58 of the Rent Law, because the costs of the appeals from the first order of the lower Court ought to be added to the amount of the judgment. The case of *Campbell v. Huq* (6 W. R., Act X Rul., 8) was cited in support of this argument. In that case it was held that the costs of, and incidental to, the execution ought to be added. This conclusion was arrived at by applying to the case the definition of costs to be found in s. 188 of Act VIII of 1859, now repealed. The interpretation was a wide one, but it did not go so far as is contended in the present case, but only so far as to add the costs of stamps, &c., in the execution-proceedings. The 188th section could not have been read to include the costs of appeal in the costs of the original suit spoken of in s. 187, for such costs are in the discretion of [559] the Appellate Court, and not of the Court which passed the original judgment.

On these grounds, I think that the execution in the present case was barred by lapse of time, and that the appellant, judgment-debtor, is entitled to succeed.

*Appeal allowed.*

[6 Cal. 339]

*The 22nd December, 1880.*

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE BROUGHTON.

Radhanath Kundu..... Defendant

*versus*

Land Mortgage Bank of India, Limited, and others.....Plaintiffs.

*Res judicata—Civil Procedure Code (Act VIII of 1859), ss. 2 and 7—Relinquishment—Suit to set aside Order releasing from Attachment Properties as to which a former Suit has been dismissed—Mortgage made during infructuous Attachment—Subsequent Attachment and Sale.*

R, on the 30th December 1870, obtained an *ex parte* decree against D, in execution of which he attached properties X and Y on the 4th January 1871.

D applied for a rehearing, which was granted; and on the 30th of December 1871, a decree was again passed against D, in execution of which the same properties were attached on the 9th of August 1872, and purchased at the execution-sale on the 1st August 1874 by R. On the 14th February 1871, D had executed a solehnama and mortgage in favour of G, pledging among other properties X and Y as security for a loan made to him by G. D having made default in payment, G obtained a decree against him in terms of the solehnama on the 28th February 1871. Subsequently, D granted another mortgage of the same properties in favour of G. G sold his decree and mortgage to the plaintiff, who in execution of the decree attached properties X and Y. In these execution-proceedings R brought forward the fact of his purchase of the same properties in August 1874, and his claim was allowed, and the properties X and Y released from attachment on the 4th March 1876. The plaintiffs had, on the 8th March 1872, obtained a mortgage from D, on which they had obtained a decree on the 28th September 1874, in execution of which they had attached X and Y; but on R claiming them under his purchase in August 1874, an order was made on the 10th April 1875 releasing X and Y from attachment; and in a suit by the plaintiff to set aside that order, they failed as to properties X and Y, on the ground that those properties were not included in the mortgage of March 1872. In a subsequent suit brought by the [360] plaintiffs against R and D, to set aside the order of the 4th March 1876, and to have X and Y declared liable to be sold under the decree of the 28th February 1871,—*Held*, that the suit was not barred under s. 2 of Act VIII of 1859 by the decree in the previous suit, nor was it barred by s. 7 of the same Act.

*Held* also, that the purchase by R in August 1874 was subject to the mortgage to G of the 14th February 1871.

\* Appeals from Appellate Decree, No. 1523 of 1879, against the decree of Alfred C. Brett, Esq., Judge of Jessore, dated the 23rd April 1879, affirming the decree of Baboo Kedaressur Roy, Subordinate Judge of that district, dated the 29th March 1878.



THIS was a suit to set aside an order dated March 4th, 1876, releasing from attachment certain properties, Shearbur and Purshearbur, in Jessore and, Furridpore, and for an order declaring the plaintiffs entitled to have the said properties sold in execution of a decree held by them against Doorgachurn Shaha, the second defendant.

The facts of the case were,—that Radhanath Kundu, the first defendant, on the 30th December 1870, obtained an *ex parte* decree against Doorgachurn, and in execution of that decree attached the abovenamed properties on the 4th January 1871. An application by Doorgachurn under s. 119 of Act VIII. of 1859 for a rehearing was granted on the 30th March 1871, and on the re-hearing, a decree in a modified form was passed against Doorgachurn on the 30th December 1871. In execution of this decree the same properties were again attached on the 9th of August 1872; and on the 1st of August 1874, they were put up for sale and purchased by Radhanath, the decree-holder. Doorgachurn had previously, on the 14th February 1871, executed a solehnama and a mortgage in favour of one Gouri Prosad Kundu, pledging among other properties the villages of Shearbur and Purshearbur as security for a loan made to him by Gouri Prosad. Doorgachurn having made default in payment, Gouri Prosad obtained a decree on the solehnama on the 28th February 1871. Subsequently, Doorgachurn executed another mortgage of the same properties in favour of Gouri Prosad. Gouri Prosad sold this decree and mortgage to the plaintiff Bank on the 11th of January 1875, the purchase being made in the name of the second plaintiff, Hurichurn Bose, a subordinate in the employ of the Bank, and his name was substituted for Gouri Prosad's in the execution-proceedings.

In execution of the purchased decree, the plaintiff Bank attached the same properties, but Radhanath Kundu intervened, [581] and objected that he had purchased the said properties at the auction-sale on the 1st August 1874, and his objection was allowed, and the properties released from attachment.

The Bank, therefore, instituted this suit, called in the judgment No. 16 of 1877, on the 3rd March 1877, to have that order set aside, and to establish their right under the decree of the 28th February 1871, and the mortgage which they had purchased from Gouri Prosad.

It appeared that the second defendant Doorgachurn had executed, in favour of the plaintiff Bank, on the 8th March 1872, a mortgage, in a suit on which, they, on the 28th September 1874, obtained a decree, in execution of which they attached Shearbur and Purshearbur, the properties now sought to be proceeded against. In those execution-proceedings the defendant Radhanath Kundu, putting forward his purchase on the 1st August 1874, obtained an order releasing those properties from attachment on the 10th of April 1875. The plaintiff Bank, thereupon, brought a suit, called in the judgment, No. 39 of 1876, to set aside the order of the 10th April 1875. That suit was partly successful, but failed as regarded the properties Shearbur and Purshearbur, on the ground that those villages were not included in the mortgage of the 8th March 1872.

One of the contentions raised by the defendant Radhanath, who alone appeared to defend the suit, was, that the present suit was barred by the former suit, 39 of 1876, under ss. 2 and 7 of Act VIII of 1859.

The Subordinate Judge, on this ground, among others, gave the plaintiffs a decree.

The Judge, on an appeal by Radhanath Kundu, held, that the purchase of Radhanath Kundu of the 1st August 1874 was subject to the mortgage of the

14th February 1871, referring to the case of *Puddomonee Dossee v. Roy Muthooranath Chowdhury* (12 B. L. R., 411); and that the suit was not barred under ss. 2 and 7 of Act VIII of 1859.

From this decision the defendant Radhanath appealed to the High Court. [562] Baboo Grija Sunker Mozoomdar for the Appellant.

Baboo Bussunt Coomar Bose for the Respondents.

The Judgment of the Court (MCDONELL and BROUGHTON, JJ.) was delivered by

**McDonnell, J.** (who, after stating the facts, continued):—The objections which are put forward in this second appeal on behalf of Radhanath Kundu are two—

1st—That the Bank has already failed in a suit on another mortgage relating to the same property, and that as the right they now claim was then in existence, they ought to have included it in the other suit, and not having done so are barred under Act VIII of 1859, s. 7

2nd. —That this defendant has priority under his purchase of first August 1874.

With regard to the first objection, it appears that the Land Mortgage Bank had obtained a decree against Doorgachurn Shaha on another mortgage, in execution of which decree the same property was put up to sale

Radhanath Kundu objected to the sale, on the ground that he had purchased the property on the 1st August 1874, and on the 10th April 1875 his objection was allowed. Thereupon the Land Mortgage Bank, on the 30th of June 1876, filed a suit, which was numbered No. 39 of 1876, against Radhanath Kundu and Doorgachurn Shaha. they succeeded in this suit only partially, they failed with regard to the property now in dispute.

This suit, No. 16 of 1877, was instituted when Act VIII of 1859 was in operation, and consequently expl. 4 of s. 13 of the present Code does not directly apply to it. But it is argued that that explanation merely expresses in a few words the result of the decisions upon s. 2 of Act VIII of 1859, which are to be found in the reports of Indian Appeals the cases of *Katama Natchiar* (11 Moore's I. A., 50) and *Woomalata Debra v. Umopoorra Dassee* (11 B. L. R., 158). These decisions were discussed in the case of *Denobundhoo Chowdhry v. Kristomonee Dossee* (I. L. R., 2 Cal., 152) by a Full Bench, the majority of which held that two suits for possession of the same [563] land could not be brought, although the title set up in the first suit was not the title set up in the second. The principle, followed in *Bemolasoondury Choudhram v. Panchanun Chowdhry* (I. L. R., 3 Cal., 705), thus laid down, has been since applied to suits to recover a specific sum of money. *Bheeka Lall v. Bhuggoo Lall* (I. L. R., 3 Cal., 23).

But the suit No. 39 of 1876 was a suit brought with the object of having the property sold in execution of one decree after an order had been made on the 10th of April 1875 releasing the property under s. 246 of Act VIII of 1859 on the claim of Radhanath Kundu. The present suit, No. 16 of 1877, is a suit brought with the object of having the property sold in execution of another decree after another order had been made in separate proceedings in execution on the 4th of March 1876 under the same section. The property to be sold is indeed the same, but in no other respect is there any identity between the suits, and we are of opinion that even the very strict interpretation put upon the decisions of the Judicial Committee by the Full Bench of this Court in the case of *Denobundhoo Chowdhry* (I. L. R., 2 Cal., 152) does not make the principle laid down applicable to this case, so that s. 2 of Act VIII of 1859

does not, in our view of the case, bar this suit; nor do we think that it was incumbent upon the plaintiff to include both claims in one suit under s. 7.

We are also of opinion that the lower Court rightly held that the purchase by the defendant in 1874 was a purchase subject to the mortgage of the 14th of February 1871. The property had been attached indeed prior to that mortgage, and if the defendant had purchased under that attachment, the case would have been different. But the *ex parte* decree under which the property was first attached had been set aside, not only had the decree been set aside, but the attachment had been withdrawn. It was under a subsequent attachment under a subsequent decree, that the defendant purchased, and he cannot set up his purchase as against the earlier encumbrance of the 14th of February 1871.

We think, therefore, that the appeal must be dismissed with costs.

*Appeal dismissed.*

[564] *The 22nd December, 1880.*

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE BROUGHTON.

Burmamoye Dassee.....Plaintiff

*versus*

Dinobundhoo Ghose and another.....Defendants.\*

*Limitation—Suit by Mortgagee for Possession after Foreclosure—Limitation Act (IX of 1871),*  
*sedes, n, arts. 135, 145.*

In a suit by a mortgagee to obtain possession after foreclosure instituted more than twelve years after such mortgagee had, upon default, become, under the words of the deed, entitled to possession, but within twelve years of the date of the expiry of the year of grace granted under the foreclosure proceedings, *Held*, under s. 145 of the Limitation Act, IX of 1871, that the period of limitation must be calculated from the date of the expiry of the year of grace, and not from the time when the default was first made.

THIS was a suit for possession of certain property after foreclosure. The plaintiff *inter alia* stated, that the plaintiff had, upon a mortgage-bond, dated the 11th June 1858, lent the first defendant the sum of Rs. 1,301, upon the security of the property, the subject of the present suit; that default having been made on the 12th June of the following year, the plaintiff applied, under Reg. XVII of 1806, for foreclosure; and that an order was made by the Court, in October 1866, to foreclose the said mortgage upon expiry of the year of grace

\* Appeal from Appellate Decree, No. 1859 of 1879, against the decree of Alfred C. Brett, Esq., a Judge of Jessore, dated the 14th May 1879, confirming the decree of Baboo Kedaressur Roy, Roy Bahadur, Subordinate Judge of that District, dated the 5th August 1878.

in the October following. The present suit was instituted on the 10th April 1878. The second defendant was a purchaser from the mortgagor after foreclosure. The defence was, that the mortgage-bond contained an express provision that, immediately after the expiration of the date, within which it was stipulated that the money should be repaid, the right and possession of the mortgagor should cease to exist; that such right and possession had absolutely terminated on the day of default, the 12th June 1859; that the continuance of such possession by the mortgagor after that period, and subsequently by the second defendant, must be taken to have been a possession adverse to [565] the plaintiff's right; and the present suit not having been instituted within twelve years of the date of default, was therefore barred by limitation.

The Court of first instance dismissed the plaintiff's suit, on the ground that the period of limitation must be taken to have begun to run on the date of default, on the 12th June 1859. The lower Appellate Court concurring in this view dismissed the appeal.

The plaintiff thereupon appealed to the High Court.

Baboo *Rashbehary Ghose* for the Appellant.

Dr. *Gurudas Banerjee* and Baboo *Joyesh Chunder Roy* for the Respondents.

The Court (MCDONELL and BROUGHTON, JJ.) delivered the following **Judgments** :—

**Broughton, J.**—This second appeal arises out of a suit for possession after foreclosure of a mortgage of a taluq, to which the defendants plead limitation. The mortgage is dated the 30th of Jeyt 1265, corresponding with the 11th June 1858; default was made on the 30th of Jeyt 1266, or 12th of June 1859. An application under Reg. XVII of 1806 was made to foreclose the mortgage in Assin 1273 (Sept.—Oct. 1866), and the year of grace expired in Assin 1274 (Sept.—Oct. 1867).

The present suit was instituted in 1284, on the 10th of April 1878. And the question is, whether the date from which the period of limitation counts was to run from the 30th of Jeyt 1266, the date of default, or from Assin 1274, when the year of grace expired.

The new Limitation Act, XV of 1877, came into operation before the suit was filed; but the Courts below have applied Act IX of 1871, which differs materially from Act XV of 1877, on the ground that the right to sue was barred before the Act of 1877 came into operation, and it is admitted that if the right was barred by Act IX of 1871, sched. ii, art 135\*, it cannot be revived.

The mortgage-deed provided that if the mortgagor did not pay the debt on the 30th of Jeyt 1266, the mortgagee "will [566] become the owner

\*[Art. 135 —

Description of suit.	Period of limitation.	Time when period begins to run.
Suit instituted in a Court not established by Royal Charter by a mortgagee for possession of immovable property mortgaged.	Twelve years.	When the mortgagee is first entitled to possession.]

by purchase, and entitled to possession." It is admitted that, if the plaintiff had sued for possession as mortgagee, he would have been bound to file his plaint within twelve years from the 30th of Jeyt 1266; but it is contended that a different view must be taken of a suit like the present, after the termination of foreclosure proceedings, which is not, like the other suit, a suit by a "mortgagee" within the meaning of the words of art. 135 of Act IX of 1871, but it is a suit by a mortgagee who has foreclosed and who has become absolute owner; and a case decided on the 6th of last May has been quoted by Baboo Rashbehary, who has appeared for the plaintiff. In that case—*Ghinaram Dobey v. Ram Monaruth Ram Dobey*, Second Appeal No. 126 of 1879, the point raised in the present appeal appears to have been very fully argued, and the judgment\* which was delivered by Mr. Justice PONTIFEX [567] was directly in favour of the contention of the present appellant. The two cases in fact are exactly similar. The mortgage-deed was in the same form, and the suit was brought more than twelve years after the date on which the mortgagee was entitled to possession; but within that period, as in the present case, foreclosure proceedings under the regulation had been taken, and the suit had been instituted within twelve years from the expiration of the year of grace. Upon this it was remarked:

"Now it cannot be said, we think, that, after taking such proceedings, he was only entitled to the time allowed by art. 135 of the Limitation Act as mortgagee. The very fact of his taking foreclosure proceedings changes his interest as mortgagee to that of absolute owner, and as he has brought his suit within twelve years from the date of such change of character, we think he is no longer bound by that article (135). By art. 145, he would be entitled to sue within twelve years after possession became adverse against him. It cannot, we think, be said, that as long as the relation of mortgagor and

\* The Judgment of the Court (PONTIFEX and McDONELL, JJ.,) in the case referred to was as follows:—

**Pontifex, J.**—This is a suit for possession after foreclosure. The mortgage was effected by an instrument, under which the money was made payable at a particular time, in default of payment at that time, the deed declared, that the mortgagee should become the owner, as if it had been a deed of absolute sale; and that he should be entitled to possession as if there had been a foreclosure. The suit has been brought more than twelve years after that date, and the defence is, that the plaintiff is barred by art. 135 of the Limitation Act of 1871, which is peculiar in its terms. It gives a period of twelve years from the time that the mortgagee is first entitled to possession. That is the period given to the mortgagee to obtain possession. No doubt, this was a very unfortunate provision in the Act of 1871, and it has been corrected in the Act of 1877. But in suits under the former Act, we are bound to decide in accordance with its provisions and language. If, therefore, no proceeding has been taken by the mortgagee within twelve years to alter his position, the plaintiff's suit would be barred; but in this case, during the twelve years and within about four years after the mortgagee became entitled to take possession, he commenced foreclosure proceedings, and after the year of grace he has sued within twelve years. Now it cannot be said, we think, after taking such proceedings, that he was only entitled to the time allowed by art. 135 of the Limitation Act as mortgagee. The very fact of his taking foreclosure proceedings changes his interest as mortgagee to that of absolute owner, and as he has brought his suit within twelve years from the date of such change of character, we think he is no longer bound by that article.

By art. 145 he would be entitled to sue within twelve years after possession became adverse against him. It cannot, we think, be said that, as long as the relation of mortgagor and mortgagee subsisted, the possession of the mortgagor could be adverse to the mortgagee.

For the time, therefore, he was entitled to take possession as mortgagee, and up to the time that the year of grace expired, possession was not adverse to him; but directly the foreclosure proceedings became complete, possession became adverse. He has brought this suit within twelve years from that date, and therefore art. 135 does not affect him, and he is in time. We agree with the decision of the lower Court upon that point.

mortgagee subsisted, the possession of the mortgagor could be adverse to the mortgagee. For the time, therefore, that he was entitled to take possession as mortgagee up to the time that the year of grace expired, possession was not adverse to him; but directly the foreclosure became complete, possession became adverse."

In answer to this case, however, Dr. Gurudas Banerjee, who appeared for the defendant, drew attention to a decision of the Judicial Committee of the Privy Council, which had not, he said, been considered in the case already quoted. The case is *Forbes v. Ameeroomissa Begum* (10 Moore's I. A., 340); the passage is printed at pages 350, 351. After referring to the various provisions of [568] Reg. XVII of 1806, the Judgment proceeds as follows: "The general effect of these Regulations is, that if anything be due on the mortgage, and the mortgagor make an insufficient deposit, and *a fortiori* if he makes no deposit at all, the right of redemption is gone at the expiration of the year of grace.

"The title of the mortgagee, however, is not even then complete. It was ruled by Circular Order of the 22nd of July 1813, No. 37, and has ever since been a settled law, that the functions of the Judge under Reg. XVII of 1806, s. 8, are purely ministerial; and that a mortgagee, after having done all that the Regulation requires to be done, in order to foreclose the mortgage and make the conditional sale absolute, must bring a regular suit to recover possession, if he is out of possession, or to obtain a declaration of his absolute title, if he is in possession.

"In that suit the mortgagor may contest, on any sufficient grounds, the validity of the conditional sale, or the regularity of the proceedings taken under the Regulation in order to make it absolute. He may also allege and prove, if he can, that nothing is due, or that the deposit (if any) which he has made, is sufficient to cover what is due, but the issue, in so far as the right of redemption is concerned, will be, whether anything at the end of the year of grace remained due to the mortgagee, and if so, whether the necessary deposit has been made. If that be found against the mortgagor, the right of redemption is gone."

A very able argument has been addressed to us upon the question, and another recent decision of this Court has been cited—*Lall Mohun Gungopadhya v. Prosunno Chunder Banerjee* (24 W. R., 433)—in which the decision appears to have been in favour of the contention raised by the respondents in the present appeal. The case is very shortly reported, and the facts are not stated in the Judgment, which alone is printed, but on referring to the records of the case, we find that the suit was one which was instituted "on the strength of foreclosure proceedings and for possession of the mortgaged premises by virtue of the sale having become absolute."

[569] The Court of first instance appears to have decided the case upon the authority of the case of *Huro Chunder Gooho v. Gudadhar Koondoo* (6 W. R., 184), which case was decided in 1866, when the Limitation Act, XIV of 1859, was in operation. It was there decided, however, that the foreclosure "gave the plaintiff no fresh starting point," and these words are relied upon in the present case. The plaintiff appealed to the Additional Judge, who reversed this decision, on the ground that the mortgagor was not in possession adversely to the plaintiff.

The decision of this Court, on special appeal in *Lall Mohun's case* (24 W. R., 433), was founded on the words of art. 135 of the Limitation Act of 1871, the Court holding that the earlier decisions on the Act of 1859 were inapplicable

to this case ; and it was held that, under art. 135, the mortgagee must sue within the specified time, when he was entitled to possession under the deed. Thus the suit was treated as a suit by a mortgagee.

In the Presidencies of Madras and Bombay, where the Regulation, XVII of 1806, does not apply, the law, although it has been disturbed by a series of decisions which have been expressly declared by the Judicial Committee to be quite unsound in principle—*Thumbusawmi Moodelly v. Hossain Rowthen* (I. L. R., 1 Mad., 1)—gives to the purchaser under a conditional sale an absolute right upon default of payment on the day stipulated. “The essential characteristic of a mortgage by conditional sale was, that, on the breach of the condition, the contract executed itself and the transaction was closed, and became one of absolute sale without any further act of the parties or accountability between them. That it still has this effect in the Presidency of Madras, was what was decided by the case in 13th Moore’s Appeals”; referring to the case of *Pattabhiramier v. Vencatarow Naicken* (13 Moore’s I. A., 560 ; s. c., 7 B. L. R., 136), and so it was in the case of conditional sales prior to the Regulation of 1806 in Bengal, *Sarfunnissa v. Sheikh Inayet Hossein* (B. L. R., Sup. Vol., 415 ; s. c., 5 W. R., 88).

The purpose for which the Bengal Regulation, XVII of 1806, was passed is stated in the preamble, section 1, as follows :—

[570] “It is further requisite for the purpose of preventing improvident and injurious transfers of landed property at an inadequate price by the forfeiture of mortgages accompanied with a condition of sale to the mortgagee. if the amount advanced be not repaid within a stated period (which description of mortgage is common throughout the country, under deeds of baibilwafa, kot-kobala, and other similar designations) that an equitable provision should be made for allowing a redemption of the estate within a reasonable and limited period, on payment of the principal sum lent, with interest thereupon, if the mortgagee shall not have been put in possession” So that the period within which the right of redemption was to remain, was to be extended, for a reasonable and limited period, beyond the actual date fixed for payment by the deed itself ; and certain provisions as to notice to the mortgagor, &c., were made for carrying out that object. That is all the Regulation purported to do, and all that it did, in this respect. Beyond that it did not interfere with the rights of the purchaser under the conditional sale, which were well established, and which it recognised, namely, that when the period for payment had elapsed, the purchaser became absolute owner of the property. But that period was to be extended.

The case of *Forbes v. Ameeroonissa Begum* (10 Moore’s I. A., 340) was a suit for possession of a taluq, which had been the subject of a mortgage by conditional sale ; proceedings had been taken to foreclose under Reg. XVII of 1806. It was found that the plaintiff was really in possession under a benami lease, and it was held, that he was entitled to possession without producing accounts of the usufruct of the estate, it appearing that the foreclosure proceedings had been regular, and that the debt was admittedly unpaid.

If the relationship of mortgagor and mortgagee had subsisted between the plaintiff and defendant when the suit was brought, the Judicial Committee would not have decided that the accounts were unnecessary, because the liability to account is one that arises on that relationship when the mortgagee is in possession, and continues so long as he is in possession ; and as it [571] was found in that case that the mortgagee was in possession from the beginning, the decision of the Judicial Committee that he was not to account, must

have proceeded on the ground that when these foreclosure proceedings (in all respect regular) had terminated, the debt being unpaid, the relation of mortgagor and mortgagee had ceased to exist. The plaintiff did not in that case sue to recover possession as mortgagee, but he claimed to be absolute owner, and it was decided that he was entitled to succeed.

So again the right to redeem is an incident which, by the terms of the Regulation, is gone when the foreclosure is completed by the expiration of the year of grace. The Judge, under s. 8, is to notify this to the mortgagor; he is to inform him that if he do not redeem the property in the manner provided within one year from the date of the notification, the mortgage will be finally foreclosed, and the conditional sale will become conclusive. The right to redeem when it existed was preserved against the operation of the law of limitation for a period of sixty years. But where foreclosure proceedings were completed by the expiration of the year of grace, the mortgagor was held to be barred, if he did not sue to open up the foreclosure within twelve years: *Loft Hossein v. Abdool Ali* (8 W. R., 476). This case can have been decided upon no other ground than that his position was changed by the foreclosure.

In addition to the authority of the case of *Ghinaram Dobey* (Ante, p. 566, note) lately decided by this Court, the case of *Jeora Khun Singh v. Hookum Singh* (5 Agra H. C. R., 358) has been cited. There the learned Judges of a Division Bench of the High Court, then at Agra, had before them a suit brought by the mortgagees under a deed of conditional sale, after foreclosure proceedings, the object of which was to obtain possession of the property and mesne profits from the date at which the foreclosure proceedings terminated. It was contended that their right to possession did not become complete until they had obtained a decree for possession, and the passage already quoted from the judgment in the case of *Forbes v. Ameeroonissa Begum* (10 Moore's I. A., 340, at pp. 350—351) was cited in support of that argument,—[572] namely, "the title of the mortgagee is not even then complete." But the learned Judges observed that, "reading the passage cited on behalf of the defendants with what immediately follows it, and referring to the Circular Order (of the 22nd of July 1813), to which reference is made by their Lordships, we do not understand them to rule that the absolute right of the conditional purchaser has not accrued to him at the conclusion of the proceedings taken under the Regulation, or that it is not (if those proceedings were regular) to be referred back to that period. But we understand them to rule that a conditional purchaser, if out of possession, cannot obtain possession by summary application to the Judge, before whom the foreclosure proceedings were held; but that he must proceed by regular suit. And that, in like manner, if he is in possession at the termination of the foreclosure proceedings, and finds it necessary to vindicate his title, he must do so by a regular suit."

The learned Judges of the High Court at Agra quote the Circular Order of 22nd July 1813, and two other Circular Orders, of the 25th of May 1832 and of the 17th of June 1834, which are to the same effect. All these Circular Orders show that they were directed against a practice which had grown up, and to which they advert, for the mortgagee to make an application to the Judge on the expiry of the year of grace to be summarily put in possession of the property. The learned Judges of the Agra Court go on to say: "The Regulation expressly declares, that, on the expiry of one year from the date of the notification, 'the mortgage will be finally foreclosed, and the conditional sale will become conclusive.' And the Sudder Court, while it was fully competent to keep within due limits the exercise of their legitimate powers by Courts subordinate, was



not competent to legislate and impose on conditional purchasers, as necessary to the perfection of their rights, a condition not prescribed by the Regulation. But in truth the Sudder Court did no more than it was competent to do. It ordered the subordinate Courts to abstain from the exercise of a jurisdiction which was not conferred on them by the Regulation, and it left conditional purchasers, who had obtained foreclosure, if they required the assistance of the [573] Court to obtain the enjoyment of their rights, to proceed in due course by the institution of regular suits." And they quote a passage from Mr. Justice MACPHERSON'S work on Mortgages,— "with that year (of grace) ends the mortgagor's whole interest in his property, unless he can prove that, previous to its lapse, he was entitled to have it declared that the mortgage had been redeemed ;"—and they held that the rights of the mortgagee who had foreclosed, *i.e.*, absolute rights, must, if established where they are contested, be referred back to the period at which the proceedings under the Regulation came to an end, and must be held to have become absolute at that date ; and they accordingly, gave him mesne profits, to which, if he had remained a mortgagee, he would not have been entitled. Dr. Gurudas argues, that this is not the case, but this argument appears to be answered in the case of a mortgage by conditional sale by the following passage of the judgment of the learned Judges of the Agra Court, who say :—"indeed, were we to hold otherwise, *i.e.*, that the plaintiff is not entitled to mesne profits," we should be doing injustice to the conditional purchaser, for from the termination of the foreclosure proceedings he can claim no interest upon the mortgage debt ; and if the conditional vendor was not answerable for mesne profits for the period antecedent to the recovery by the purchaser of a decree for possession, it would in many cases, be to his interest to prolong to the utmost limit frivolous and vexatious litigation."

Mesne profits appear to have been given by this Court in a similar case—*Mussamut Pandroo Koonwar v. Mohesh Chunder Mookerjee* referred to in *Jeora Khun Singh v. Hookum Singh* (5 Agra H. C. R., 358).

The two cases of *Deno Nath Gungooly v. Nursingh Proshad Dass* (14 B. L. R., 87 ; s.c., 22 W. R., 90) and *Mankee Koor v. Sheik Munnoo* (14 B. L. R., 315 ; s.c., 22 W. R., 543) do not appear to me to have any bearing upon the present case. The question in these cases arose under the Limitation Act of 1859, and the Court was asked to decide when the cause of action arose, and that depended upon the right to possession in the plaintiff, and the adverse possession of the defendant. In the first case, the defendants having purchased from the vendor under [574] the conditional sale at an auction without notice of the mortgage, and having got into possession, and claiming as absolute owners, their possession was held to be adverse to the conditional purchaser : and having been so in possession for twelve years, during which period, the purchaser had a right to possession, he was barred by limitation, and could not, by taking proceedings to foreclose under the Regulation, obtain a fresh start ; but that decision is not inconsistent with the proposition that the purchaser has a different title under the *kotkobala* to that which he acquires after the termination of the year of grace. Whatever his title may have been, whether as mortgage or as absolute owner, the defendant had held adversely to him for twelve years. It was held that the purchaser had a right to possession on default of payment in terms of the deed, which stipulated that, "if I don't repay the whole money within the period, then this conditional bill will be reckoned as a true and absolute bill of sale ; my and my successor's rights will cease to the said *zernindari* ; the proprietary rights, with the rights of gift and sale to it, will accrue to you and your successors ; and registering your names on the *sherista* of the Collectorate you will take possession of it

in the mofussil, and on payment of revenue, you, your sons, grandsons, etc., will continue to have felicitous occupation and possession thereof." This was held to give the purchaser a right to possession, not as absolute owner, but as mortgagee accountable to the mortgagor for the profits which he received subject to redemption within the period specified by the law of limitation, unless he should in the meantime have taken proceedings for foreclosure.

In the other case the possession of the mortgagor asserting only a title as mortgagor consistent with the mortgage by conditional sale could not be considered as a holding adversely to the conditional purchaser so as to create a cause of action within the meaning and intention of the Limitation Act.

The question of adverse possession in these two cases was decided in conformity with two decisions of the Judicial Committee in *Pran Nath Roy Chowdry v. Rookea Begum* (7 Moore's I. A., 323) and *Anundo Moyee Dosse v. Dhonendio Chunder Mookerjee* (14 Moore's I. A., 101, s.c., 8 B. L. R., 122).

[575] In the present case it is not contended that the possession of the vendor prior to the termination of the foreclosure was adverse to the purchaser.

It is not necessary to consider the question whether the article (135) had the effect of obliging the mortgagee to sue for or to take proceedings within a particular period to foreclose his mortgage, nor to do more than to say that, agreeing with the view taken by the High Court at Agra and by Mr. Justice PONTIFEX, I am of opinion, that the present suit is not barred by limitation, and that the appellant is entitled to succeed.

**McDonell, J.**—This case is on all fours with the case decided on 6th May last by Mr Justice PONTIFEX and by me [No. 126 of 1879 (*ante*, p. 566, note)], and for the reasons given in that judgement I hold that the present suit is not barred by limitation, and that the appellant is entitled to succeed. The case must be remanded to the Subordinate Judge for a trial on the merits. Costs to follow the result.

*Case remanded.*

[9 Cal. 575]

# APPELLATE CRIMINAL.

*The 5th January, 1881.*

PRESENT :

MR. JUSTICE MORRIS AND MR. JUSTICE PRINSEP.

Ram Chunder Shaw and others.

*versus*

The Empress.

*Bengal Excise Act (Beng. Act III of 1878), ss. 9, 58, 74,—Introduction into Calcutta of Spirituous Liquor manufactured elsewhere—Fines fixed by Collector—Additional Punishment—Alternative Sentence of Imprisonment*

The provisions of s. 74 of the Beng. Excise Act as to additional punishment, where there has been a "previous conviction for a like offence," contemplate merely the case of the offender having been already convicted of an offence punishable with a fine of Rs. 200 or

\* Criminal Appeal, No. 765 of 1880. against the order of F. J. Marsden, Esq., Chief Presidency Magistrate of Calcutta, dated the 20th November 1880

upwards, and being again convicted of another offence punishable with the same punishment; it is not necessary that he should have been previously convicted of the same offence.

[576] The accused were sentenced by the Presidency Magistrate, under ss. 58 and 74 of the Beng. Excise Act, to a fine of Rs. 200 each, in default to three months' imprisonment, and in addition to six months' imprisonment, which was the maximum term that could be awarded under s. 74. *Held*, that the sentence of imprisonment was not in excess of the powers given to the Magistrate by s. 12 of the Presidency Magistrates' Act, the imposition of the additional sentence of imprisonment not affecting the Magistrate's powers as regarded the original sentence under s. 58.

No limits with regard to any distilleries in Calcutta having been fixed under s. 9 of the Act within which spirituous liquor manufactured otherwise than in that particular distillery, shall be introduced or sold without a special pass, and the fixing of such limits being necessary to a conviction of an offence under s. 58, the convictions in this case were set aside.

In this case Obinash Chunder Shaw, Husnoo Khan, Ramchunder Shaw, Chinibash Shaw, Adhore Chunder Shaw, and Baneshur Shaw were charged with having introduced for sale spirituous liquor into the town of Calcutta, at 14, Mechooa Bazaar Street, without a special pass from the Collector, the said spirit not having paid duty as required by s. 18 of Beng. Act VII of 1878, and not having been manufactured at a distillery within the limits of the town, in contravention of ss. 9 and 58 of the said Act, and also for having in their possession spirituous liquor without a pass in contravention of ss. 17 and 61 of the same Act. They were tried before the Chief Presidency Magistrate, and Obinash and Baneshur were each fined Rs. 100, in default to undergo three months' rigorous imprisonment, and Ram Chunder, Chinibash, and Adhore Chunder were each fined Rs. 200, in default to undergo three months' rigorous imprisonment, and in addition to undergo six months' rigorous imprisonment. Husnoo Khan was discharged.

From this sentence Ram Chunder, Chinibash, and Adhore Chunder appealed to the High Court.

Mr. *R. Allen* for the Appellants.

The *Standing Counsel* (Mr *Phillips*.) for the Crown

The **Judgment** of the Court (MORRIS and PRINSEP, JJ.) was delivered by

**Prinsep, J.** The three appellants before us, as well as two others, have been convicted and sentenced under s. 58 of the [577] Beng Excise Act (Beng Act VII of 1878), and in addition to the penalty prescribed thereby, they have, under s. 74, been sentenced to imprisonment, in consequence of their having been previously convicted of an offence under the Act punishable with a fine of Rs. 200 or upwards.

The Presidency Magistrate has recorded on the proceedings of the trial that he has "not the least doubt that the defendants (with the exception of Husnoo, who has been discharged) did introduce spirituous liquors without a pass, and have committed an offence under s. 58 of the Excise Act."

To constitute an offence under the latter part of s. 58, it is necessary that the offender should have introduced, or attempted to introduce, for sale, spirituous liquors manufactured at another place into the limits fixed for the consumption of such liquors manufactured at such distillery (*i.e.*, a distillery, established under s. 9) without a special pass from the Collector.

In the present case, we find that there is some evidence which apparently the Magistrate has believed to show that the liquor seized in Calcutta had been manufactured in Tallygunge, a suburb. Under the circumstances it is not necessary for us to express any opinion on the value of that evidence. But

Mr. R. Allen for the appellant has maintained, and the Standing Counsel for Government, who appeared to support the conviction, has ultimately admitted, that the Collector of Calcutta, up to the present time, has not, under s. 9, fixed limits with regard to any distillery in Calcutta within which no spirituous liquor manufactured after native processes except in that particular distillery shall be introduced or sold without a special pass. There cannot, therefore, be the special protection necessary to constitute an offence under s. 58, and the conviction and sentences passed on the appellants must accordingly be set aside.

Two other persons have been convicted simultaneously with the appellants, who have not been able to appeal, their sentences not being appealable. We have already held that no offence has been committed, and we therefore feel bound to deal with their cases under s. 147 of the High Courts' Criminal Procedure Act. The Standing Counsel, on behalf of Government, consents to [578] our proceeding summarily with this matter without complying with the special procedure provided by s. 181 of the Presidency Magistrates' Act, and as this would necessitate a mere compliance with form without any possible advantage, we direct that the conviction and sentences passed on these two men, Obinash Chunder Shaw and Baneshur Shaw, be set aside. The fines, if paid, will be refunded; and the appellants will be released from jail.

It is right that we should notice two objections taken in this appeal to the legality of the sentences passed. Mr. Allen first contended that, in order to render an offender under the Beng. Excise Act liable to additional punishment under s. 74, it is necessary that he should have been previously convicted of the same offence, the words *like offence* being synonymous with *same offence*. It appears to us, however, that the section contemplates merely that the offender having been already convicted of an offence punishable with fines of 200 or upwards should be again convicted of another offence punishable with the same punishment, and that this is the correct interpretation to be put on the term *like offence*. The additional sentence of imprisonment passed under s. 74 would not be illegal if, in the case now before us, an offence had been established under s. 58.

The other objection is, that the alternative sentence of imprisonment—viz., three months' rigorous imprisonment in default of payment of the fine imposed—is beyond what the Magistrate can inflict under s. 12 of the Presidency Magistrates' Act (IV of 1877). Mr. Allen contends that, as under s. 74 of the Beng. Excise Act, the appellants were liable to imprisonment for a term not exceeding six months, the Magistrate, under s. 12 of the Presidency Magistrates' Act, could not sentence them to undergo imprisonment for more than six weeks—i.e., one-fourth of six months, on default of payment of the fine imposed.

It appears to us, however, that the appellants have been sentenced practically to two sentences—one under s. 58 to fine of "rupees one hundred each, in default to undergo three months' rigorous imprisonment each;" and the other under s. 74, in addition to the penalty under s. 58, to imprisonment each for six months. The imposition of the additional sentence would not [579] affect the Magistrate's powers as regards the original sentence under s. 58. It cannot be denied that, standing by itself, the sentence under s. 58 is perfectly legal; but it is contended that, by reason of the additional sentence of imprisonment under s. 74, the term of imprisonment in default of payment of the fine imposed under s. 58 is excessive, and therefore illegal. We see no valid reason for this contention, and indeed it would be an anomaly if a sentence perfectly legal

under s. 58 should become otherwise, because the offender had rendered himself liable to an *additional* punishment on account of a previous conviction under the Beng. Excise Act.

We observe that this case was heard by the Magistrate on the 6th, 9th, and 16th November, though it was of a nature which should ordinarily have permitted of its decision at the first hearing. No reason is assigned for the postponements, if it existed, or that they were owing to the absence of the necessary evidence for the prosecution. We think it necessary to notice this, because frequent postponements add considerably to the expense incurred by the parties, and should be avoided.

We observe also that, in the affidavit it is stated on behalf of appellants that "application was made to the Magistrate for copies of the evidence in this case, but the same was refused," notwithstanding the terms of s. 170 of the Presidency Magistrates' Act.

*Conviction set aside.*

[6 Cal. 579.]

*The 5th January, 1881.*

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

In the matter of the Petition of Panjab Singh and another.

The Empress

*versus*

Panjab Singh and another \*

*Criminal Procedure Code (Act X of 1872), s. 227, cl. (h)—Recording Reasons for Conviction—Practice of High Court on Revision.*

Under cl. (h) of s. 227† of the Criminal Procedure Code, although a Magistrate is not required to record any evidence, he should, in recording his reasons for the conviction, state them so, that the High Court, on revision. [580] may judge whether there were sufficient materials before him to support the conviction

Where they were not so stated, the High Court, on motion, set the conviction aside.

THE accused were found guilty of an offence under s. 447 of the Penal Code. It appeared there was gambling going on in the house of one Jakri, in which the accused confessedly took part. The gambling ended in a quarrel and consequent disturbance, which caused great annoyance and alarm to the women in the house. The Assistant Commissioner was of opinion, that

\* Criminal Motion, No. 300 of 1880, against the order of A. W. Paul, Esq., Assistant Commissioner of Darjeeling, dated the 23rd October 1880.

†[Sec. 227 :—In cases where no appeal lies, the Magistrates or Bench of Magistrates need not record, the evidence of the witnesses nor the reasons for passing the judgment, nor draw up a formal charge, but he or they shall enter in a register to be kept for the purpose, the following particulars :—

(h) The finding, and, in the case of a conviction, a brief statement of the reasons therefor :]

although the original entry might be considered lawful, their remaining there to gamble and creating a disturbance was sufficient to bring the accused within s. 447 of the Penal Code.

Against this order the accused filed a petition in the High Court.

Mr *M. M. Ghose* and *Baboo Bordonath Dutt* appeared for the petitioners.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by

**Mitter, J.**—We are of opinion that the conviction in this case must be set aside. The lower Court is of opinion that the prisoner is guilty, under s. 447 of the Indian Penal Code, of criminal trespass. In order to constitute that offence, it is necessary to establish, on behalf of the prosecution, that the entry into another person's property must have been made with intent to commit an offence, or to intimidate, insult, or annoy that person in his possession, or that, having lawfully entered the premises, remaining there for the purpose of intimidation, annoyance, or insult, or with intent to commit an offence. Now in this case, which was tried summarily, we have simply before us the finding and the reasons upon which the conviction is based under cl. (h), s. 227 of the Code of Criminal Procedure. Under that section the Magistrate was not required to record any evidence.

We think that, under the clause in question [cl. (h) of s. 227], a Magistrate, in recording his reasons for the conviction, should [581] state them so, that this Court, on revision, may judge whether there were sufficient materials before him to support the conviction.

In this case we do not find that there is any finding at all in the reasons stated, that the applicants remained in the premises on which they are alleged to have trespassed with any such intents as are mentioned in s. 447 of the Penal Code. All that the lower Court upon that point says is this, that "their original entry on the property was lawful, but their remaining there to gamble and creating a row must be held to bring the accused within s. 447." It does not even say that they remained there in order to create a row, but simply that they remained there to gamble, and then created a row afterwards. Even if the lower Court had found that they remained there to create a row, it would have been doubtful whether such a finding would have been sufficient, because it would have been as much consistent with the knowledge that they were likely to annoy as with the intention to do so. But as the finding now stands, there is not a shadow of ground for supposing that there was any evidence before the lower Court upon which it could be found that they remained there with any such intent as it is necessary to establish under s. 447.

The conviction is, therefore, set aside, and the applicants directed to be released.

*Conviction set aside.*

#### NOTES.

#### [CONVICTION, RECORDING REASONS ON—

Magistrate ought to record reasons on conviction : s. 260 of the Code of 1898

Followed in (1886) 13 Cal., 272 which was a non-appealable case, (1898) 18 Bom. 97, (1899) 21 All., 189 where it was held that the Magistrate under Sec. 260 of the Code of Criminal Procedure should state his reasons briefly but brevity should not be obscure. See also (1904) 31 Cal. 983.

Referred to in *Balamukund Ram v. Ghansam Ram* (1894) 22 Cal. 391 for the position that insult must be intended not simply as one resulting from trespass in order to constitute criminal trespass.]

[5 Cal. 581]

## CRIMINAL REFERENCE.

*The 10th January, 1881.*

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Mona Sheikh

*versus*

Ishan Bardhan.\*

*Criminal Procedure Code (Act X of 1872), s. 211—Order of Acquittal—  
Compensation to accused.*

An order for compensation against a complainant may be made on an order of acquittal under s. 211 of the Criminal Procedure Code.

[582] THE complainant, Mona Sheikh, complained before the police at Gopalpore, that the accused and others arrested him, took him to one Poran Bardhan's house, maltreated him, and kept him in confinement, but afterwards released him. The accused was discharged at the hearing before the Sub-Deputy Magistrate, a Magistrate who could only exercise 3rd class power under s. 211 of the Criminal Procedure Code, and the complainant was directed to pay the accused Rs. 20 as compensation. The case was referred by the Joint Magistrate to the High Court, under s. 296 of the Criminal Procedure Code.

The material portion of the **Opinion** of the Court was as follows :—

**Mitter, J.**—We do not think that the trial and acquittal were illegal. As for the order for compensation, s. 209<sup>†</sup> seems to contemplate a dismissal of the complaint rather than an acquittal of the accused, but referring to s. 212<sup>‡</sup> and to the order in which the sections come, we are not prepared to say that an order to pay compensation may not be added to an acquittal.

\* Criminal Reference, No. 211 of 1880, and letter No. 2987 from A. J. Alexander, Esq., Magistrate of Mymensing, dated the 14th December 1880.

† [Sec. 209 :—A Magistrate may dismiss the complaint as frivolous or vexatious, and may, in his discretion, by his order of dismissal, award that the complainant shall pay to the accused person such compensation, not exceeding fifty rupees, as to such Magistrate seems just and reasonable.

In such cases, if more persons than one are accused in the complaint, the Magistrate may in like manner award compensation not exceeding fifty rupees to each of them.

The sum so awarded shall be recoverable by distress and sale of the moveable property belonging to the complainant, which may be found within the jurisdiction of the Magistrate of the District, and such order shall authorize the distress and sale of any moveable property belonging to the complainant without the jurisdiction of the

Magistrate of the District, when the order has been endorsed by the Magistrate of the District in which such property is situated, and, if the sum awarded cannot be realized by means of such distress, by imprisonment of the complainant in the civil jail, for any time not exceeding thirty days, unless such sum is sooner paid.]

‡ [Sec. 212 .—The dismissal of a complaint under this chapter shall operate in like manner as the acquittal of the accused person.

No complaint shall be dismissed under the provisions of this chapter, except in so far as it refers to a summons case.]

[6 Cal. 582]

*The 13th January, 1881.*

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

The Empress  
versus  
Salik Roy.\*

*Penal Code (Act XLV of 1860), s. 211—Charge made on report of Police  
that case was false—Charge of giving false information.*

A commitment for trial under the provisions of s. 211 of the Penal Code, for knowingly instituting a false charge with intent to injure the persons accused, is not illegal, merely because the complaint which the accused made has not been judicially enquired into, but is based on the report of the Police that the case was a false one.

SALIK ROY, the accused, sent information to the Police through the chowkidar, charging certain persons with setting fire to his house; and he repeated the charge to the Police officer who went to his village to investigate the case. In the end the Police reported the case to be a false one. The Magistrate, thereupon, [583] at once directed the prosecution of Salik Roy for giving false information, without calling upon him or giving him any opportunity to prove his case. Salik Roy was committed to the Court of Session for trial, under the provisions of s. 211 of the Penal Code, for knowingly instituting a false charge with intent to injure the persons whom he accused.

The Sessions Judge, being of opinion that the commitment was illegal and against a decision of the High Court, which he referred to but did not name, sent the record to the High Court in order that the commitment might be quashed, or such other order passed as should seem proper to the High Court. The following was the **pinion** of the High Court :—

**Mitter, J.**—This is a reference from the Judge of Sarun asking us to quash a commitment. The ground upon which we are asked to do so is, that the accused, who is charged with an offence under s. 211, Penal Code, should not have been committed for trial until the complaint which he made had been judicially enquired into; and the Judge refers to a case decided by this Court which he considers applies to the present case.

If the case referred to by the Sessions Judge is the case of *Biyogi Bhagut* (4 C. L. R., 134), we may point out that it is not in all respects similar to the present case. In that case the complainant, dissatisfied with the Police investigation and report, made a complaint to the Magistrate, which was dismissed without hearing his witnesses.

We do not find in the record that there was any complaint made to the Magistrate in this case; but on the report of the Police that the case was false, the prosecution of the complainant was set on foot. We are unable to say that there is anything illegal in the proceedings, and we are supported in this view by the case of *Empress v. Abul Hasan* (I. L. R. 1 All., 497). We are not aware of any recent ruling of this Court of a contrary tenor. We must, therefore, refuse to quash the commitment on the ground on which the Judge's recommendation is based; see *Ashrof Ali v. The Empress* (I. L. R., 5 Cal., 281).

\* Criminal Reference, No. 218 of 1880, and letter No. T. b. 1, from J. F. Stevens, Esq., officiating Sessions Judge of Sarun, dated the 18th December 1880.



## NOTES.

[Referred to in (1887) 14 Cal. 707 F. B. for the position that a Magistrate has jurisdiction to order prosecution for false charge under s. 211 of Indian Penal Code on Police report. Referred to in (1908) 28 Bom. 226 for the position what amounts to a false charge.]

[584] *The 20th January, 1881.*

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

The Empress

versus

Shibo Behara.\*

[8 C. L. R. 265.]

*Penal Code (Act XLV of 1860), s. 211—Sanction to prosecution for making false charge.*

A sanction for a prosecution for making a false charge under s. 211 of the Penal Code, without hearing all the witnesses whom the person accused of making the false charge wishes to produce, is illegal.

The High Court has power to quash an illegal commitment at any stage of the case.

THE accused Shibo Behara, at Teapo Police outpost, brought a charge against one Bali Jenna and others of arson. The Police took up the case and reported it to be a false charge, and the Magistrate, thereupon, sanctioned the prosecution of Shibo Behara, under s. 211 of the Penal Code. Previously to this order, however, Shibo presented a petition to the Magistrate asking for a judicial enquiry; but this petition does not appear to have been disposed of. The case under s. 211 was sent to a Deputy Magistrate, who committed the accused for trial. Before the Sessions Judge the accused pleaded not guilty, and objected to being tried, on the ground that he had been prejudiced by the refusal to grant judicial inquiry he asked for.

The Sessions Judge, being of opinion that the objection was a good one, and that the commitment should be, therefore, quashed, referred the case to the High Court under s. 296 of the Criminal Procedure Code, in his reference citing the following cases :—

*In the matter of Gour Mohan Sing* (8 B.L.R., Ap., 11), *In the matter of Bishoo Barik* (16 W. R., Cr., 77), *Ashrof Ali v. The Empress* (I. L. R., 5 Cal., 281), *Nusibunnissa Bibee v. Sheikh Erad Ali* (4 C. L. R., 413), *Sheikh Erad Ali v. Nusibunnissa Bibee* (4 C.L.R. 534), and *Government v. Karimdad* (Ante, p. 496).

[585] The following were the **Opinions** of the High Court :—

**Mitter, J.**—Whether the Judge was right or not in postponing the trial after it had once begun, I think this Court has the power to quash an illegal commitment at any stage of a criminal proceeding.

In these two cases I am of opinion that the commitments should be set aside on the ground that the sanction for prosecution under s. 211 was illegally given. Whatever might have been said in *Nusibunnissa Bibee v. Sheikh Erad Ali* (4 C. L. R., 413), the later cases have distinctly laid it down that a sanction for prosecution under s. 211 given without hearing all the witnesses whom a

\* Criminal Reference, Nos. 226 and 227 of 1881, and letters Nos. 120 and 121, from the order of A. W. Cochran, Esq., Officiating Sessions Judge of Cuttack, dated the 27th December 1880.

complainant wishes to produce in Court, is illegal. In these cases, therefore, the original orders sanctioning prosecution under s. 211 are illegal. That being so, the commitments are also illegal. I would, therefore, set them aside as recommended by the Judge.

**Maclean, J.**—The principle involved in these cases is the same as that involved in the case of *Chukrodhur Pati* just disposed of; and as I am of opinion that any convictions had upon the trials under the commitments which we are asked to quash would be set aside, I think the simplest course is to set aside the proceedings at this stage.

## NOTES.

[See Notes to 6 Cal. 582.]

[6 Cal. 585]

## SMALL CAUSE COURT REFERENCE.

*The 13th January, 1880*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE WHITE,  
AND MR. JUSTICE MITTER.

Kali Kumar Roy .....Plaintiff

*versus*

Nobin Chunder Chuckerbutty.....Defendant.

[=7 C. L. R. 562]

*Pleaders and Muktears' Act (XX of 1865), ss. 11, 13—Muktears and Private agent, distinction between.*

*Per WHITE and MITTER, JJ.*—The mere fact that a person looks after an appeal and gives instructions to pleaders in connection with such appeal, does not show that such person was practising as a muktear within the meaning of s. 13† of Act XX of 1865.

[586] *Per Garth, C. J.*—Where a person is in the habit of acting for persons in Courts of law, and holds himself out as ready to perform what is usually considered muktear's work, for reward, such person is no less acting as a muktear on any particular occasion, because he may have abstained on the particular occasion from doing any of those acts which a duly qualified muktear is alone legally capable of performing.

THIS case was referred for the opinion of the High Court, the facts being fully set out in the following order of reference :—

\* Small Cause Court Reference, No. 2 of 1880, from Baboo Amrita Lall Chatterjee, Judge of the Small Cause Court at Dacca, dated the 19th December 1879.

†[Sec. 13 :—Except as hereinafter provided, any person who shall practise as a Pleader or Mookhtear in any Civil or Criminal Court or Revenue Office to

Uncertificated persons practising as Pleaders or Mookhteers to be liable to fine or imprisonment and to be incapable of recovering fees.

which this Act extends, without having previously obtained a properly stamped certificate authorising him so to practise, which certificate shall be then in force, shall be liable by order of such Court or the officer at the head of such office to a fine not exceeding ten times the amount of the stamp required by this Act to be impressed on the certificate which he should then have held, and, in default of payment, to imprisonment in the Civil

gaol for a period not exceeding six calendar months. He shall also be incapable of maintaining any suit for any fee or reward for or in respect of anything done or any disbursement made by him as such Pleader or Mookhtear whilst he shall have been without such certificate.]

"The plaintiff, who had not been admitted and enrolled as a duly qualified muktear, was employed by the defendant for the purpose of looking after a regular appeal of his and giving instructions to the pleaders in connection with it. In consideration of the plaintiff's agreeing to perform these services, the defendant promised to pay him Rs. 100 as remuneration.

"The plaintiff having performed the services which he had agreed to perform, now sues the defendant for the recovery of his remuneration.

"The defendant contends that the plaintiff is, under s. 13, Act XX of 1865, incapable of maintaining the present action. His argument is, that when the plaintiff agreed to look after, and did actually look after, a case of the defendant in a Civil Court, and gave instructions to the pleaders on behalf of the latter, he was necessarily practising as a muktear in that Court in connection with that case, and that as he had not previously obtained a proper certificate authorising him so to practise, he came under the provisions of s. 13 of Act XX of 1865, and his suit is, under the latter part of that section, not maintainable in a Court of Justice.

"This argument seems to me to make two assumptions, the correctness of neither of which I am prepared to admit:—*1st*, that any one who looks after a case of another and gives instructions to the pleader engaged in it, is necessarily a muktear within the meaning of Act XX of 1865, and *2ndly*, that looking after a case of another and giving instructions to pleaders, amount to practising as a muktear within the meaning of s. 13 of the Act.

[587] "The case of *Fuzzle Ali* (19 W. R., Cr. Rul., 8) seems to show that a private agent may go between the client and his vakil without his being a muktear under Act XX of 1865. The Hon'ble Mr. J. PHEAR, in delivering the judgment of the Court, said, "there is nothing either in the words of the Act (meaning XX of 1865), or in its spirit, to prevent him (*Fuzzle Ali*) as *private agent* from going between the prisoner and the duly authorized vakil." The case of *Gujraj Singh* (10 W. R., 355) would seem to show that there is nothing in Act XX of 1865 to restrain any person from supplying information to vakils in the presence of the Judge.

"Even the new Act (XVIII of 1879), which is evidently more stringent in its provisions than the one which is still in force, does not prohibit private servants of persons from giving instructions to pleaders (s. 13).

"So far as I can see, the plaintiff here was not a muktear within the meaning of Act XX of 1865, but merely a private agent of the defendant appointed for the purpose of going between him and his vakils, and giving instructions to the latter, and generally looking after the progress of the case. The words 'practise as a muktear' used in s. 13 of the Act appears to my mind to mean simply 'to appear or act as a muktear.' Looking after a case and giving instructions to pleaders appear to me to be quite different from appearing or acting within the meaning of s. 5<sup>th</sup> of the Act. 'The word act in s. 5 of

\*[Sec. 5 :—Except as hereinafter provided, no person shall appear, plead or act as a pleader, or appear or act as a muktear in any Court to which this Act extends, unless he shall have been admitted and enrolled, and shall be otherwise duly qualified to practice as a pleader or as a muktear, as the case may be, pursuant to the provisions of this Act, and unless he shall continue to be so qualified and enrolled at the time of his practising as a pleader or muktear as aforesaid. Provided that every person who at the time at which this Act shall come into operation in any part of British India shall be, or shall be qualified to act as a pleader in any Court in such part, by virtue of any law, rule or order in force

No person to practice as a Pleader, or as a Mookhtear unless qualified under this Act.

Saving of Pleaders already qualified.

the Statute has been construed to mean the doing something as the agent of the principal party, which shall be recognized, or taken notice of, by the Court as the act of that principal; 'vide *Fuzzle Ali* (19 W. R., Cr. Rul., 8).

There is nothing to show in the present case that the plaintiff did anything of the kind in connection with the regular appeal, which he was employed to look after, which could in any sense be construed to be the doing of something as the agent of defendant which could be recognized, or taken notice of, by the Court as the act of the defendant. Looking after a case and giving instructions to pleaders do not, in my opinion, amount to either appearing or acting as a muktear, or, which is [588] the same thing practising as such; vide *Kali Charan Chund* (9 B. L. R., Ap., 18; s.c., 18 W. R., Cr. Rul., 27). The plaintiff, therefore, did not practise as a muktear within the meaning of s. 13 of Act XX of 1865, by simply looking after the progress of a regular appeal in a Civil Court and giving instructions to the pleaders engaged in it. The section does not in consequence stand as a bar to the maintenance of the present suit.

"I have, however, serious doubts as to the correctness of my conclusions, firstly, because I have nowhere been able to find a correct definition of the word 'muktear' as used in Act XX of 1865, and also because I have been pressed with the conviction that dalals or touters who ought not to be allowed to enter the precincts of our Courts of Justice will be encouraged to ply their trade if the opinion which I have come to on the question of law involved in the case be good and correct law."

The Judge decreed the case in favour of the plaintiff, contingent on the opinion of the High Court on the following points:—

1. Whether looking after a case of another and giving instructions to the pleaders engaged in it necessarily amount to practising as a muktear?
2. Whether an agreement to do these acts by a person not duly admitted and enrolled as a muktear is contrary to law?
3. Whether upon the facts found above plaintiff is entitled to recover?

No one appeared before the High Court.

The following were the **Opinions** of the Court:—

**White, J. (MITTER, J., concurring):**—The third point as stated by the Small Cause Court Judge virtually raises all the questions upon which the opinion of this Court is sought.

The third point is whether, upon the facts found, the plaintiff is entitled to recover.

The facts found are these:—The plaintiff, who has not been admitted and enrolled as a muktear, and consequently is not [589] in possession of a certificate authorizing him to act as a muktear, was employed by the defendant for the purpose of looking after a regular appeal which has been preferred by the defendant and also for giving instructions to the pleaders in connection with that appeal. The remuneration for the services was fixed by agreement at Rs. 100. The services have been performed. The plaintiff sues for the Rs. 100. The defendant resists payment on the ground that, by virtue of s. 13 of Act XX of 1865, the plaintiff is incapable of maintaining a suit for the agreed reward. Section 13 of the Act cited enacts, amongst other things, that any

therein, shall be entitled to be admitted and enrolled as a pleader in the High Court pursuant to the provisions of this Act, without passing any examination, but subject to the conditions of any certificate or diploma held by him as to the class of Courts in which such certificate or diploma authorizes him to practise.]

person who shall practise as a muktear in any Civil or Criminal Court without having previously obtained a certificate, shall be liable to fine, and shall also be incapable of maintaining any suit for any fee or reward for or in respect of anything done by him as such muktear.

The question then resolves itself into this, whether the looking after a regular appeal and the giving instructions to pleaders in connection with it are a practising as a muktear within the meaning of the section. There is no definition in the Act of what the Legislature meant by practising as a muktear. But I think the meaning may be gathered from s. 11 of the Act, which enacts that "muktears" duly admitted "and enrolled may, subject to the conditions of their certificates as to the class of Courts in which they are authorized to practise, appear and plead in any Civil Court, and may appear, plead, and act in any Criminal Court within the same limits." It may fairly be concluded from this that, by practising as a muktear in a Court, the Legislature meant, in the case of a Civil Court, appearing or acting in that Court; in the case of a Criminal Court, appearing, pleading, or acting in the latter Court.

It is not stated in the reference whether the regular appeal preferred by the defendant was a civil or criminal appeal, but this will not affect the decision, as upon the facts found the plaintiff was clearly not employed to plead for the defendant.

Did the plaintiff then appear or act in Court? I think not. These words have a well-defined and well-known meaning. [590] To appear for a client in Court is to be present and to represent him in the various stages of the litigation at which it is necessary that the client should be present in Court by himself or some representative. To act for a client in Court is to take on his behalf in the Court, or in the offices of the Court, the necessary steps that must be taken in the course of the litigation in order that his case may be properly laid before the Court. What the plaintiff is found to have done in the present case was not appearing or acting for the defendant in the sense in which I think the words must be understood nor involved any such appearance or acting. It is true that, in rendering the stipulated services, he must have attended the Court and frequented the offices of the Court at certain times, but his presence there was not for the purpose of representing his client or taking any steps in the suit on his behalf, but to watch his case and see that others had taken the necessary steps and were fully informed as to the nature and facts of his employer's case and as to the best mode of conducting it. It would, I think, be a straining of the language of the Act to hold that attendance at the Court and its offices for the latter purposes was a practising as a muktear.

The authorities cited in the reference are in favour of this view.

In the case of *Gujraj Singh* (10 W. R., 355), which was an appeal against an order of the Judge of Tirhoot restraining all persons from coming into his Court and instructing pleaders except muktears duly enrolled under Act XX of 1865, JACKSON, J., set aside the order saying, that "there is nothing in the provisions of that Act which restrains any person from coming into the presence of the Judge and supplying information to the vakils." In the case of *Kali Charan Chund* (9 B. L. R., Ap., 18; s.c., 18 W. R., C. R. Bul., 27), the Officiating Joint Magistrate had fined the petitioner under s. 13 of the Act for practising as a muktear without having a certificate. What the petitioner had done was to write out a petition of complaint for one Komiruddin, which Komiruddin presented himself in the Officiating Joint Magistrate's Court.

[591] KEMP and GLOVER, JJ., set aside the order and remitted the fine, remarking that "the mere writing of a petition for a party, who afterwards presents that petition himself," is not "acting in the sense of s. 11\* of Act XX of 1865." In the case of *Fuzzle Ali* (19 W. R., Cr. Rul., 8), PHEAR and AINSLIE, JJ., set aside the order and remitted the fine inflicted upon the petitioner for practising as a muktear. The petitioner had, as appears from the judgment of the District Judge, "instructed the vakil, stood behind him during the trial, suggested questions, and taken an active part in the management of the defence." PHEAR, J., in giving judgment, says:—"I think the word act in s. 5 of the Act means the doing something as the agent of the principal party which shall be recognized, or taken notice of, by the Court as the act of the principal. Such, for instance, as filing a document."

I am of opinion, therefore, as well upon the authorities as upon the true construction of the Act, that the plaintiff, in rendering the services which he is found to have rendered, was not practising as a muktear within the meaning of the 13th section, and is therefore not debarred from maintaining this suit. If that be so, as the services have been performed, he is entitled to recover the agreed reward from the defendant.

Garth, C. J.—My learned brothers, in deciding this question, have thought it right to deal with it in the same way as it has been dealt with in the Court below; that is to say, they have merely considered whether, having regard to the facts of this particular case, the plaintiff has done anything for the defendant which a person who is not a qualified muktear is prohibited by law from doing; and if I thought that this was the proper mode of dealing with the question, I should probably have arrived at the same conclusion as they have.

But I think that this is not the fair or proper mode of dealing with the question; and that, for the purpose of ascertaining the plaintiff's right to succeed in this suit, or in other words, for the purpose of ascertaining whether the plaintiff, in what he did for the defendant, *was acting as a muktear*, it [592] is necessary to enquire whether the plaintiff really acted in this instance as a private agent of the defendant, or as a muktear habitually practising in the Courts as such. If the plaintiff merely acted as the private agent of the defendant in giving instructions to the pleader, and abstained from doing any of those act which by law can only be done by a duly qualified muktear, then I think Mr. Rampini is quite right in holding that the plaintiff is entitled to recover his promised remuneration. But if the plaintiff is in the habit of acting for clients generally in Courts of law, and holds himself out as ready to perform what is usually considered muktear's work for reward, then I think that he was no less acting as a muktear in what he did for the defendant, because he may have abstained in this particular case from doing any of those acts which a duly qualified muktear is alone legally capable of performing. This seems to me constitute the difference between acting as a private agent and acting as a muktear. If a man holds himself out generally as ready to

Pleaders may practice in Criminal Courts and Revenue Offices.

Mookhtears may plead in Criminal Courts.

as to the class of Courts in which they are authorized to practise, appear and act in any Civil Court, and may appear, plead and act in any Criminal Court within the same limits.]

Sec. 11 :—Pleaders duly admitted and enrolled under this Act may appear, plead, and act in any Criminal Court, or before any Board of Revenue, or in any Revenue Office within the limits of the general jurisdiction of the High Court in which they are enrolled. Muktears duly admitted and enrolled as aforesaid may, subject to the conditions of their certificates

conduct cases for clients for reward, and makes this his public profession or calling in the same way as a pleader or an attorney, then he cannot with propriety be considered a *private agent*.

Unless this is the proper view of the law, the Legal Practitioners' Act, whatever the intention of the Legislature may have been, must of necessity, so far as it relates to muktears, become a dead letter; and duly qualified muktears will be deprived of their legitimate profits and privileges by men who have no right to practise in the Courts as muktears at all. In that case it is clear that either fresh Legislation is necessary or this Court must pass rules to define more particularly what "acting as a muktear" is to mean.

I should add that it has occurred to my learned colleague, Mr. Justice MITTER, that s. 13 appears to apply to those persons only who are qualified and enrolled as muktears, but who have practised as muktears without obtaining their certificates. The language of s. 13 does certainly seem to afford some ground for this view; and yet it would seem an absurdity that a man, who is duly qualified and enrolled as a muktear, and who has only neglected to take out his certificate, [593] should be subject to penalties, and disabled under that section from suing for his fees; whilst a man who is neither qualified nor enrolled as a muktear, nor certificated, should be enabled to recover his fees, and be subject to no penalties. It is difficult to conceive that this could have been the intention of the Legislature.

But whatever may be the meaning of s. 13, s. 5 of the same Act appears to me to remove all difficulty, and to debar the present plaintiff, if he has really acted as a muktear, from the right to enforce his present claim. Section 5 enacts that "no person shall appear or act as a muktear, etc., unless he shall have been admitted and enrolled, and otherwise duly qualified to practise as a muktear, etc." The plaintiff, therefore, if he practised as a muktear when acting for the defendant, did an act which is expressly forbidden by the Legislature; and I take it to be clear, as a matter of law, that he cannot recover his fees for doing such an act. See the case of a broker suing for his fees, without being licensed—*Cope v. Rowlands* (2 M. and W., 149), and of an appraiser suing for work done without being licensed—*Palk v. Force* (12 Q. B. 666).

I think, therefore (having regard to the foregoing observations), that in order to decide this case properly, the learned Judge in the Court below should be directed to ascertain whether the plaintiff, when acting for the defendant, was a private agent of the defendant, or a person who practises generally for reward in Courts of law as a muktear. But as my learned brothers are disposed to take a different view of the matter, the judgment which has been passed for the plaintiff must stand.

#### NOTES.

#### [MUKTEAR—PRACTISING IN COURT—S. 13 OF ACT XX OF 1866—

The view expressed by White, J. (concurring in by Mitter, J.) viz., that a person looking after an appeal and giving instruction to pleaders is not a person practising as a muktear within the meaning of s. 13 of Act XX of 1866 was overruled in (1887) 14 Cal. 556 F.B., where their Lordships held that any other person performing any of the functions of a muktear or pleader is guilty under s. 32 of the Act. See also (1904) 26 All. 380 where it was held that a single act was sufficient.

Referred to in (1894) 18 Mad. 188 where this case was distinguished as depending on the construction of special wording of the section.]

[594] APPELLATE CIVIL.

*The 13th January, 1881.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE WHITE, AND  
MR. JUSTICE MITTER.

In the matter of the Petition of Kally Soondery Dabia.

Kally Soondery Dabia

*versus*

Hurrish Chunder Chowdhry.

*Appeal—Order by Judge of the High Court presiding over the Privy Council Department—  
Letters Patent, s. 15—Judgment—Certified Copy of Order of the Privy Council—Civil Procedure  
Code (Act X of 1877), s. 610.*

\* A decree obtained on appeal by certain defendants in the High Court was appealed to the Privy Council by one only of the two plaintiffs to the suit, and the decision of the High Court was reversed, the plaintiff who had appealed assigned her share in the order of the Privy Council to one of the defendants, and delivered him the certified copy of the decree made in the Privy Council. The plaintiff who had not appealed to the Privy Council applied to the High Court for leave to transmit the order to the Court of first instance for execution of the share decreed to him, but on account of the assignment abovementioned, was unable to produce the certified copy of the decree of the Privy Council. The Judge presiding over the Privy Council Department in the High Court held, that the production of a certified copy of the order of the Privy Council was excusable under the circumstances, but refused the application, on the ground that the decree of the Court of first instance, which was affirmed by the Privy Council, could only be executed as a whole and not partly by one of the plaintiffs.

*Held on appeal per GARTH, C. J.*—That the duties of a Judge in dealing with the meaning of decrees of the Privy Council are purely ministerial, and that any order made in such ministerial capacity could not be considered a judgment, and could not, therefore, be made the subject of an appeal to a Bench of the High Court under s. 15 of the Charter (*see Mowla Buksh v. Kishen Pertab Sahu, I. L. R., 1 Cal., 102*).

*Per WHITE AND MITTER, JJ.*—An order of a Judge presiding over the Privy Council Department in the High Court, rejecting an application for execution, is a final order and is a judgment within the meaning of s. 15 of the Charter, and is therefore appealable.

ONE Shumbhu Chundra Chowdry, by a sanad in 1226 B. S. (1820), granted a Shikmee talook, comprising three mou-[595]zas to his sister, one Kassiswari Dabia (The words of the gift are set out in the case as reported in L. R., 5 I. A., 138, and I. L. R., 4 Cal., 23). Kassiswari had a son, the husband of the appellant, who pre-deceased her. On the 3rd Assar 1272 (16th June 1865) Kassiswari died, and by her will left the above properties to her daughter, Chundra Moni Dabia, and the adopted son of Sreemuty Kally Soondery Dabia equally. Kassiswari died on the 20th Bhadoor 1278 B. S. (corresponding with 4th September 1871), whereupon one Kassi Kissory Roy and one Hurrish Chunder Chowdry took possession of the property, alleging that the sanad only conferred on Kassiswari a life-interest in the property.

\* Appeal under s. 15 of the Letters Patent from an order of Mr. Justice PONTIFEX, dated the 27th February 1880, made on an application by the appellant in Privy Council Appeal, No. 5 of 1876.



Chundra Moni Dabia, and Kally Soondery Dabia on behalf of her adopted son, on the 16th January 1873, brought a suit to recover possession of the property and for mesne profits under the sanad and will before mentioned.

The Subordinate Judge held that the sanad and the will were valid, and gave a decree in favour of the plaintiffs. The defendants appealed to the High Court, and the learned Judges (BIRCH and MORRIS, JJ.) decided, reversing the decree of the lower Court, that, upon the right interpretation of the sanad, the gift to Kassiwari was a gift of a life-interest only, and that, therefore, she had no right to dispose of the property by will. In March 1876 (Chundra Moni Dabia being dead) Bhoobun Mohini Dabia and Hurro Kinkurry Dabia, her daughters, who had been substituted for her on the record, applied and obtained leave to appeal to the Privy Council; Kally Soondery Dabia, the mother and guardian of Shurut Chundra Lahiri, did not join in the appeal. On the appeal being heard, their Lordships of the Judicial Committee reversed the finding of the High Court, finding that the sanad of 1226 (1820) gave to Kassiwari an absolute estate, and as such she could dispose of it under her will: their Lordships, however, declined to decide the rights of the plaintiffs *inter se*. Hurro Kinkurry Dabia, while the appeal was pending, purchased the right, title, and interest of her co-appellant in the properties in question, and on the 4th January 1880, Hurro Kinkurry, not having taken out execution of the Privy Council order, sold her right and [596] interest in the subject-matter of the suit to Hurrish Chunder Chowdhry, and made over to him the certified copy of the decree made on appeal to the Privy Council.

On the 13th May 1880, Kally Soondery Dabia, on behalf of her adopted son, applied to the High Court for execution of the order of the Judicial Committee.

Mr. Phillips for the Applicant.

The Advocate-General (Mr. Paul) for Hurrish Chunder Chowdhry.

The Judge in the Privy Council Department of the High Court, PONTIFEX, J. (after stating the facts), continued.—“The party who did not appeal having applied to execute the decree has been met with two objections: the first, under s. 610 of Act X of 1877, that this application could not be granted, because it was not accompanied by a certified copy of the decree of Her Majesty in Council; but the defendant himself has got that certified copy of the decree, and I think the objection under s. 610 cannot be sustained. The other objection to the execution of the decree of the Privy Council was, that the decree of the original Court upheld by the Privy Council could only be executed as a whole, and not by one of the two

\*[Sec. 610.—Whoever desires to enforce or to obtain execution of any order of Her Majesty in Council shall apply by petition, accompanied

Procedure to enforce orders of Queen in Council. by a certified copy of the decree or order made in appeal and sought to be enforced or executed, to the Court from which the appeal to Her Majesty was preferred. Such Court shall transmit the order of Her Majesty to the Court which made the first decree appealed from, or to such other Court as Her Majesty by her said order may direct, and shall (upon the application of either party) give such directions as may be required for the enforcement or execution of the same; and the Court to which the said order is so transmitted shall enforce or execute it accordingly, in the manner and according to the rules applicable to the execution of its original decrees.

When any moneys expressed to be payable in British Currency are payable in India under such order, the amount so payable shall be estimated according to the rate of exchange for the time being fixed by the Secretary of State for India in Council, with the concurrence of the Lords Commissioners of Her Majesty's Treasury, for the adjustment of financial transactions between the Imperial and Indian Governments.]

plaintiffs. Mr. Phillips relies on s. 231\* of Act X of 1877. Now the two plaintiffs claim under a will which is not free from difficulty. The Privy Council decline to construe the will as between the two plaintiffs claiming under it. I think, therefore, I must refuse the application for execution, and the applicant must be left to a regular suit to enforce her claim to any share of the property, but I do so without costs.

From this decision Kally Soondery Dabia Chowdrain appealed under s. 15 of the Letters Patent.

The *Standing Counsel* (Mr. J. D. Bell) for the appellant.—The Judge ought to have ordered the decree to be executed by the Court below under s. 231 of Act X of 1877, at the same time ordering the protection of the rights of the other decree-holders. If the judgment now appealed against is sound, a defendant could, by purchasing the right of one out [597] of several successful plaintiffs, do away with the good obtained by the decree. *Indro Coomar Doss v. Mohinee Mohun Roy* (15 W. R., 159) lays down the proper procedure where one of several decree-holders wishes to execute his decree, but I can find no case which would serve as a precedent where one of several plaintiffs sells his rights. See however, the notes to s. 238 in Mr. O'Kinealy's Code of Civil Procedure—I rely on ss. 231\* and 539† of Act X of 1877.

The *Advocate-General* (Mr. Paul) for the respondent.—There is no appeal from an order of a Judge sitting on matters connected with the Privy Council, refusing or allowing an appeal: *Amirrunnissa v. Behary Lall* (25 W. R., 529). Further, s. 610 of Act X of 1877 lays down that the applicant for execution must have in his possession a certified copy of the order of the Privy Council. The applicant in the present case has not such a certified copy, the only certified copy is with us; and inasmuch as the applicant was not a party to the appeal to Her Majesty, she cannot obtain one; her only remedy is to bring a regular suit for a declaration of her rights under the will. The remarks made in *Joynarain Giree v. Goluck Chunder Mytee* (20 W. R., 444) apply to

\*[Sec. 231 :—If a decree has been passed jointly in favour of more persons than one, any one or more of such persons, or his or their representatives may apply for the execution of the whole decree for the benefit of them all or, where any of them has died, for the benefit of the survivors and the representative in interest of the deceased.]

If the Court sees sufficient cause for allowing the decree to be executed on an application so made, it shall pass such order as it deems necessary for protecting the interests of the persons who have not joined in the application.]

†[Sec. 539 .—In case of any alleged breach of any express or constructive trust created for public or charitable purposes, or whenever the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General acting ex-officio, or two or more persons having a direct interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit in the High Court, or the District Court within the local limits of whose civil jurisdiction the whole, or any part of the subject-matter of the trust is situate, to obtain a decree—

- (a) appointing new trustees of the charity ;
- (b) vesting any property in the trustees of the charity ;
- (c) declaring the proportions in which its objects are entitled ;
- (d) authorizing the whole or any part of its property to be let, sold, mortgaged or exchanged ;
- (e) Settling a scheme for its management ;

or granting such further or other relief as the nature of the case may require. The powers conferred by this section on the Advocate-General may (where there is no Government Advocate) by such officer as the Local Government may appoint in this behalf.]

this case. [GARTH, C. J.—In replying Mr. *Bell*, we wish you to confine yourself to the question as to whether or no we have jurisdiction. The order seems to be ministerial; can you call it a judgment? and if it is not a judgment within the meaning of s. 15 of the Letters Patent, it is not appealable.]

The *Standing Counsel* (Mr. J. D. *Bell*) in reply referred to Macpherson's Judicial Committee Practice, p. 147. [GARTH, C.J.—But see s. 19\* of Act VI of 1874, the word "enforcement" is not used in reference to the High Court; and the other made by the High Court cannot be considered a judgment, but merely a direction as to the Privy Council order.]

Mitter, J.—(after stating the facts down to the decision of the Privy Council, continued).—Hurro Kinkurry Dabia, on the 4th January 1880, conveyed away to the respondent her [598] right, title, and interest in the subject-matter of the suit, etc., and made over to him the certified copy of the decree made in appeal to the Judicial Committee. Previously, however, she had produced this certified copy in this Court, when she made an application in the matter of security for costs which she had given in the Privy Council appeal proceedings. A copy of this certified copy of the final decree of the Privy Council is on the record of this Court.

The appellant before us then made an application to this Court setting out all these facts, to be allowed to execute the decree of the Court of first instance as restored and affirmed by the Judicial Committee of the Privy Council. The respondent raised two objections,—first, that the application was not accompanied by a certified copy of the decree of Her Majesty in Council, as it should have been under s. 610 of the Civil Procedure Code; and secondly, that the appellant, under the peculiar circumstances of the case, ought not to be allowed to execute the decree, until she establishes her rights to a share in the property in dispute in a regular suit instituted for that purpose. The learned Judge of this Court, before whom this application was brought on for hearing, being of opinion that there was no force in the first objection, inasmuch as the defendant himself was in possession of the certified copy in question, disallowed the application upon the second objection. Under s 15 of the Letters Patent, this appeal has been preferred against that decision. A preliminary objection has been taken to the hearing of the appeal, on the ground, that an order passed under s. 610 of the Civil Procedure Code is not a judgment within the meaning of s. 15 of the Letters Patent, and is therefore not appealable.

I am of opinion that this objection is not tenable. In the first place, whether the function of this Court under s. 610 be judicial or not, the learned Judge who has disposed of the appellant's application under that section has passed a decision disposing of it judicially, considering that, under that section, this Court has no judicial discretion to exercise, but is bound to transmit the order of Her Majesty to the Court which made the first decree, yet that was

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\*[Sec. 19 :—Whoever desires to enforce or to obtain execution of any order of Her Majesty in Council shall apply by petition, accompanied by a certified copy of the decree or order made in appeal and sought to be enforced or executed, to the Court from which the appeal to Her Majesty was preferred.

Such Court shall transmit the order of Her Majesty to the Court which made the first decree appealed from, or to such other Court as Her Majesty by her said order may direct, and shall, (upon the application of either party), give such directions as may be required for the enforcement or execution of the same, and the Court to which the said order is so transmitted shall enforce or execute it accordingly, in the manner and according to the rules applicable to the execution of its original decrees.]

not done in this case. The learned [599] Judge who heard that application has exercised his judicial discretion under s. 231 of the Civil Procedure Code, and the order passed by him is therefore a judgment within the meaning of s. 15 of the Letters Patent, and is accordingly subject to appeal.

It has been said that this Court has no jurisdiction under s. 610 to decide any question between the parties, and that as the learned Judge who disposed of this application has assumed a jurisdiction not vested in him, his order is not open to appeal in the same way as any other order passed in strict conformity with that section. Assuming that the order which is the subject of this appeal is not in accordance with s. 610 (which is by no means clear to me), yet, it being a judgment by which the learned Judge, in the exercise of his judicial discretion, refused the prayer of the appellant, is, in my opinion, appealable under s. 15 of the Letters Patent; see *Dyebukee Nundum Sen v. Mudhoo Mutty Goopta* (I. L. R., 1 Cal., 123, s.c., 24 W. R., 478).

The next question is whether, under the circumstances of this case, the appellant is entitled to an order from this Court under s. 610 transmitting the decree of Her Majesty to the lower Court to execute and enforce it. It is true that the certified copy of the decree which the appellants to Her Majesty's Privy Council obtained is not in the record, and cannot, therefore, be transmitted; but a copy of that certified copy is on the record, and the copy itself is in the possession of the respondent. Under these circumstances, the learned Judge in this Court was of opinion, that the appellant had sufficiently complied with the provisions of s. 610. No appeal has been preferred against this ruling. We cannot, therefore, re-open this question. Besides, it seems to me that there may be cases in which great injustice would be done, if it were to be held that, under no circumstances, would this Court transmit a copy of a certified copy of the decree of the Privy Council under s. 610. Suppose the certified copy obtained by a party is lost for no fault, negligence, or laches on his part, and it is impossible for him to obtain another certified copy from England within the time allowed by law to execute the decree, would the decree- [600] holder be entirely without any remedy? It would be unjust to hold so. But be that as it may, in the absence of any cross-appeal on the part of the respondent, we are bound to accept upon this point the ruling of the learned Judge who disposed of the appellant's petition under s. 610 in the first instance.

That being so, it seems to me that there does not exist in the circumstances of this case any sufficient reason which would warrant us in refusing the appellant's prayer. It is true that the decree was passed jointly in favour of the appellant as well as Chundra Moni, whose interest probably is now vested in the (defendant) respondent. Because the appellant's co-plaintiffs chose to convey their interest to the defendant, it does not follow that she should be left to have her rights determined in a regular suit. Suppose out of 100 persons, jointly holding a decree, one of them, whose interest is very small, were to assign it over to the defendant, would it be just to drive the remaining 99 persons to a regular suit to have their shares determined? Besides, I do not see why the Court executing the decree should be held incompetent to determine the question of shares, under cl. (c) of s. 244 of Act X of 1877, with as much facility and finality as the same Court in a regular suit. The defendant says, that since the decree was passed, he has acquired the interest of one of the joint decree-holders. The question that then arises between him and the remaining decree-holder is one that seems to me to come both within the spirit and letter of cl. (c) of s. 244 of Act X of 1877—see *Wise v. Moulvie Abdool Ali* (7 W. R., 136). I would, therefore, grant the

prayer of the appellant, and direct the Privy Council decree in question to be transmitted to the Court which made the first decree to be executed according to the provisions of s. 610 of the Code of Civil Procedure.

**White, J.**—This is an appeal against an order of the learned Judge in the Privy Council Department refusing the application of Kally Soondery Dabia, as guardian of her infant son, Shurut Chunder Lahiri, to transmit for execution by the Court of first instance a decree made by Her Majesty in Council.

[601] Kally Soondery Dabia's infant son is one of the plaintiffs in the suit which terminated in that decree, Hurro Kinkurry Dabia being the other plaintiff, and the decree of Her Majesty in Council reversed the decree of the High Court and affirmed that of the Subordinate Judge of Mymensingh of the 10th of March 1874, which ran in these words—"that the plaintiffs do recover from the defendant possession of the disputed mouza."

The application was made by petition, but not accompanied by a certified copy of the decree of the Privy Council as required by s. 610 of the Code. The petition stated that the certified copy was in the possession of the defendant; and in explaining how this came to be, disclosed that, since the decree of the Privy Council had been made, the co-plaintiff, Hurro Kinkurry Dabia, had sold to the defendant, by a deed of sale dated the 4th January, her right, title, and interest in the subject of the suit, and had handed to him the original order of her Majesty in Council.

The learned Judge held, that the production of the certified copy was excused under the circumstances, but refused the application on the ground that the decree of the Original Court, which was affirmed by the Privy Council, could only be executed as a whole, and not partly by one of the plaintiffs.

The first point to be considered is, whether an appeal lies against the order complained of. The order is made by a single Judge appointed to dispose of all matters relating to appeals to Her Majesty in Council. The delegation is made, under Rules of this Court, which are authorised by the Charter Act, 24 and 25 Vict., c. 104, s. 13.

Section 15 of the Charter of 1865 gives an appeal against the judgment of a single Judge appointed in pursuance of s. 13 of the Charter Act.

What constitutes a judgment within the meaning of this section was well considered in the *Justices of the Peace for Calcutta v. The Oriental Gas Company* (8 B. L. R., 433). COUCH, C.J., giving the judgment of himself and MARKBY, J., says:—"We think that 'judgment' in cl. 15 means a decision which affects the merits of the question between the parties by determining [602] some right or liability. It may be either final or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, having other matters to be determined." In the same judgment the Chief Justice, in dealing with an argument based on the fact that an appeal is entertained in cases where a plaint is rejected, remarks, "there is an obvious difference between an order for the admission of a plaint and an order for its rejection. The former determines nothing, but is merely the first step towards putting the case in a shape for determination. The latter determines finally, so far as the Court which makes the order is concerned, that the suit as brought will not lie. The decision, therefore, is a judgment in the proper sense of the term."

The order now under appeal appears to me to have the characteristics which are noticed in the above judgment. It is an order for rejection. It

decides that, for the reason stated in the order, the applicant is not entitled to have the decree of the Privy Council executed. It determines her right to have execution; and the determination, so far as the Court passing the order can make it, is final. That being so, I am of opinion that the order is "a judgment" within the meaning of s. 15 of the Charter, and is therefore appealable.

On the merits, I am of opinion, that the order cannot be sustained. The duties thrown upon the Court by s. 610 are in a large measure ministerial only. No doubt, the Court must ascertain in the first instance, whether the applicant is the party, or if the original party is dead, the legal representative of the party in whose favour the decree of the Privy Council is made; but when that is proved, the Court is bound to transmit the decree to the Court of first instance for execution, and has nothing further to do, unless one or other of the parties applies for special directions respecting the enforcement or execution of the decree, when the Court is to give such directions as may be required.

In the judgment passed in the present case, the lower Court appears to me in the first place to have travelled outside s. 610 [603] of the Code, and in the next place to have come to an erroneous conclusion that the decree could only be executed as a whole.

The application was, unquestionably, made on behalf of a party to the decree, though not the sole party, and by reason of the sale which had taken place subsequent to the decree, and so vested the interest of his co-plaintiff in the defendant, he was really the only party to the decree who could apply under s. 610 for its execution. Under these circumstances, I think the learned Judge ought to have transmitted the decree for execution to the Court of first instance, and left it to that Court to determine, in the course of execution, the questions which have arisen between the defendant and the applicant in consequence of the purchase by the former of the interests of the co-plaintiff. Clause 6 of s. 244 of the Code is, in my opinion, wide enough to permit of these questions being so determined. They are questions relating to the execution of the decree or to its satisfaction and discharge, and they have arisen in consequence of the defendant dealing with one of the plaintiffs since the decree. The effect of the purchase of that plaintiff's interest is to satisfy the decree and discharge it to the extent of that interest.

I do not think that the applicant, who has retained his interest, ought, as suggested by the learned Judge, to be left to bring a regular suit against the defendant in order to determine his share. To hold otherwise would be, in the case of all decrees which have passed in favour of several plaintiffs, to put it in the power of a defendant, by persuading one of the plaintiffs to sell to him his interest, however small, in the decree, to defeat the execution of the decree and compel the remaining decree-holders to encounter the expense, delay, and hazard of another suit, when they were on the eve of reaping the fruits of their success at the end of a protracted litigation.

It was decided by LOCH and MACPHERSON, JJ., in *Wise v. Moulvie Abdool Ali* (7 W. R., 136), that where one of several plaintiffs had died after decree, the fact that by his death a share in the property, the subject of the suit, had devolved upon one of the [604] defendants, did not prevent the execution of the decree by the surviving plaintiffs, and that the latter were from that circumstance alone not compelled to bring a separate regular suit. This case was decided in 1868. The present Code, as amended in 1879, has enlarged the questions arising between parties to a suit which may be determined in the course of executing a decree. In the case cited, the devolution was by operation of law in consequence of the death of one of the plaintiffs, but the sale by

the co-plaintiff in the present case and the purchase by the defendant were unknown to the co-plaintiff, and were really as much beyond the control and without the co-operation of the applicant, as the devolution by the operation of law was beyond the control of the co-plaintiff in the case cited. The result too was the same, *viz.*, that the decree could not be executed to the extent of the interest which had vested in the defendant.

As no appeal has been preferred by the defendant against that part of the order which dispensed with the production by the appellant of a certified copy of the Privy Council decree, it is unnecessary to consider the propriety of the order in this respect.

The result is that I would set aside the order appealed against, and order that the decree be transmitted to the Court of first instance for execution.

It is a peculiarity in this case that the applicant did not join in the appeal to the Privy Council which terminated in the restoration of the decree of the First Court, but I think that that circumstance makes no difference, as the Privy Council, by restoring that decree, have in effect given a joint decree in favour of both the plaintiffs.

**Garth, C. J.**—The point in this case upon which I am unable to agree with my learned brothers is as to whether we have jurisdiction to entertain this appeal.

It appears to me, that, having regard to the provisions of s. 610 of the Civil Procedure Code, the duties of the High Court in dealing with decrees of the Privy Council are purely ministerial; and that any order which the Judge of the Privy Council Department may make, when acting in a ministerial [605] capacity, cannot properly be considered as "a judgment," and consequently cannot be made the subject of appeal to a Bench of this Court under s. 15 of the Charter.

It is said that the duties of the High Court under s. 610 are not altogether ministerial; and that it may become necessary for the Judge, acting under that section, to determine certain questions judicially; as for instance, if two persons presented themselves, each claiming to be entitled to the benefit of a Privy Council decree, it would be the duty of the Judge to decide which of those persons was really so entitled. But even in such a case, I consider that the High Court would have no power to decide between the contending parties. The question, who is entitled to the benefit of the decree, is one which, in my opinion, should either be decided by the Privy Council, or by the Court whose duty it is to execute the decree.

If, as in the present case, the person claiming the benefit of the decree was no party to the appeal to the Privy Council, and there were any question, whether, having regard to the true meaning of the decree, the claimant was entitled to take advantage of it, I consider that that the Privy Council, who made the decree, would best understand its meaning, and would be the proper Court to determine that question.

But if, on the other hand, the question did not depend upon the meaning of the decree itself, but upon something which had happened subsequently, as for instance, if the decree-holder had died, and the question was, who was his representative, or if the decree-holder had assigned his interest, and the question was between the assignee on the one hand and the heirs of the decree-holder on the other, this would be a question which, under s. 210 of the Code, would have to be determined, as in other cases, by the Court which executes the decree; and having been determined there, might be made the subject of appeal to the High Court.



But the High Court, in my opinion, is neither the proper Court to put a construction upon the decree, nor to determine questions which would, in the ordinary course, have to be decided in the execution-proceedings. The High Court has merely to transfer the decree for execution to the Court below ; and I [606] think that s. 610 has specially provided a means of notifying to the High Court the person or persons in whose favour, and upon whose application, the decree should be so transferred.

The person who applies must do so by petition, and this petition must be accompanied by a certified copy of the decree or order which is sought to be executed. That certified copy can, of course, only be obtained at the Privy Council Office ; and if any one applies for it other than the decree-holder, I presume the question whether he is, or is not, entitled to a copy, would have to be determined by their Lordships of the Privy Council.

When, therefore, the petitioner produces to the High Court a certified copy of the decree, that Court has then, and not till then, as I conceive, the duty thrown upon it of transferring the decree to the lower Court for execution ; and it has no discretion, in my opinion, to refuse to perform that duty. The production of the certified copy is a sufficient warrant to the High Court that the party producing it is entitled to ask to have the decree executed ; and the language of the section is imperative, that, upon its production, *the High Court shall transfer* the decree for execution.

In this particular case the party applying did not produce a certified copy of the decree, and the learned Judge thought it right to dispense with the production of it, because a certified copy had been produced by one of the other parties to the proceeding. I confess, I doubt very much whether this was right. I think, for the reasons which I have just now explained, that the certified copy is not merely intended to satisfy the High Court that the decree exists, but that the person who applies for execution is entitled to the benefit of it. And this case affords a good illustration of the convenience and propriety of such a provision ; because here the applicant was no party to the appeal to the Privy Council ; he had paid no share of the costs, and if he had applied to the Privy Council for a certified copy of the decree, their Lordships might, with good reason, have refused to allow him to share in the benefit of the decree, until he had paid or given security to his co-plaintiff for his share of the costs.

[607] I would, however, decide this appeal solely upon the ground that we have no jurisdiction to hear it. I think that if this Court or any other Court has a mere ministerial duty to perform, and refuses to perform it (no matter for what reason) the order or act of refusal can no more be considered as "a judgment" than could the order of the Court made ministerially in compliance with that duty ; and it is not because the learned Judge of the Privy Council Department has in this case acted *ultra vires* in determining the right of the parties, and has usurped, as I consider, a jurisdiction in that respect which he does not possess, that we have any right to usurp a jurisdiction also, and to treat his decision as "a judgment" which may be reviewed in appeal under s. 15 of the Charter. If any Court subordinate to the High Court were to usurp a jurisdiction in a similar way and to refuse to perform some ministerial act, the High Court, in my opinion, could not confer upon itself right to review the decision of the subordinate Court by way of appeal. Its proper course would be to set aside the decision and to order the subordinate Court to do its duty either under s. 15 of the High Courts Act or s. 622 of the Civil Procedure Code.



In such a case as this, it seems to me that the Privy Council is the only proper tribunal to rectify the order of Mr. Justice PONTIFEX. But I cannot regret that my learned brothers have come to a different conclusion, because it is no doubt more convenient that the mistake which we all agree has been made should be rectified here, instead of putting the parties to the trouble and expense of applying to the Privy Council. If it were merely a question of convenience, I should certainly have agreed with the other members of the Court; but as I consider it a question of principle, by the decision of which we must be guided in other cases, I feel compelled, for the reasons which I have given, to dissent from their judgment.

*Appeal allowed.*

#### NOTES.

##### [LETTERS PATENT, S. 15—MEANING OF JUDGMENT—

Followed in (1881) 7 Cal. 539 where it was held that no appeal lay against an order rejecting appeal to Privy Council: (1890) 17 Cal. 455 where the order was granting leave to appeal to Privy Council. See (1890) 18 Cal. 182 when the order was refusing to extend time for giving security for costs of appeal to Privy Council and directing the appeal to be struck off. But appeal lies against an order made under s. 622 of Civil Procedure Code of 1882 if it amounts to a judgment: (1898) 22 Mad. 68.

Referred to in (1901) 25 Mad. 431 for the position that the decree in favour of majors is barred].

[608] *The 13th January, 1881.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE WHITE, AND  
MR. JUSTICE MITTER.

Parmeshari Proshad Narain Singh.....Defendant  
*versus*

Mahomed Syud and others.....Plaintiffs.

*Right of private ferry—Easement—Limitation Act (IX of 1871), s. 27—  
User for twenty years.*

The right of establishing a private ferry and levying tolls is recognized in British India.

*Per* GARTH, C. J., and WHITE, J.—Twenty years is the shortest period within which such a right of ferry can be established by user.

*Per* MITTER, J.—Where the existence of a private right of ferry plying between the lands of A and B is admitted by B, no question of user arises; the issue that is raised between the parties is not whether a private ferry exists, but whether the *recognized* private ferry which is in existence is the property of A or B: but *semble*, supposing such question of user to arise, a right of private ferry cannot be established as an indefeasible right by long user.

THE plaintiffs in this case claimed, as a matter of private property, an exclusive right of ferry across the river Nun, from their own ghat to the ghat of the defendant, which right they stated had existed in their ancestors, themselves,

\* Appeal from Appellate Decree, No. 850 of 1879, against the decree of Baboo Ram Pershad, Second Subordinate Judge of Mozufferpore, in the district of Tirhoot, dated the 16th December 1878, reversing the decree of Baboo Ramyad Lall, Munsif of Tajpore, dated the 5th October 1877.

and their ticcadars for more than a hundred years ; and further claimed the right to take toll from passengers, and sought to exclude the defendant from interfering with their profits by exercising a similar right of ferry.

The defendant denied the plaintiffs' right, and set up a right similar to the alleged right of the plaintiffs as belonging to himself.

The Munsif found that there was no evidence of user on the part of the plaintiffs for twenty years as required under Act IX of 1871, s. 27, and dismissed the suit, refusing to hear some of the plaintiffs' witnesses.

**[609]** The plaintiffs appealed to the Subordinate Judge, who reversed the decision of the Munsif, and found that the plaintiffs had collected the ferry charge on both sides of the river, and had been in possession "*for a long time,*" but did not find the duration of the possession.

The defendant appealed to the High Court. The appeal was first heard by GARTH, C. J., and MITTER, J., who differed in opinion, and the case was accordingly reheard before three Judges under the provisions of s. 575 of the Civil Procedure Code.

*Baboo Annoda Pershad Banerjee* for the Appellant.

*Mr. R. E. Twidale* for the Respondents.

The following **Judgments** were delivered:—

**Garth C. J.**—The plaintiffs in this case claim an exclusive right of ferry across the river Nun, from their own ghat in Mouza Buch on the eastern side of the river, to the ghat of the defendant in Mouza Kistwara Fakir on the western side of the river. They claim not only the right to carry passengers by this ferry, and to take tolls from them, but also to exclude the defendant from interfering with their profits by exercising a similar right of ferry on the western side of the river. This right is claimed by the plaintiffs as a matter of private property, and they say that the defendant has interfered with their alleged right by ferrying passengers across the river in an ekta boat and taking tolls from them.

The defendant denies the plaintiffs' alleged right, and sets up a similar right as belonging to himself ; and the issues are intended to raise, and do raise in my opinion, the question, whether the plaintiffs are entitled to the right which they set up.

The plaintiffs have produced no grant or other document of title in support of their claim ; but they have endeavoured to establish their right by proof of long user, and have brought forward some purwanas from the Fouzdari Court, which they seek to use as evidence in their favour.

The Munsif apparently considered that, as the right claimed was in the nature of an easement, the plaintiffs, under s. 27 of **[610]** the Limitation Act, were bound to prove a user of the right for twenty years before suit. He found that the plaintiffs had given no evidence of the exercise of the right for twenty years, and consequently he dismissed the suit.

The Subordinate Judge considered that s. 27 of the Limitation Act did not apply to the case ; and he has found in favour of the plaintiffs, apparently upon the ground that the plaintiffs' alleged right has been exercised and not interfered with for twelve years, and he has relied in support of his finding upon the proceedings in the Fouzdari Court, which took place at various times between the year 1865 and the commencement of the suit.

I confess, if the question had been *res integra*, I should have doubted whether such an extensive and exclusive right as the plaintiffs claim is not illegal, as being contrary to public policy. But I find that such rights have long been recognized in this country as private property, from times anterior to the Permanent Settlement, and I therefore forbear to throw any doubt upon their legal validity.

The only real question in the case then, as it seems to me, is as to the length of user which should justify the Court in presuming the existence of a right of this kind in favour of the plaintiffs. I think that it would clearly be improper and unsafe to leave it open to the subordinate Courts in this country to presume such a right from any number of years' user according to their own discretion. If this were the law, it would inevitably work unfairly, because different Judges might act upon a different rule according to their own notions upon the subject. It is not only right, as it seems to me, but in conformity with the law, both here and in England, that there should be some definite principle upon which all Civil Courts should act as to the period of prescription in such cases; and as the Indian Legislature, in conformity with the English law, has now prescribed twenty years as the proper period in the case of easements and profits *à prendre*, I think that, in conformity with that rule, it would be proper to consider twenty years as the shortest period within which a right of ferry can be established by user.

As my brother MITTER and myself were not agreed upon this [611] point, the question has been referred to my brother WHITE as a third Judge. We have heard the case argued again, and I am still of opinion that no such right as that which the plaintiffs claim ought to be presumed from a user of less than twenty years. As the Subordinate Judge has not dealt with the case upon this principle, and has apparently considered a twelve years' user sufficient to establish such a right, I think that the case should be remanded to him to determine whether the plaintiffs have proved an exclusive exercise of the right for at least twenty years.

It seems to me very doubtful whether, considering that this is a private right, the purwanas which have been admitted ought to be treated as evidence as against the defendant. We do not know what the purwanas are, or how far they can legally be made evidence; but as the case is to be remanded, I think it right to direct the attention of the Subordinate Judge, as well of the parties, to that point.

My brother WHITE agrees that the costs of both hearings in the High Court, and also of the lower Appellate Court, should abide the ultimate result of the cause.

We are informed by the learned pleader for the plaintiffs that, in the Court of first instance, the plaintiffs were prepared to call eighteen witnesses in support of their case, and that the Munsif only allowed them to call twelve of those witnesses. This seems to have been made one of the plaintiffs' grounds of appeal to the Subordinate Judge, and Mr. Twidale contends, that, upon the case being remanded, the plaintiffs ought to have the advantage of that ground of appeal if they can make anything of it. If the plaintiffs can satisfy the Subordinate Judge upon affidavit, that the Munsif did really refuse to allow these witnesses to be called, and that their evidence was calculated to support the plaintiffs' case upon the point which we now direct to be tried, we think that the plaintiffs ought to have an opportunity of calling those witnesses before the Subordinate Judge. The defendant will, of course, be at liberty to

answer upon affidavit any case which the plaintiffs may make as to the Munsif not allowing the witnesses to be called, and the Munsif himself may be referred to, if necessary, to ascertain the truth of the matter.

[612] **White, J.**—I agree that the plaintiffs should have the opportunity of examining their further witnesses, provided they satisfy the Subordinate Judge as regards the particulars mentioned in the judgment of the Chief Justice.

The suit out of which this appeal arises is for the disturbance of a ferry claimed by the respondents. The relief sought is a perpetual injunction to restrain future disturbance and damages for past disturbance.

The ferry lies between two villages, which are separated by the river Nun. One of the villages, which is on the eastern bank, is called Buch, and belongs to the respondents. The other, which is on the western bank of river, is called Kistwara Fakir, and belongs to the appellant.

In their plaint the respondents state that the ferry under the name of Buch Bhudunghat has existed for upwards of a hundred years, and that they and their ancestors have all along been in the enjoyment of the ferry, and by themselves, or their tiocadars, have received the charges for ferrying passengers over the river backwards and forwards between the two villages. The respondents claim the ferry by virtue of proprietary and prescriptive right. The claim of the respondents thus involves the exclusive right as against the appellant and the rest of the public to levy tolls from passengers passing from one village to the other by the ferry (Buch Bhudunghat), and also the right as against the appellant to use the western bank of the river for the purpose of embarking and disembarking passengers using the ferry.

The ferry is not claimed as a public ferry under Reg. VI of 1819, nor as established by sannad or grant from the ruling authority, but as a private ferry.

There appears to be nothing in the law which prevails in the mofussil of this Presidency to prevent any private person from establishing a ferry and levying tolls from those who use the ferry. The existence of such ferries is impliedly recognized in Reg. VI of 1819, and such recognition is affirmed by the late Sudder Dewany Adawlut in the case of *Rajiblochun Roy v. Kumri Bebee* (S. D. A., 1854, p. 153) ; see also the case of *Kishoree Lall Roy v. Gokool Monee Chowdhraun*, (16 W. R., 281).

[613] Now, as any man may set up a ferry over a river which passes between his own village and that of another riparian owner, no one who works such a ferry can exclude his neighbour from doing the like thing, unless the former has acquired a right of property in the working of his own ferry. This right may be acquired as against his neighbour by proving a grant from him or his predecessors in title, granting the right of embarking and disembarking passengers on his land, or it may be acquired, as against all the world, by proof of long uninterrupted user.

The respondents have produced no written or other evidence of a grant from the appellant or the former owners of Kistwara Fakir, but rely solely upon evidence, to the effect that they have, for a certain period of time, by themselves or their tiocadars, used ferry boats and collected the ferry charge on both the eastern and western sides of the river ; in other words, they seek to prove what they call their " proprietary and prescriptive right " by long uninterrupted user.

The first Court found that there was no evidence of the user beyond sixteen years, and considered such evidence of user as there was to be unsatisfactory ; and dismissed the suit, on the ground that the plaintiffs had not proved their

right to the ferry. The lower Appellate Court reversed the decision of the first Court, and decreed the relief prayed. The Subordinate Judge finds that the plaintiffs have collected the ferry charge on both sides of the river, and have been in exclusive possession for a long time, but he does not find the duration of the possession.

The question raised by this appeal is, what must be the duration of the user to give the respondents a right to the relief which they ask? In my opinion it should be not less than twenty years. The respondents' claim, so far as it involves a right to embark and disembark passengers on the landing place in the appellant's village, is really a claim to an easement, or a right in the nature of an easement; and the Indian Limitation Act has prescribed for the acquisition of an easement a user of twenty years. Supposing a ferry could by English law be erected by a private person at his own will, and the proof of title to it depended upon long uninterrupted user, there can be no doubt that a user of twenty years would be required in order to make out [614] title. There is nothing that I am aware of which makes a period of twenty years unsuited to the circumstances of the mofussil of this Presidency or its inhabitants. Long and uninterrupted possession or use by a claimant may be viewed as long continued acquiescence on the part of those who are entitled to interrupt or disturb the claimant. Why twenty years have been fixed by the English law as the period to which the user must extend is not easy to say, and I have not been able to discover; but there is a good reason for a lengthened period to be found in this, that it affords ample time for those interested in preventing the acquisition of a right, to interfere and resist. It also allows for the supineness of individuals, and for the numerous hindrances to interference and disturbance which may arise from minority, absence, and other temporary causes.

It has been argued that it should be left to the Judge who presides at the trial to decide from the circumstances of each case whether the user has been of sufficient duration to confer an absolute and indefeasible right; but that course would, besides being at variance with the ordinary principles of law which regulate the acquisition of rights by user, be productive of the greatest uncertainty and inconvenience.

It has also been contended that a twelve years' user should be deemed sufficient, inasmuch as the Indian Legislature has fixed that period as the limit for a suit to recover immoveable property. But the argument founded on this circumstance fails, for the Legislature has by the same Act prescribed twenty years as the time for the acquisition of easements and certain profits *à prendre*, and there is a much closer analogy between such rights and the right claimed in this action than between the latter and immoveable property. In fact the mode in which the Legislature has dealt with easements furnishes an affirmative argument in support of the longer limit which I have mentioned.

No decision has been cited for the respondents which shows that the right which the respondents claim can be acquired by user within a less period than twenty years.

A case, however, has been referred to—*Joy Prokash Singh v. Ameer Ally* (9 W. R., 91), decided in the year 1868—in which PEACOCK, [615] C. J., after referring to the English Prescription Act, says,—“That Act, however, does not apply to the mofussil here, and there is no magic in the number 20. I am inclined to think that by analogy to the Indian Limitation Act, an adverse and uninterrupted use of an easement for twelve years would confer a right to it. But it is premature to decide the point in this

case. The point has not been argued." This expression of opinion is admittedly an *obiter dictum*. The Indian Legislature has since definitely fixed the period for the acquisition of an easement at twenty years, and thus adopted the English law on the subject.

It is true that there is no magic in the number 20, nor is there indeed in the number 12 or any less number. But some limit of time must be fixed.

By the old Roman law a title to immoveable property on Italian soil was acquired by use (*usucapione*), if held for two years. This was altered by Justinian, who published a constitution, by which, throughout the empire, twenty years in the case of absent parties, and ten years in the case of those present, were fixed as the period of possession that must elapse before the use or possession was clothed with the title (Inst. Justinian Lib. 2, Tit 6). The French Civil Code prescribed thirty years for the acquisition of an easement, as also did the law which prevailed in the mofussil of Bombay before the Indian Limitation Act of 1871; see *Anaji Dattushet v. Morushet Bapushet* (2 Bom. H. C. Rep., 354). These periods are no doubt more or less arbitrarily fixed. It will not be contended that this Court is to apply Roman or French or any other foreign law. There is no Indian law either legislative or judge-made which meets the case. What period then can this Court declare to be the proper limit except that prescribed by the English law in similar or analogous cases?

My brother MITTER, whose judgment I have had the advantage of perusing, is of opinion that the duration of user is not a question which arises in the suit, inasmuch as the existence of a private ferry plying between the respondents' and appellant's villages is admitted by the latter. But I cannot agree in this view. The mere existence of a private ferry, though admitted [616] by the appellant, cannot entitle the respondents to the relief prayed, unless the respondents are entitled to prevent the appellant from using his own boats to carry passengers from the landing place in his own village across the river.

The respondents cannot be so entitled, unless they themselves have the absolute and indefeasible right to use the landing place in question to the exclusion of the appellant; and to have acquired that right, they must have used the ferry without interruption for so many years as the law declares to be sufficient for the acquisition of the right.

The issues also which were framed in the first Court, in my opinion, clearly raise the question of right. Part of the first issue is, what right the plaintiffs have, and part of the second issue is, "whether the plaintiffs are entitled to recover the damages claimed or not?" The judgment too of the first Court, which dismissed the suit, proceeded upon the failure of the plaintiffs to prove a user of sufficient length to establish the right which they claimed.

The lower appellate Court in effect narrowed the issues to this one,— "Whether the plaintiffs had collected the ferry charge on both the western and eastern sides of the river, or had only collected the ferry charge of the ghat on the eastern side." In so doing, I think the lower Appellate Court erred. It overlooked the essential point on which the plaintiffs' claim to relief depended,—*viz.*, the proof of an exclusive and absolute right to the ferry in themselves.

On the whole, I am of opinion that the decree of the lower Appellate Court must be reversed; but as the importance of the duration of the user of the ferry escaped the attention of that Court, I am not unwilling that the case should be

sent back to the lower Appellate Court with a direction to find specifically on this point, and upon the terms mentioned in the judgment of the Chief Justice.

**Mitter, J.**—The plaintiffs' case is, that they have the exclusive right of ferry across the river Nun between these villages, and the defendant having interfered with their right by setting up an opposition ferry from his side of the river, the suit has been brought virtually to restrain him (the defendant) from disturbing the plaintiffs' right.

**[617]** The defendant does not deny that there is a private ferry in existence by which passengers are taken from one mouza to the other, and *vice versa*; but he alleges that that right belongs to him as the proprietor of Mouza Kistwara Fakir.

The Munsif dismissed the suit, but on appeal the Subordinate Judge has awarded a decree in favour of the plaintiffs. The defendant has preferred this appeal, and the first question that has been raised before us is, whether, by the laws of this country, a private individual can claim a right of this nature—a right which entitles him, to the exclusion of the other members of the State, to ferry across a river within a particular area all passengers, receiving tolls from them.

Whatever may be the origin of this right, it is clear from the legislative enactments on the subject of "ferry ghats" framed from time to time, that such right exists in this country.

The earliest Regulation on the subject is No. XIX of 1816, of which ss. 2, 8, 9, and 15 bear upon the subject under consideration. Section 2 classifies ferries into three divisions,—*first*, ferries which are to be let in farm, *second*, ferries held under khas management of the officers of Government, and *third*, ferries held by private individuals without payment of revenue. Section 8 empowers the Revenue Authorities to reduce or enlarge "the number of ferries of every description, either of their own accord or at the suggestion of the Magistrate." Then s. 9 lays down that "in the event of its appearing that the profits derived from any resumed ferry may have been included in the permanent assessment of the estate to which it has heretofore been annexed, the Board or Commissioner under whose orders the inquiry may be conducted shall report the circumstances, with an opinion on the merits of the claim, for the consideration and orders of the Governor-General in Council, and the Courts of Judicature shall not take cognizance of any claims to deductions or compensation on account of the tolls levied at any ferry or ghat." Section 15 enacted that the employing of a boat for the purposes of ferrying passengers, &c., by an *unauthorized* person would subject him to a fine, &c.

This Regulation was repealed by Reg. VI of 1819, of which ss. 3, 5, 6, and 13 define the distinction between public and private ferries.

**[618]** The latest enactment on the subject is Beng. Act I of 1866, s. 4, which clearly recognizes the right of *private* ferry; see also the case of *Government v. Bry Soondree Dassee* (7 Sel. Rep. 497), *Rajblochun Roy v. Kumri Bebee* (S. D. A., 1854, p. 153), *Kishoree Lall Roy v. Gokool Monee Chowdhram* (16 W. R., 281), and *Naram Singh Roy v. Nurendro Naram Roy* (22 W. R., 296).

But although the enactments referred to above recognise the right of private ferry in this country, they do not throw any light as to its origin.

But it seems to me that a right of this nature must, in some way or other, originate from the sovereign authority. In the course of the argument of this appeal, it was contended that, in this case, the right in question is claimed by the plaintiffs on the ground that it was acquired solely by prescriptive user for a certain length of time; and one of the questions raised before us is, what is the shortest period during which the user must be proved to entitle the plaintiffs to a decree? In this case it seems to me that the existence of a *private ferry* plying between the plaintiffs' and the defendant's mouzas is admitted. Therefore the question mentioned above does not really arise. The issue that is raised between the parties is not whether a *private ferry* does exist in the river Nun between the two mouzas, but whether the *recognized* private ferry, which is in existence there, is the property of the owner of Mouza Buch or of that of Mouza Kistwara Fakir. It is clear from the plaint and the written statement, as well as the evidence given by the contending parties, that the existence of a *private ferry* in the river Nun between the plaintiffs' and the defendant's villages is admitted.

The plaintiffs' witnesses deposed that the tolls from the passengers using this ferry were exclusively collected by the plaintiffs, while those of the defendant deposed they were exclusively received by the latter. The first issue framed, by the Munsif is in these words: "Whether the plaintiffs or the defendant used to take the ferry charge of the ghat on the river Nun? What right the plaintiffs have? If the plaintiffs used to take the ferry charge, whether the defendant can be restrained from [619] taking it or not?" The first branch of this issue raises the only *question of fact* upon which the parties are disagreed. There is no other question of fact upon which the parties are at issue. The remaining portion of the first issue substantially raises the same question of *law* which has been first argued before us,—*viz.*, whether the right of private ferry is recognized by the laws of this country. Upon the aforesaid question of fact, the lower Appellate Court came to a finding favourable to the plaintiffs, and it is not disputed that there is evidence on the record to support it. I am, therefore, of opinion that this appeal must fail, and the question of law noticed above, and which has been argued before us, does not really arise. If it did arise, I should be inclined to hold that a right of a private ferry cannot be established as an indefeasible right by long user. Long uninterrupted user may be evidence of a lost grant or immemorial custom giving rise to the inference that the right had a legal origin. But the influence of the existence of the right from long user is one of *fact* and not of *law*; see *Bhuban Mohan Banerjee v. J. S. Elliot* (6 B. L. R., 85) and the *Mayor of Kingston-on-Hull v. Horner* (1 Cowp., 102). I may as well cite the observations of Lord Mansfield in the last mentioned case bearing upon this subject. There also a right similar to the one now in dispute was claimed without the production of a grant from the Crown. The plaintiffs in that case had to establish their exclusive rights to certain dues—a right which could only emanate from the sovereign power. He says: "Now, with regard to admitting evidence to satisfy a jury that a charter did exist within time of memory which is not produced by record, my opinion is this, namely, that all evidence is according to the subject-matter to which it is applied. There is a great difference between length of time which operates as a bar to a claim, and that which is only used by way of evidence. A jury is concluded by length of time that operates as a bar; as where the Statute of Limitation is pleaded in bar to a debt, though the jury is satisfied that the debt is due and unpaid, it is still a bar. So in the case of prescription, if it be time out of mind, a jury is bound to conclude the right from that prescription, if there could be a legal [620]



commencement of the right. But any written evidence showing that there was a time when the prescription did not exist, is an answer to a claim founded on prescription. But length of time used merely by way of evidence may be left to the consideration of the jury to be credited or not, and to draw their inference one way or the other, according to circumstances."

*Case remanded.*

#### NOTES.

##### [PRIVATE FERRIES—

In (1891) 19 Cal. 253=19 I. A. 48 the Privy Council said. "whatever the defendant may think himself entitled to, he has not in this suit claimed to possess a ferry in any such sense as would entitle him to restrain competition.

It is recognized law in India that a man may set up a ferry on his own property, and take tolls from strangers for carrying them across, and may acquire such a right by grant or by user over the property of others; and, except as affecting the proof of his acquisition of title, it can make no difference whether he is a co-sharer with those others or not. \* \* \* But the defendant is not using his own property, except that he owns it jointly with the plaintiffs; and, as no grant ever was made to him, he can only set up exclusive right against the plaintiffs by showing either that he has dispossessed them for twelve years, or that he has held possession adversely to them for twelve years, or that he has enjoyed what he claimed for twenty years, as an easement and as of right." In this case, the other co-owners were not allowed to interfere with the enjoyment of the ferry set up. See also 9 I. C. 846.

It was held in (1891) 18 Cal. 652 that these sections of the Limitation Act would not apply to the acquisition of a *monopoly*.]

#### APPELLATE CRIMINAL.

*The 22nd January, 1881.*

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

In the matter of the Petition of Jamoona.

The Empress

*versus*

Jamoona.\*

*Penal Code (Act XLV of 1860), s. 211—Making false charge to Court or Officer having no jurisdiction.*

It is necessary for a conviction under s. 211 of the Penal Code that the false charge should have been made to a Court or officer having jurisdiction to investigate and send it up for trial.

THE accused, Jamoona, was charged under s. 211 of the Penal Code with having made a false charge of rape against one Sheikh Ahmed, with intent to injure him, before Captain Simpson, the Station Staff Officer of the Cantonment of Dorenda.

\* Criminal Appeal, No. 735 of 1880, against the order of H. L. Oliphant, Esq., Judicial Commissioner of Chota Nagpore, dated the 18th September 1880.

It was proved that she did make the charge, and it was also proved that the charge, was false and she was sentenced to one year's rigorous imprisonment.

The prisoner appealed to the High Court.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by

**Mitter, J.**—This case came before one of the Judges of the present Bench in the vacation, and it occurred to him that no charge was made to any one competent to act upon it. Enqui-**[621]**ries were, therefore, made as to the powers (magisterial or police) of the Station Staff Officer.

From the papers within it will be seen that he has no such powers.

The appellant appeared before Captain Simpson, Adjutant, 11th M. N. I., and Station Staff Officer, and charged a non-commissioned officer with rape. There was an enquiry, and the charge being found to be false by the military authorities, the Commanding Officer caused the appellant to be prosecuted before the criminal authorities under s. 211. She was committed for trial, and convicted by the Judicial Commissioner under that section.

We are of opinion that the appellant neither instituted, nor caused to be instituted, a criminal proceeding. She, no doubt, charged the non-commissioned officer with an offence: but the Station Staff Officer having neither magisterial nor police powers, as we are informed, it seems to us that s. 211 will not apply. We do not think it is unduly refining the words of the section to say that the false charge must be made to a Court or to an officer who has powers to investigate and send up for trial.

We, therefore, set aside the conviction and direct the appellant's discharge.

*Conviction set aside.*

#### NOTES

[See (1894) 19 Bom. 51 where this case was distinguished. Mayne's Criminal Law, (3rd Ed.) p. 597.]

A Village Munsif not being the proper authority to investigate in cases of dacoity, a conviction under s. 211 was set aside, in (1908) 31 Mad 506, as the subsequent prosecution was on his report as distinguished from his *information*, but this view was overruled by the Full Bench in (1909) 32 Mad. 258 F. B., as the village officer was bound to transmit the information to the proper authority.]

[6 Cal. 621]  
CRIMINAL REFERENCE.

*The 28th January, 1881.*

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

The Empress  
*versus*  
Nobocomar Pal.\*

*Bengal Excise Act (Beng. Act VII of 1878), s. 53—Sale by Licensed Vendor contrary to Terms of his License.*

Section 53 of the Bengal Excise Act does not apply to sales by a licensed vendor contrary to the terms of his license. That section provides for a breach of the condition of a license not covered by the second clause of s. 59 of the Act.

NOBOCOOMAR PAL was summarily tried before the Magistrate of Howrah, on a charge of having sold imported liquor [622] by the bottle, without a license empowering him to do so, and having, therefore, committed an offence under s. 53 of the Bengal Excise Act (Beng. Act VII of 1878). At the time of the alleged offence, the accused held a license (under Form 4A of those prescribed under the Act by the Board of Revenue) empowering him to sell only imported liquor, and that only by the glass, to be drunk only on the premises licensed, and not to be removed from them before consumption. The offence imputed to him was, that he sold imported liquor on several occasions by the bottle, delivering it to his customers at their own residences.

He was found guilty under s. 53 of the above Act, and sentenced by the Magistrate to pay a fine of Rs. 200, and to rigorous imprisonment in default of payment. An application was made to the Sessions Judge, who considered the conviction illegal, and referred the case to the High Court under s. 296 of the Criminal Procedure Code.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by

**Mitter, J.**—The Magistrate of Howrah having convicted the petitioner, Nobocomar Pal, of an offence under s. 53, Beng. Act VII of 1878 (The Beng. Excise Act), and sentenced him to a fine of Rs. 200, and rigorous imprisonment in default of payment, an application was made to the Judge of Hooghly, in order that the proceedings might be referred to this Court under s. 296, Criminal Procedure Code.

In his application Nobocomar Pal raised two objections to his conviction and sentence: first, that he held a retail license for sale of spirits, and could not, therefore, be convicted under s. 53 of the Act, second, that he was not liable to rigorous imprisonment in default of payment of the fine.

The Judge has referred the case to this Court, and his opinion is, that s. 59, and not s. 53, of the Act applies. He brings to notice certain informalities in the proceedings of the Magistrate, and recommends that the proceedings may be set aside, or the fine reduced to Rs. 50.

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\* Criminal Reference, Nos. 3 and 6 of 1881, from the order of J. P. Grant, Esq., Sessions Judge of Hooghly dated the 6th January 1881.

We have carefully considered the papers sent up to us, and [623] have come to the conclusion, that s. 53 of the Act does not apply to this case. It is not disputed, that Nobocoomar Pal held a license for retail sale of imported spirituous and fermented liquors, which is one of the two classes of licenses to which the Act refers. The license, however (No. 49—4A) restricts him to sale *by the glass*, and art. vi of the license confines the sale to his shop, and directs that the spirits, &c., shall be drunk on the premises. The Magistrate thinks, that because Nobocoomar had not a simple Retail Vend License (Form 4B), and because he sold liquor by the bottle for consumption off the premises, he was justified in convicting him under s. 53.

We concur with the Judge in his view, that s. 53 does not apply to sales by a licensed vendor contrary to the terms of his license. This seems to follow from a consideration of s. 60 with s. 53. If s. 53 were to be applied to wholesale sales by a retail licensed vendor, a fine of Rs. 500 might be imposed, whereas by s. 60, the maximum fine is Rs. 200 for that offence. Section 60 would be redundant if the construction put by the Magistrate upon s. 53 is correct, whereas it is, upon the construction we put upon it, quite consistent with the previous section and provides for a breach of the conditions of a license not covered by the second clause of s. 59.

As has been said already, Nobocoomar held a license for retail sale. An ordinary retail licensee might sell up to twelve quart bottles; but under its powers under s. 28, the Board of Revenue has regulated the conditions of Nobocoomar's license, and limited him to selling by the glass, with a condition that the liquor shall be drunk in his shop. The information laid against him was, that he had, on seven dates in April, May, and July 1880, sold liquor by the bottle without a bottle license. This seems to be another modification of the ordinary retail license.

The proceedings before the Magistrate were held under chap. xviii of the Criminal Procedure Code. It is therefore difficult to say, whether there was legal evidence for any conviction. In his summary and reasons the Magistrate alludes to account-books, orders, and bills, as satisfying him that the offence was committed. It would have been better if the [624] Magistrate had summed up the evidence by which the orders and bills were *proved*, for their mere production is no evidence. Two of the orders refer to lemonade, and we are not aware that this is an excisable article.

We are unable to say for what offence the prisoner really was tried. The complainant was not examined as required by s. 144 of the Procedure Code, and it is certain, that the seven offences mentioned in the information could not be dealt with in one trial, *vide* s. 453\*, Procedure Code. The omission to record the date of the commission of the offence in the register as required by s. 229, Procedure Code, is, therefore, a material error, and the whole case shows the necessity of recording the few particulars required by law in trials under chap. xviii.

As we are unable, on the record as it stands, to say, that any offence has been made out for which the petitioner ought to have been convicted, we must set aside the conviction under s. 53, Beng. Act VII, 1878.

*Conviction set aside.*

More offences than one of same kind may be charged within a year of each other.

hundred and fifty-five.]

\*[Sec. 453 :—When a person is accused of more offences than one of the same kind committed within one year of each other, he may be charged and tried at the same time for any number of them not exceeding three.

*Explanation*—Offences are said to be of the same kind under this section if they fall within the provisions of section four

**NOTES.**

[The same view as in this case was taken in (1882) 11 C.L.R. 416; a contrary view was taken in (1881) 8 Cal. 207 but it was overruled and the view in this case was adopted by the Full Bench in (1902) 29 Cal. 606 F.B.=6 C.W.N. 674.

See also 12 C.W.N. 461; 7 C.L.J. 377.]

[6 Cal. 624]

**APPELLATE CRIMINAL.**

*The 7th February, 1881.*

PRESENT:

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE PRINSEP.

In the matter of the Petition of Shumsher Khan.

The Empress

*versus*

Shumsher Khan.\*

*Criminal Procedure Code (X of 1872), s. 36—Confirmation of Sentence by Sessions Judge.*

Section 36 of the Criminal Procedure Code, as regards the necessity for confirmation of the sentence by the Sessions Judge, refers to cases in which the sentence of imprisonment is a sentence of upwards of three years, without including any additional sentence as to fine or whipping.

THE accused, who was a head constable, was charged with having received a bribe. The trial was held under the special powers conferred by s. 36 of the Criminal Procedure Code, and he was found guilty of an offence under s. 161 of the [625] Penal Code, and was sentenced to rigorous imprisonment for three years, and to pay a fine of Rs. 1,000, or in default, to suffer rigorous imprisonment for a further period of six months.

The accused appealed to the High Court.

Baboo *Rashbehary Ghose* and Baboo *Sarojā Prosonno Roy* for the Appellant.

The **Judgment** of the Court (CUNNINGHAM and PRINSEP, JJ.) was delivered by

**Cunningham, J.**—We think that the appeal must be dismissed, on the ground that there is no sufficient reason shown for calling in question the deliberate conclusion at which the Magistrate has arrived.

With regard to the point that the sentence required the confirmation of the Sessions Judge, we think that the words of s. 36 of the Code of Criminal Procedure must be construed to refer to cases in which the sentence of imprisonment is a sentence of upwards of three years, and to leave aside any sentence the Magistrate may pass as to fine or whipping.

We, therefore, think that it is unnecessary for the sentence in this case to be confirmed by the Sessions Judge.

The appeal is dismissed.

*Appeal dismissed.*

**NOTES.**

[See (1901) 1 L.B. R. 57]

\* Criminal Appeal, No. 759 of 1880, against the order of A. C. Campbell, Esq., Deputy Commissioner of Goalpara, dated the 30th September 1880.

[6 Cal. 625]

The 27th January, 1861.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

In the matter of the Petition of Janokinath Gupta.

The Empress

*versus*

Janokinath Gupta.\*

*Police Act (V of 1861), s. 29—Overstaying Leave without permission.*

The failure of a Police constable to resume his duty on the expiration of his leave, does not constitute an offence under s. 29, Act V of 1861.

THE accused, a Police constable, obtained leave of absence from his duties, which had expired on the 15th October 1880. He obtained no extension of leave, but did not return to [626] resume his duties until the middle of December. He was then charged with having committed an offence under s. 29, Act V of 1861, by having overstayed his leave without permission, and being found guilty, was sentenced to two months' rigorous imprisonment.

He petitioned the High Court against this conviction and sentence.

Baboo Barkant Nath Doss for the Petitioner.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by

**Mitter, J.**—The petitioner, a constable, obtained a month's leave, but failed to join his post at the expiration of that time. For this omission on his part he has been committed under s. 29†, Act V of 1861, and sentenced to two months' rigorous imprisonment.

We think the conviction is bad, because his failure to resume his duty on the expiration of the leave, does not, in our opinion, constitute an offence under the aforesaid section.

The conviction is therefore set aside.

*Conviction set aside.*

\* Motion, No. 9 of 1881, against the order of C. E. Buckland, Esq., Magistrate of Howrah, dated the 17th December 1880

† [Sec. 29 :—Every Police Officer who shall be guilty of any violation of duty or wilful breach or neglect of any rule or regulation or lawful order made by competent authority ; or who shall withdraw from the duties of his office without permission, or without having given previous notice for the period of two months ; or who shall engage

Penalties for neglect of without authority in any employment other than his Police duty ; or who shall be guilty of cowardice, or who shall offer any unwarrantable personal violence to any person in his custody, shall be liable, on conviction before a Magistrate, to a penalty not exceeding three months' pay, or to imprisonment, with or without hard labour, for a period not exceeding three months, or to both.]

[6 Cal. 626]  
ORIGINAL CIVIL.

The 7th February, 1881.

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE PONTIFEX.

Kedarnauth Doss and another.....Plaintiff

versus

Protab Chunder Doss and others.....Defendants.

*Common Ancestor—Claim as Collateral Heir—Evidence—Amendment of Record on Appeal.*

Where the plaintiff claimed as paternal uncle's grandson and only heir of *N*, and the evidence showed that *N*'s father was one of three brothers, but it was not stated in the plaint, nor shown by the evidence, who was the father of the three brothers,—*Held*, that the suit ought to be dismissed, it being incumbent on the plaintiff, claiming as a collateral heir, to show who the common ancestor was from whom he derived title.

[627] A second plaintiff was added in the Court below, but no amendment was made in the record, and the suit was dismissed with costs. An appeal being brought, the original plaintiff failed to pay the costs, was made insolvent, and the Official Assignee declined to proceed with the appeal. It was objected that the appeal ought to be dismissed, there being no appellant on the record; but the Court allowed the appeal to proceed, and the amendment ordered by the Court below to be effected.

APPEAL from a decision of BROUGHTON, J., dated the 20th August 1880

The suit was brought for possession of a family dwelling-house and land in Calcutta. The plaint stated that one Nobocoomar Dhara was in his lifetime the absolute owner of the house and land in suit; that he died intestate and without issue in 1867, leaving his widow, Otulmoney Dossee, and the plaintiff, his paternal uncle's grandson, him surviving; that Otulmoney was in possession of the said house and land until her death, which took place in March 1879, when the defendants took possession of the premises and refused to give them up to the plaintiff, who submitted that, on the death of Otulmoney, he became absolutely entitled to the said house and land as the heir of Nobocoomar Dhara according to Hindu law.

Koylashmoney, the second plaintiff, was added during the hearing of the case.

The facts material to the report are sufficiently set out in the judgment of the Court.

The evidence having shown that Nobocoomar's father had two brothers, who were stated to be dead, but it was not shown how their property had devolved, BROUGHTON, J., thinking the plaintiff's case very unsatisfactory, and remarking, among other things, that "none of the witnesses seem to know anything of the father of the three brothers," dismissed the suit with costs.

From this decision the plaintiffs appealed.

Mr. Bonnerjee and Mr. Trevelyan for the Appellant Koylashmoney.

Mr. Mittra and Mr. Lee for the Respondents.

[628] The following Judgments were delivered:—

Garth, C. J.—I think that the judgment of the Court below should be affirmed, upon the single ground that the plaintiff has not shown who is the common ancestor through whom he claims title to the property in question from Nobocoomar Dhara.

The case comes before us under rather peculiar circumstances. The original plaintiff, Kedarnauth Doss, claimed as the sole heir of Nobocoomar Dhara ; but it turned out at the trial that if the plaintiff should make out his title to the property, his mother, the witness Koylashmoney Dossee, would be entitled to a share of it. Upon this it was objected by the defendants' counsel that her name ought to be added as a co-plaintiff, and an order was made by the Court to that effect, although the plaint does not appear to have been amended.

The decree of the Court below being then given for the defendants with costs, the plaintiff Kedarnauth did not pay the costs ; consequently he has been made an insolvent by the defendants, and the Official Assignee has declined to proceed with the appeal on behalf of the creditors. Koylashmoney Dossee is, therefore, the only appellant, and an objection was taken before us that as it did not appear upon the proceedings that she was a party to the record, the appeal should be dismissed. But we thought it right under the circumstances to allow the argument to proceed, upon the understanding that an amendment was to be made by the proper officer in accordance with the order of the Court below.

We have, therefore, properly speaking, to consider only the case of Koylashmoney Dossee ; but, as both plaintiffs claim under the same title, it will really be necessary to consider the whole case, as if Kedarnauth had not become an insolvent.

The plaintiff Kedarnauth claimed to be the heir of Nobocoomar Dhara, as being the only surviving son of his paternal uncle's daughter ; but it turned out in the course of the case that he had a brother, who is now dead, and who, if he had lived, would have been his co-heir. This brother's share, if he had any, would now have passed to his mother Koylashmoney, and this is the reason why she was ordered to be made a co-plaintiff.

[629] Koylashmoney was herself called as a witness at the trial ; and if her story is to be believed, she proved the following facts:--

Rammohun, Ramjoy, and Rambuddo were three brothers ; Koylashmoney herself was the only daughter of Ramjoy, and her father and mother were both dead. Rammohun left no children, and he and his wife are both dead ; but Rammohun's mother, although an old woman, is not proved to be dead. Rambuddo, who would seem to have been known by other names, was the father of Nobocoomar, who died without issue, and his wife is dead also.

Several points were raised in the Court below and pressed upon us here by the defendants' counsel with regard to the insufficiency of the evidence ; but I would decide the appeal upon this one point only.

The common ancestor is of course alleged by the plaint to have been the father of the three brothers ; but it is not shown who or what he was, nor is even his name mentioned. No information whatever has been given to the Court respecting him, and no sufficient reason has been suggested why such a material element in the case has been omitted. It is certainly very remarkable that Koylashmoney, if her story be true, should not know who her father's father was ; and it does not appear that any steps have been taken to ascertain that fact.

It must be borne in mind, that the brothers would not have inherited directly from one another, but through their father ; and that the father would, if alive, be entitled to the property in question before Ramjoy. In this respect the rule of Hindu law is similar to the law of England since the Statute 3 and 4 Will. IV, c. 106, s. 5 ; and I believe that the rule of evidence there in cases



like the present is correctly laid down in the last Edition of Roscoe's *Nisi Prius* Evidence p. 1010, that where the plaintiff claims as a collateral heir, he is bound to allege and prove his title *through the common ancestor in all its stages*; and one most important stage is of course the common ancestor himself.

It is obviously only fair to the defendants that this rule should be strictly observed; because although Ramjoy, Ram-[630] mohun, and Rambuddo may be said and believed by the witnesses to be three brothers, it is possible that they may in fact be cousins or related in some other degree, or that their legitimacy may be doubtful, or that they may have other brothers, who, if alive, would take as heirs in priority to the plaintiffs.

I think, therefore, that, upon this ground alone, the appeal should be dismissed with costs on scale 2.

**Pontifex, J.**—I agree with BROUGHTON, J., that the evidence is untrustworthy and insufficient to entitle the plaintiff to a decree.

It seems to me incredible that Koylashmoney should not know her grandfather's name. But it may have been material to suppress it, as it might have given the defendants a clue. In my opinion the plaint ought to have stated the descent from a common ancestor, and the evidence ought to have supported such statement.

Then the failure of the male plaintiff to present himself as a witness is very gravely suspicious. According to the evidence of the Doctor, his father-in-law, Nobocoomar arranged his marriage and acknowledged him as his nephew. But if this is true, it must have happened immediately before Nobocoomar's death, and the necessary consequence must have been that the male plaintiff must have performed Nobocoomar's shrad.

Now the evidence does not show that he did perform the shrad, and according to the evidence the defendants must have been aware from being in the house whether he did so or not. If he had presented himself as a witness, the first question would have been—Did you perform the shrad or not; and if not, why not? It seems to me that he could not face this question; and not only do I think the evidence is insufficient to give the plaintiffs a decree, but I also have a very grave suspicion that the whole case is untrue.

*Appeal dismissed*

Attorney for the Appellant Koylashmoney: Mr. F. O. Moses.

Attorney for the Respondents: Baboo N. C. Burral.

[631] The 7th February, 1881.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE PONTIFEX.

Abdool Futteh Moulvie.....Defendant

*versus*

Zabunnessa Khatun.....Plaintiff.

*Mahomedan Law—Husband and Wife—Maintenance—Decree for past Maintenance.*

In a suit for maintenance by a Mahomedan wife against her husband, where there was no decree or agreement for maintenance before suit,—*Held*, reversing the decision of the Court below, that the decree should not have awarded past maintenance, but that maintenance should have been made payable only from the date of the decree.

*Held* also, that future maintenance should have been given only during the continuance of the marriage, and not during the term of the plaintiff's natural life.

APPEAL from a decision of WILSON, J., dated the 20th July 1880.

This suit was brought by the respondent Zabunnessa Khatun for dower and maintenance. She stated in her plaint that she was married to the defendant in Calcutta on the 12th March 1874, that on the same day, and in consideration of the marriage, a kabinamah or settlement was executed, by which defendant promised to pay her Rs. 10,000 on demand by way of dower; that she cohabited with him until the end of December 1877, when he left her, and had not since contributed anything to her maintenance. In November 1878, she demanded payment of her dower, and of the sum of Rs. 100 per month for her maintenance from January 1878, and that the defendant should make provision for her future maintenance at the same rate, as long as he should not cohabit with her.

The defence was, that the defendant's signature to the kabinamah had been obtained by the plaintiff's father fraudulently misrepresenting the status of the plaintiff among Mahomedans, which the defendant found afterwards to be much lower than his own; that the dower was not wholly payable on demand, but that a portion of it was deferred dower, and the kabinamah had been altered in that respect; that the plaintiff was not entitled to maintenance, as she had never lived with the defendant and the marriage had never been consummated. The defendant appeared in person at the hearing.

WILSON, J. gave the plaintiff a decree for the dower and for Rs. 1,400 for arrears of maintenance, from March 1878 until the end of June 1880, at the rate of Rs. 50 a month; and it was further ordered, that "the defendant should pay monthly to the plaintiff, during the term of her natural life, Rs. 50, from the 1st July 1880, for her maintenance and support."

From this decision the defendant appealed.

Mr. Piffard for the Appellant.

Mr. Bonnerjee and Mr. Trevelyan for the Respondent.

The Judgment of the Court (GARTH, C. J., and PONTIFEX, J.) was delivered by

Garth, C. J.—The only material question which we are called upon to decide in this appeal, is as to the maintenance. The plaintiff's right to the dower is hardly disputed.

Mr. *Piffard* certainly contended, in the first place, that the defendant was placed at a great disadvantage at the trial in consequence of being obliged to conduct his own case ; and urged that the Court should allow him a new trial upon payment of costs. But there is clearly no ground for this contention. The defendant has never applied for a new trial in the Court below, and any disadvantage under which he has laboured is due to his own default.

With regard to the question of maintenance, Mr. *Piffard* does not object to the amount of the monthly allowance ; but he contends that the decree is erroneous in two respects : first, that no order ought to have been made for past maintenance ; and second, that it should have been made payable, not during the plaintiff's natural life, but only during the continuance of the marriage.

As the defendant conducted his own case at the trial, it would appear that the attention of the learned Judge was never called [633] to either of these points ; but upon reference to the authorities, we think that Mr. *Piffard's* contention is well founded.

As to the first point, the law is stated thus in Baillie's Digest, p. 443 :— " When a woman sues her husband for maintenance for a time antecedent to any order of the Judge or mutual agreement of the parties, the Judge is not to decree maintenance for the past." And the same rule is laid down in much the same terms in the Hedaya, Vol. I, p. 398, and quoted in the Tagore Law Lectures for 1873, p. 453. We think, therefore, that as in this case no decree or agreement for maintenance was made before this suit, the maintenance should have been made payable only from the date of the decree.

We think it also quite clear that maintenance can only be payable during the continuance of the marriage.

The decree will, therefore, be modified accordingly, and as the appellant has partially succeeded, we think that the parties should pay their own costs of this appeal.

*Decree varied.*

Attorneys for the Appellant : Messrs. *Dhur* and *Dhur*.

Attorney for the Respondent : Mr. *Leslie*.

#### NOTES.

#### [MAHOMEDAN LAW—WIFE'S MAINTENANCE—

[See also (1896) 19 All. 50 ; (1889) 7 Bom. 180 ; (1882) 5 All. 226. For the difference between the Shiah Law and the Sunni Law, see *Tyabji's Mahomedan Law* (1913) p. 236.]

[6 Cal. 636]

## INSOLVENCY JURISDICTION.

*The 18th, 19th, and 20th January, and 7th February, 1881.*

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE PONTIFEX.

In the matter of Morgan and another.....Insolvents.

E. S. Gubboy

*versus*

A. B. Miller.

*Insolvent Act (11 and 12 Vict., c. 21, s. 23)—Reputed Ownership—Possession, Order, or Disposition—Consent of True Owner—Partner out of Jurisdiction—Mortgage of Chattels—Priority.*

In 1878 the members of the firm of *A and Co.* mortgaged the live and dead stock, chattels, and effects belonging to the firm to *B*, the mortgage deed containing a clause to the effect that as long as there was anything due on the mortgage, the mortgaged property should be treated and considered as the property, and in the order and disposition, of the mortgagee. *A and Co.* sub-[634]sequently obtained further advances from *B*: at this time *A* was residing out of the jurisdiction of the Court, and the instruments creating the further charges were signed by his attorney. *C and D*, the two members of the firm residing in Calcutta, remained in possession of the mortgaged property up to the 10th May 1880, when they became insolvent, and their property was vested in the Official Assignee, who entered into possession. On the 12th May the mortgagee also entered into possession. On the 26th June *A*, the remaining partner of the firm, returned to Calcutta and filed his petition of insolvency.

Upon a petition by the mortgagee claiming to be paid his mortgage-money in priority to the other creditors of the firm,—

*Held*, that the goods and chattels of the firm which were covered by the mortgage and further charges did not vest in the Official Assignee upon the insolvency of *C and D*.

*Reynolds v. Bowley* (L. R., 2 Q. B., 474; in the Court below, *Id.* 41) and *Ex parte Dorman* (L. R., 8 Ch., 51) followed; *In re Hill Ex parte Lepage* (*Post* p. 636, note) distinguished.

APPEAL from a decision of BROUGHTON, J., dated 24th July 1880.

In this case it appeared that Richard Morgan, William Forbes, and Thomas Smith carried on business, as livery stable-keepers, in Calcutta, under the style of "Thomas Smith and Co." The business was carried on by Morgan and Forbes, Smith taking no part in the management, and residing in England. On the 5th May 1878 Morgan, Forbes, and Smith mortgaged all the live and dead stock, chattels and effects, good-will, debts, and sums of money outstanding, belonging to the business, to one Elias Gubboy, to secure the repayment of the sum of Rs. 35,000, with interest. The mortgage-deed contained a proviso that, as long as any money remained due on the mortgage, the mortgaged property should be treated and considered as the property and in the order and disposition of the mortgagee. On the 27th May 1878, and the 24th April 1879, further advances were made to the firm by Gubboy. These further charges were executed on behalf of Smith by his attorney. The mortgaged property remained in the possession of the mortgagors. On the 10th May 1880, Morgan and Forbes filed their petition in the Court for the Relief

of Insolvent Debtors, and their estate and effects vested in the Official Assignee, who entered into possession. On [636] the 12th May, the mortgagee entered into possession. On the 26th June, Smith returned to Calcutta and filed his petition.

The mortgagee now filed a petition, praying that the property comprised in the mortgage might be sold, and that his claim might be satisfied in priority to that of the other creditors. He contended that the mortgaged property was not, by the consent of the true owners, in the possession, order, or disposition of the insolvents as reputed owners, within the meaning of s. 23 of the Insolvent Act.

Mr. Phillips and Mr. Trevelyan for the petitioner.

Mr. Kennedy for the Official Assignee.

Mr. R. Allen for an opposing creditor.

Mr. Phillips.—Section 23 of the Insolvent Act does not affect the mortgage. This case comes within the principle laid down in *Reynolds v. Bowley* (L. R., 2 Q. B., 474 ; in the Court below, *Id.*, 41), which decides, that where one partner allows the other, *bonâ fide*, to carry on the business ostensibly as his own, on the bankruptcy of the latter, the share of the dormant partner in the partnership stock-in-trade cannot be dealt with as in the possession, order, or disposition of the bankrupt as reputed owner with the consent of the true owner. Here Smith was not insolvent at the time of the insolvency of the other partners. In *Ex parte Dorman* (L. R., 8 Ch., 51), the Lords Justices held, that the clause relating to goods in the possession, order, or disposition of a bankrupt is confined to cases where the bankrupt is in the sole possession of goods as the sole reputed owner ; and they say,—“ It is obvious that if the clause was held to apply to every case where goods, with the permission of the true owner, are left in the possession of a bankrupt, jointly with others as reputed owners, great injustice would be done in every case in which goods are left in the possession of a firm, one of whose members becomes bankrupt. It surely never could have been intended that if goods are left by the true owner in the possession of the firm of A and B, of whom A becomes bankrupt, but B remains solvent, the goods should [636] become the property of A divisible among his creditors.” That case was approved of in *In re Bainbridge* (L. R., 8 Ch. Div., 218), where it was pointed out that *Ryall v. Rowles* (1 Ves., Sen., 375 ; s. c., 1 Atk., 164) is no longer law.

Mr. Kennedy for the Official Assignee.—At the time when the petition was filed, so far as the mortgaged property was the property of Gubboy, the insolvents had, by the consent and permission of the true owner, in their possession, order or disposition, goods and chattels, of which they were the reputed owners, and of which they had taken upon themselves the sale, alteration, or disposition as owners. Such goods and chattels, therefore, became their property, so as to become vested in the Official Assignee. There was nothing to interfere with the management, sale, order, or disposition of the insolvents ; and they did in fact deal with the property as owners. The insolvents, therefore, had in themselves the management of the property. The cases of *Reynolds v. Bowley* (L. R., 2 Q. B., 474 ; in the Court below, *Id.*, 41) and *Ex parte Dorman* (L. R., 8 Ch. 51) are distinguishable. This case comes within the principles laid down in *Ryall v. Rowles* (1 Ves., Sen., 375 ; s. c., 1 Atk., 164). It has been said on the other side that *Ryall v. Rowles* (1 Ves., Sen., 375 ; s. c., 1 Atk., 164) has been overruled. But in *In re Bainbridge* (L. R., 8 Ch. Div., 218), which is cited as an authority for that proposition, it was merely said, that the law had been altered by statute, not that *Ryall v. Rowles* (1 Ves.

Sen., 375 ; s. c., 1 Atk., 164) had been overruled. The law laid down in *Ryall v. Rowles* (1 Ves., Sen., 375 ; s. c., 1 Atk., 164) is untouched. In *In re Hill*\* decided by PONTIFEX, J., [637] August 14th 1874, one Lepage, the original owner of a business, sold it to three persons, taking from them a mortgage of the stock-in-trade, etc., and leaving them in possession. Ultimately, the partners consisted of Hill, the insolvent, and one Hogan, who was a dormant partner and lived out of the jurisdiction. The whole of the property remained in the possession of, the insolvent, with the consent of Hogan. *Ex parte Dorman* (L. R., 8 Ch., 51) and *Reynolds v. Bowley* (L. R., 2 Q. B., 474 ; in the Court below, *Id.*, 41) were cited, and it was argued that the principle of those cases prevented the property from being in the [638] order and disposition of Hill. But PONTIFEX, J., held, that the goods were in the order and disposition of Hill only, and that Lepage had no preferential right. *Reynolds v. Bowley* (L. R., 2 Q. B., 474 ; in the Court below, *Id.*, 41) is the case of a dormant partner, but what was there held was, that the dormant partner was actually in possession. He was not a mortgagee, the whole of the property belonged to him, that is to say, was in the order and disposition of the insolvent partner. Here the person who claims leaves the property in the disposition of persons who are insolvent. Gubboy was the true

\* *In re Hill. Ex parte Lepage.*

In this case one Lepage sold his business, which was carried on under the name of "C. Lepage & Co.," to three persons named Barham, Hill, and Seymour. The name of the firm was immediately changed to "Barham, Hill, & Co." Part of the purchase-money remained outstanding, and the good-will, stock-in-trade, shop-furniture, and book-debts of the business were mortgaged to Lepage by his vendees, subject to a proviso for redemption on payment within seven years of the principal sum secured and interest. In 1870, Seymour, with the consent of Lepage, sold his share in the business to one Thomson, who agreed to become liable to Lepage for all claims which Lepage might have against Seymour. In 1871, the share of Barham (who was dead) was sold by his executor to Hill and Thomson, who agreed to become liable to Lepage in respect of such share. In 1871, Hill and Thomson executed a bond in favour of Lepage, for the purpose of securing the sum of Rs. 24,936 then due to him on the mortgage ; and to secure certain other sums due by them to him, gave him their joint and several promissory note for Rs. 27,648. In December 1871, Thomson left India owing to ill-health, and shortly afterwards sold his share to one Hogan, remaining however liable to Lepage. Thomson was never advertised out of the firm in consequence of a private arrangement between himself and Hogan, who was admitted as a dormant partner. In 1879 Hill became insolvent, and filed his petition. Lepage filed a petition claiming priority.

Mr. Phillips for Lepage.

Mr. Kennedy and Mr. Evans for the Official Assignee.

Mr. Watson for Hill.

PONTIFEX, J.—Lepage claims to be not only a creditor of the estate, but a secured creditor. He claims under a deed which provided that he was not to be paid for seven years. The property was left in the possession of Hill. Mr. Phillips says, that the property was not in his possession with the consent of the true owner. The proviso in the deed does not affect his possession—*Reynolds v. Bowley* (L. R., 2 Q. B., 474 ; in the Court below, *Id.*, 41) ; *Spackman v. Miller* (12 C. B., N. S. 659).

The claimant has consented to Barham, Hill & Co. being in possession of the property mortgaged to him, and if it remained so, he could not take. Mr. Phillips has cited *Ex parte Dorman* (L. R., 8 Ch., 51) and *Reynolds v. Bowley* (L. R., 2 Q. B., 474 ; in the Court below, *Id.*, 41). In both these cases the possession of the property was the possession of both partners, and therefore was not such a sole possession, order, or disposition as required by s. 23 of the Insolvent Act. This case is different. Hogan was out of the jurisdiction, and was a dormant partner. Neither of the authorities cited would operate to enable the Official Assignee to succeed in any action against Hogan, and I do not see why Lepage is to be in a better position. The only person in whose possession, order, or disposition the goods were was Hill.

Proof allowed subject to adjustment of the amount with the Official Assignee. In case of difference, to be referred to the Court. Preferential right disallowed, and the petitioning creditor to take rateably with the other creditors.]

owner, and the property was in the order and disposition of the insolvents. Gubboy had the power to resume his rights, to take the property out of the possession of the persons to whom he had entrusted it, and therefore he was the true owner. In *Ex parte Dorman* (L. R., 8 Ch., 51), the property was in the possession of the solvent partner as well as in that of the insolvent partner. But the case is different here. The property was in the possession of the insolvent partners alone. Here the horses were kept for the purpose of being hired out, and the fact that the insolvents did let them out would strengthen the belief of the creditor that the insolvents were the actual owners. The interest of the partners in the partnership property\* was such as to be within their, order and disposition, and they did deal with and dispose of it; *Hornsby v. Miller* (1 E. & E., 192). With respect to the rights of the mortgagee in substituted property, the mortgage-deed provides, that the mortgagors shall make over the live and dead stock, etc., to the mortgagee on demand in writing. That might include substituted and additional stock. But the right does not arise until demand in writing has been made, and there is no evidence of any such demand.

Mr. Allen for an opposing creditor.—This case is within the mischief which the Insolvent Act endeavours to prevent. Credit was acquired by the insolvents having possession of and dealing with the property. My clients dealt with the insolvents upon the faith that the property in the possession of the insolvents was their own property. It was in their visible possession, [639] and was actually dealt with by them as owners, at least, so far as regarded the public: *Ex parte The Union Bank of Manchester, In re Jackson* (L. R., 12 Eq., 354). Smith was neither in possession, nor exercising any rights of ownership. The mortgagee was the true owner. The three partners executed the mortgage, conferring the ownership on Gubboy. He allowed the property to remain in the possession of the insolvents; therefore, on the plain construction of s. 23, the property was in the possession of the insolvents with the consent and permission of the true owner. The case is clear, unless it is to be considered as affected by the English authorities. *Reynolds v. Bowley* (L. R., 2 Q., B., 474; in the Court below, *Id.*, 41) is distinguishable. The real reason of the decision in that case was, that, on the facts, the Court could not say that it came within s. 123 of 12 & 13 Vict., c. 106. The person in whose possession the property was, was both real and reputed owner. His sister was also real owner jointly in possession with him. She had transferred none of her rights. See the judgment of PHEAR, J., in *In re Agabey* (2 Ind. Jur., N. S., 240). *Ex parte Dorman* (L. R., 8 Ch., 51) is also distinguishable. There the property was in the reputed ownership of the infant. Here Smith is out of possession, and out of the jurisdiction. He is really insolvent. Had he been here, there would have been no difficulty. Does the fact of his absence improve the mortgagee's position? He has parted with his right as owner.

Mr. Phillips in reply.

BROUGHTON, J. (after stating the facts of the case, continued).—The Official Assignee contends, that the property was in the possession, order, and disposition of the insolvents within the meaning of the 23rd section of the Insolvent Act, and must be deemed to be the property of the insolvents, Morgan and Forbes.

If the Official Assignee is wrong in this contention, it follows that the substantial partner of a business in Calcutta may [640] leave the country, mortgage the whole of his share in the business for its full value, and leave his partners, who may be men without any or with very little capital, to carry on the business on the same scale as before, while the mortgagee, who is the real

owner, may lie by; and if he only steps in after the partners here have filed their petitions, but before the partner who is absent has time to come out and do the same, may sweep away the whole of the assets of the partnership, and leave the other creditors, who may have dealt with the firm on the credit of its apparent wealth, with nothing. It seems to me that this is a state of things directly in conflict with the spirit of the 23rd section of the Insolvent Act, which is intended to prevent traders trading on fictitious credit. Nevertheless, if the law is so, it must be obeyed; and Mr Phillips, on behalf of the mortgagees, contends, upon the authority of certain cases decided in the English Courts upon similar sections of the Bankruptcy Acts, that so it is.

The words of s. 23, upon which the question turns, are these:—"If any such insolvent shall, at the time of filing the petition, by the consent of the true owner thereof, have in his possession, order, or disposition any goods or chattels, whereof such insolvent is reputed owner, or whereof he has taken upon him the sale, alteration, or disposition as owner, the same shall be deemed to be the property of such insolvent so as to become vested in the Official Assignee of the Court by the order made in pursuance of the Act."

The first case upon which Mr. Phillips relies, in order of date, is the case of *Reynolds v Bowley* (L. R., 2 Q. B. 474; in the Court below, *Id.*, 41).

In that case the plaintiff was the sister of Mr. T. H. Reynolds, a cowkeeper, who was adjudged bankrupt on the 9th December 1864. The defendants were the creditor's assignees.

The plaintiff and her brother owned a number of cows and the stock of a dairy farm, in equal shares; and they entered into a written agreement to carry out the business with an equal share in the profits. They agreed to take the farm on a 14-years' lease, and in the case of the death of Mr. T. H. Reynolds, [641] the plaintiff was to retain her interest or share in the lease. The plaintiff also agreed to be a sleeping partner, the business to be conducted and carried in the name of T. H. Reynolds. The lease was granted to T. H. Reynolds alone. They both resided at the farm-house. The plaintiff did not interfere in any way with the management of the business, but devoted her whole time and labour to assisting her brother. It was not generally known that the plaintiff was a partner, although it was known to their relatives and friends, and to some of the tradesmen in the neighbouring town, Swindon. The plaintiff and her brother drew equally on account of their shares in the profits.

On November 16th the brother being embarrassed on account of a bill accepted by him for a brother, absconded, and then committed an act of bankruptcy, of which the plaintiff had notice; but she remained on the farm selling the milk, &c., until the property was seized by the messenger of the Court.

On the 9th of December, T. H. Reynolds was adjudicated a bankrupt, and the defendants were appointed creditors-assignees, and the messenger seized the stock on the same day under the usual warrant. On the 10th of December, notice was given to the defendants that the plaintiff claimed an interest in the stock. In January 1865 the defendants, under an order of the Court, sold the stock. Under these circumstances, the Court of Queen's Bench held, on the authority of the decided cases, but with some doubt, that the stock was in the possession and order and disposition of the bankrupt with the consent of the true owner, and might be dealt with under s. 125 of 12 and 13 Vict., c. 106, a section similar in its terms to the 23rd section of the Indian Insolvent Act. But this decision was reversed by the Court of Exchequer Chamber. The Chief Baron adopted the words of Baron PARKE in *Load v. Green* (15 M. and W. 216, see p. 223), viz., that the true owner must be one person, and the apparent



owner another person, in order that the property might pass to the creditors-assignees; and that, as the brother, who was bankrupt, and the sister were equally entitled to possession and equally owners, the section did not apply. Mr. Justice WILLES and Baron BRAMWELL came to the same conclusion as the Chief Baron, but put it on the ground that the bankrupt was not in [642] fact in sole possession of the property; his sister was as much in possession as he was.

The case of *Reynolds v. Bowley* (L. R., 2 Q. B., 474; in the Court below *Id.*, 41), differs from the present case in this particular, namely, that the property was in the possession of the bankrupt. In the present case, the third partner, Thomas Smith, acting by his attorney, had mortgaged the property to the present claimant, who was the true owner—*Ex parte Union Bank of Manchester, in re Jackson* (L. R., 12 Eq., 354).

But then it is said that the property was not in the order and disposition of Morgan and Forbes, but of the three partners—Smith, Morgan, and Forbes; and at the date of the insolvency of the two latter, Smith was not insolvent, so that the mortgagee had a right to come in and claim the property on the 12th of May, and the case of *Ex parte Dorman* (L. R., 8 Ch. 51) is relied on.

In that case Dorman, the landlord, let his house to a partnership, consisting of two partners—Lake and Clench. Clench was a minor. There were certain trade fixtures, and there was some machinery in the house used in the business of the partnership, the two partners being in possession.

On the 29th September 1871, both Lake and Clench committed an act of bankruptcy. On the 23rd November Lake was adjudicated bankrupt, but no petition in bankruptcy was presented against Clench on account of his infancy. Dorman claimed the machinery, plant, and type comprised in the lease; but it was ordered by the Registrar in Bankruptcy, sitting as Chief Judge, to be made over to the Trustee in Bankruptcy. From this order Dorman appealed. The words of the section of the Act upon which this decision rested (32 and 33 Vict., c. 11, s. 15, cl. 5) are similar to those of s. 23 of the Indian Insolvent Act, and the Lords Justices held, that the clause was confined to cases where the bankrupt is in the sole possession of goods as the sole reputed owner. The judgment was delivered by Sir George MELLISH, who gave his reasons for the decision very fully. He said:—"It is obvious that if the claim was held to apply to every case where goods with the permission of the true owner, [643] are left in the possession of a bankrupt, great injustice would be done in every case in which goods are left in the possession of a firm, one of whose members becomes bankrupt. It surely never could have been intended that if goods are left by the true owner in possession of the firm of A and B, of whom A becomes bankrupt, but B remains solvent, that the goods should become the property of A, divisible among his creditors. Cases have happened in which one member of a most wealthy and solvent firm has, from his private extravagance, become bankrupt, and surely it would be absurd that all persons who had trusted the firm with the possession of their goods should be deprived of their property. Then does it make any difference that in this particular case the person who was in possession of goods with the bankrupts as reputed owners was an infant? We think it makes no difference. The fact of Clench being an infant did not prevent him from being in possession of the goods jointly with Lake, nor from being one of the reputed owners of the goods. The lease to him was not void, but only voidable, and Lake having knowingly entered into a contract of partnership with an infant, could not deprive him of his rights as a partner. It was argued, indeed, that the case came within the mischief against which the order and disposition

clause was intended to provide, and we think it must be admitted that it does ; but still a consistent construction must be put upon the clause, and we think it must be construed either as confined to cases in which the bankrupt is solely in possession, or as extending to all cases in which the bankrupt is in possession jointly with others. There are no words in the clause which enable us to distinguish between cases which we might think within the mischief intended to be prevented, and cases to which the clause was plainly not intended to apply. We cannot, for instance, make a distinction between cases in which the partner of the bankrupt is solvent, and cases where he is insolvent, though for some cause he is not made bankrupt ; or between cases in which the partner of the bankrupt is an infant and cases in which he is of full age."

This decision was followed by the Chief Judge in Bankruptcy, Vice-Chancellor BACON, who said :—"The Act of Parliament is perfectly clear, and even if I had not the assistance of *Ex parte* [644] *Dorman* (L. R., 8 Ch., 51), and if I was not bound by that case, I should act upon it. It is as clear as anything can possibly be."—*In re Bainbridge* ( L. R., 8 Ch. Div., 218).

The Lord Chief Justice of England, in deciding the case of *Reynolds v. Bowley* ( L. R., 2 Q. B., 474 ; in the Court below *Id.* 41), in the first instance pointed out that there might be cases of hardship on either side ; and from the judgment in *Ex parte Dorman* (L. R., 8 Ch , 51) it must be taken as decided in England, that the section must receive a consistent construction, independent of the circumstances of the particular case , and as the Indian enactment is an Act of Parliament identical in its terms, and having the same object, these decisions are, I conceive, binding upon me ; and the reasons upon which they proceed must also be admitted, as Mr. *Phillips* contends, to be unanswerable.

There is, however, a marked difference between the present case and the two cases of *Reynolds v. Bowley* (L. R., 2 Q. B., 474 ; in the Court below *Id.*, 41) and *Ex parte Dorman* (L. R., 8 Ch., 51). In both these cases the partners were actually in possession and on the premises. Here one partner was absent from the country, and the only persons who were in actual manual possession of the property were the two insolvents. This, it seems to me, must be the possession contemplated by the Statute, the object of which is to prevent a trader acquiring a false credit by having in his visible possession another person's property.

In the present case there is a clause in Mr. Gubboy's mortgage to the effect, that as long as there is any money due to him upon it, the stock-in-trade upon the premises in the occupation of the insolvents shall be treated and considered as the property and in the order of Mr. Gubboy, the mortgagee. Mr. *Phillips* has drawn my attention to this clause, but he does not to any extent rely upon it ; he rather puts his argument on the decisions of the English Courts in the cases I have quoted. I should hold that the clause itself cannot override the Act of Parliament, and that the parties cannot make a contract, the effect of which would be, if it were upheld, to deprive the public of the benefit of a law enacted for their protection.

Mr. Gubboy did, however, himself rely upon this proviso and abstained from taking actual possession of the premises until [645] after the 10th May, when Messrs. Morgan and Forbes filed their petition, and when the vesting order on that petition was made.

It is said that the fact that the firm was carried on in the name of T. H. Smith, and not in that of the other partners, supports the contention of Mr. Gubboy. That argument is, I think, answered by observing that it is a matter

of notoriety that partnerships are often carried on in the names of persons who have long ceased to have any connexion with the business. The question seems to me to be—"To whom was credit given?" and the answer is—"To the ostensible partners, Messrs. Morgan and Forbes." And the further question is—"Why was that credit given to them?" The answer is—"Because they appeared to be the owners of a large stock of horses and carriages of their own, dealing with them as their own on the premises in which they were in visible occupation." It cannot be supposed that Mr. Allen's client, a native dealer in hay and straw, would have allowed Messrs. Morgan and Forbes to run up a bill to the amount of Rs. 10,000 if he had known that the real owner of the property was Mr. Gubboy, with whom he made no contract, or that Mr. T. Smith, who resided in England, was in possession of the property. On this ground, I am of opinion that this case can be clearly distinguished from the cases relied on for the mortgagee. I do not come to this conclusion in the absence of authority: I refer to the observation of Mr. Justice WILLES in the case of *Reynolds v. Bowley* (L. R., 2 Q. B., 474; see p. 481), who says:—"I am clearly of opinion in accordance with the conclusion of the Lord Chief Baron, that the fact of a business being carried on in the name of an ostensible partner does not necessarily make a reputed ownership in the partner whose name is used. Such a partner may or may not be—I think in this case he was not—a reputed owner."

I have said that, in my view, the use of the name "Thomas Smith" is not material. Messrs. Morgan and Forbes might call themselves Thomas Smith and Co., if they wished to do so, and did not infringe the rights of others in so doing, and I think this is one of those cases to which Mr. Justice WILLES refers, and [646] that I have his authority for holding that Messrs. Morgan and Forbes were the reputed owners, and that the property was in their order and disposition.

There was also a case (*ante* p. 636, note), decided in August 1874 by Mr. Justice PONTIFEX, in which the circumstances were somewhat similar, and in which both the English cases quoted by Mr. *Phillips* were discussed. The case was that of the insolvency of Mr. Hill, of the firm of Barham and Hill, the booksellers. Mr. Lepage who originally owned the business, had sold it to Messrs. Hill and Seymour and to the executors of Mr. Barham, taking a mortgage to secure his purchase-money, and leaving the new firm in possession. There were subsequently some changes among the partners; and at the time of Hill's insolvency, the firm consisted of Messrs. Hill and Hogan. The latter was a Government servant, and on that account stipulated that he would not take any active part in the management, but was to be a sleeping partner; and he left the whole of the property in the possession of his partner, Hill, who was then in sole actual possession with the consent of his partner Hogan, and of Lepage the mortgagee. It was held, that the property vested in the Official Assignee. So here, I think, that the property was in the order and disposition of the insolvents, Morgan and Forbes, and upon their insolvency vested in the Official Assignee; and that the petition of Mr. Gubboy to be paid in Full must be refused.

The Official Assignee informs me that this question has been argued by arrangement on this petition to avoid the expense of a suit, and agrees that the costs of all parties be paid out of the estate.

From this decision Mr. Gubboy appealed.

The *Advocate-General* (Mr. G. C. Paul) and Mr. *Phillips* for the Appellant, Mr. *Kennedy* and Mr. R. Allen for the Official Assignee.

Mr. Phillips.—It is contended that, though Smith was entitled to one-half of the property, it must be considered that Gubboy [647] left the whole of the property in the order and disposition of Morgan and Forbes to the exclusion of Smith. It is not shown that he knew that Smith was absent. It is more probable that Gubboy would prefer to trust Smith than the junior partners. *Reynolds v. Bowley* (L. R., 2 Q. B., 474; in the Court below, *Id.*, 41) shows that the partner out of the country cannot sweep away the assets of the concern as the learned Judge in the Court below thought he could. It is not shown that Gubboy assented to Morgan and Forbes having exclusive disposition; it can only be inferred from the fact that they were the only partners here. I only admit that Smith was out of the country when the further charges were made. In *Reynolds v. Bowley* (L. R., 2 Q. B., 474; in the Court below, *Id.*, 41) the Court considered the case to be that of a secret partner. It is not pretended that Smith was a dormant partner; he was merely out of the country. [PONTIFEX, J.—In all the English cases the partner was in the country and in possession. Might not the decisions have been different if the partner had been abroad?] There is nothing in *Reynolds v. Bowley* (L. R. 2 Q. B., 474; in the Court below, *Id.* 41) which shows that the case turned in any way on the partner being on the spot. Smith, by going to England, did not leave his goods in the sole disposition of the other partners; they held for him and themselves. Suppose that they all went away, would they all be out of possession? If the property had been left in charge of a manager, would it have gone to his assignees? If a man goes away from his house, leaving his servants in charge, he remains in possession of the goods in the house.

In *Ex parte Dorman* (L. R., 8 Ch., 51) the possession was possession as partners; there was nothing about "actual" possession. Here Smith was carrying on trade; further charges for the purposes of the trade were made by his attorney. Possession in the popular sense is not the possession meant by the Statute. Otherwise possession by a servant would pass the master's goods to the assignee on the servant's insolvency. Suppose, after the insolvency of Morgan and Forbes, Gubboy had allowed the goods to remain in Smith's possession, then they would have been in his order and disposition, and would have passed to his assignee. In *In re Bainbridge* (L. R., 8 Ch. D., 218), BACON, C. J., says:—"Can it be said [648] that these two gentlemen carrying on partnership together, any one part of this property remained in the order and disposition of the bankrupt with the consent of the true owner? Not only do I adopt the judicial interpretation in *Ex parte Dorman* (L. R., 8 Ch., 51) and say, that s. 15 sub-section 5, relates to sole possession of that kind alone, but I say that it must be necessarily so, for it is impossible to point out anything in the case to show that either of these partners was more a partner than the other. Partners are possessed *per mie et per tout*; and each of them was lawfully in possession of the whole of the assets, but not exclusively in possession, not solely in possession." [GARTH, C. J.—Might not the shares of the partners only pass?] The reason that anything of Gubboy's would pass would be because he had left it in the possession, order or disposition, and reputed ownership of the insolvents. It cannot be said that he left it in their possession according to their shares, so that if one became insolvent his share would pass. There are no words in the Act which refer to shares. In *re Bainbridge* (L. R., 8 Ch. D., 218) was the case of a share, and it was held that it did not pass. This case turns on Gubboy's having the legal right in the goods and chattels. If the decision is correct, they would pass to the Official Assignee on the insolvency of any person in whose possession they happened to be to the

exclusion of both mortgagor and mortgagee. Credit was not obtained by the possession of the mortgaged goods. In *Belcher v. Bellamy* (2 Exch. 309), PARKE, B. says :—"It is evident that, at the present day, a trader does not obtain credit by the possession and apparent ownership of other persons' goods, but in consequence of his general estimation as a merchant. In order to bring a case within the provisions of the Bankrupt Act, there must be a real owner distinct from the apparent owner, and the real owner must have consented that the trader should have possession of the goods." Here Thomas Smith & Co., was the name of the firm ; it is useless to talk of persons advancing money on the faith of Smith not being a member of the firm : *Ex parte Vaux* (L. R., 9 Ch. App., 602).

[649] Mr. Kennedy for the Official Assignee.—The case of *In re Bainbridge* (L. R. 8 Ch. D., 218) was based on a Statute which is not in force here. *Ryall v. Rowles* (1 Ves. Sen., 375 ; s. c. 1 Atk., 164) is still an authority ; it has only been impeached to this extent, that, as far as goods and chattles are concerned, the law has been altered by Statute. In *In re Bainbridge* (L. R. 8 Ch. D. 218) all that passed by virtue of the assignment was purely a *chose in action*. *Choses in action* are excluded by the late Bankruptcy Act in England from the operation of the order and disposition clause, they were included under goods and chattels in the old Acts. Taking the whole of this mortgage-deed together, it appears to be framed for the purpose of infringing the insolvent law and sweeping away the property of these persons from their creditors. Such a clause is in direct contravention of s. 23 of the Insolvent Act. Gubboy knew that in case of insolvency he might be treated as having allowed his property to be in the order and disposition of the insolvents, and therefore liable to be applied in paying the other creditors of the firm, and he tried to avoid that. Assuming that the firm was insolvent, the effect of a partner remaining abroad does of itself make him the subject of the insolvent law. The law infers from the natural consequences of a man's act that his intention was, the consequences should follow—Griffith and Holmes' Bankruptcy, 98. Mere constructive possession in a person who really has nothing to do with the property is not actual possession of property. In all the cases there was actual manual possession. In *Reynolds v. Bowely* (L. R., 2 Q. B., 474 ; in the Court below, *Id.*, 41), KELLY, C.B., says :—"It is not to be denied that there may be cases of a partnership in which goods shall be in the possession, and in the apparently exclusive ownership, of the ostensible partner, so as to enable him to obtain credit by reason of his possession and apparently exclusive ownership by which a body of creditors may be wronged and even defrauded ; and in which such a possession may be entrusted to him by another member of the partnership under circumstances in which the property ought to pass to the assignees of the bankrupt." That was the view taken in *In re* [650] *Hill* (*Ante* p. 636) note. That case decides that where a partner is not really in possession, the possession, order, and disposition are with the partner in charge. These goods were in the sole possession and in the sole reputed ownership of Morgan and Forbes—*Ex parte Dorman* (L. R. 8 Ch., 51). Section 23 only applies to a class of goods the possession of which implies property, not to the case of factors and commission agents. The mortgagee is the true owner ; all the cases go upon that. The word "possession" should have such a meaning as to exclude a person not in actual possession. The words of the Act are possession, order or disposition, not order and disposition. The insolvents took upon themselves the "sale, alteration or disposition" of the mortgaged property. That is a question of fact—*Horn v. Baker* (9 East, 215). and *Ex parte Emerson* (41 L. J. Bkey., 20).

Mr. *Allen* on the same side.—Gubboy endeavoured to contract himself out of his liability under s. 23. The object of that section is to render available for creditors that property which has been held out to the public as a basis for credit. The question is one between the creditors and the true owner. The creditors would not have trusted Morgan and Forbes if they had known the property was Gubboy's. Morgan and Forbes were exercising rights of ownership. This is precisely the case which the section was meant to provide against, a case where one person is enabled to obtain a false credit by the possession of goods which really belong to some one else. The section refers to actual possession, to the case of a creditor seeing his debtor apparently exercising rights of ownership over property which really belongs to a third party. Such actual possession is distinguishable from constructive possession. Actual possession once fully acquired can only be lost by deliberate intention on the part of the owner to give up possession.—Domat, Bk. III, Tit. 7, s. 1. Smith was not in possession of any of the goods. Morgan and Forbes were in possession. There cannot be a passive acquisition of property. There is a distinction between acquiring a right to possess and acquiring [651] possession.—Domat, Bk. III, Tit. 7, s. 2. The thing possessed must be certain: there must be a present intention in the mind of the possessor to possess a certain and definite thing. The possession of Smith was not actual, it could only have been constructive. He could only have the right to possess things bought during his absence. He was not an active partner. His only acts were the mortgage and further charges. He must be treated as a sleeping partner; there is no evidence of his active interference with the affairs of the firm which was carried on by Morgan and Forbes. The mere use of the words "Thomas Smith & Co.," is not sufficient to show that he was an active partner. In *Reynolds v. Bowley* (L. R., 2 Q. B., 474; in the Court below, *Id.*, 41) the facts did not show that the real owner was separate from the apparent owner.—In *re Agabeg* (2 Ind. Jur., N. S., 340). In *Reynolds v. Bowley* (L. R., 2 Q. B., 474; in the Court below, *Id.*, 41) there was actual possession by the brother and sister; both were actively working in the business. Here there was no active interference on the part of Smith. His possession could only be said to be constructive. There was consent to the reputed ownership of Morgan and Forbes—*Load v. Green* (15 M & W., 216).

In *Ex parte Dorman* (L. R., 8 Ch., 51) there was actual possession. The goods possessed were owned by the landlord. the lessees had only the right of user. They could have made no title nor have passed any property in the goods. To make that case an authority, it must be extended to a case of constructive possession.

Mr. *Phillips* was not called upon to reply.

*Cur. ad. vult.*

The following **Judgments** were delivered :—

**Pontifex, J.** (after stating the facts of the case, continued).—The sole question we have to decide is, whether the absence of Smith in England had the effect of placing the goods and chattels of the firm in the possession, order or disposition of his two partners within the meaning of s. 23 of the Insolvent Act.

If it had that effect, it will be impossible for any partner in a Calcutta firm, even when the firm as a firm is solvent, to go to England without incurring considerable risk.

[652] If it had not that effect, s. 23 becomes almost inoperative whenever a partner in an insolvent firm is in England.

It is, of course, a matter of constant occurrence that some one partner of a Calcutta firm should be in Europe for health or relaxation.

The construction of the section in the English Bankruptcy Act, corresponding with s. 23 of the Indian Insolvency Act, has lately received considerable attention with reference to partners; and the outcome of the decisions is certainly in accordance with common sense; for the section is a limitation of, or derogation from, the rights of the true owner, and accordingly to be construed with strictness. It may be stated thus,—If the possession by one partner of the goods of the firm is justifiable—if the circumstances are such as to show that his possession is for purposes strictly connected with the partnership, then the order and disposition section will not apply. For the goods are not in his sole possession, order or disposition. His actual possession is on behalf of himself and his joint owner.

There may perhaps be cases, such as *Lepage's case* (see *ante*, p. 636, note) decided by myself, and very briefly reported at p. 33 of Vol. VI, Calcutta Reports, where the circumstances may make a material difference. In that case there seems to have been a private arrangement, that the fact of Hogan being a partner should be concealed, he being a Government officer; and the name of Thomson, his predecessor in the firm, was continued with that object, although his interest in the firm had ceased. Hogan was not simply a dormant partner, but from his position as a Government officer, it was necessary for him to conceal the fact of a partnership.

But whether that case was rightly decided or not, it is in my opinion distinguishable from the present case. How can it be said in the present case that the action of Smith in allowing these goods and chattels to remain in the actual possession of his two partners was unjustifiable? He had, according to a very common practice, gone to Europe; there is no evidence to show that he did not intend to return: indeed, during his absence he gave evidence of two emphatic acts of ownership by executing [653] the further charges through his attorney. There is no pretence for saying even that he was a dormant partner, and certainly he did not court concealment, for he allowed the business to be carried on in his own name.

The case of *Reynolds v. Bowley* (L. R., 2 Q. B., 474) decided that the order and disposition section did not apply to the case of a partner who had agreed to be a dormant partner, but who in fact resided on the premises and devoted his whole time and labour in assisting the acting partner in the management of the business. The majority of the Judges based their judgment on the broad ground that the order and disposition section does not apply to cases where the person in possession is himself a joint owner; and, having as much right to possession as his co-owner, holds possession by virtue of his own ownership. I find that Mr. Justice LINDLEY, in considering this case, says in his valuable book, p. 1162 (4th Edn.):—"If this view should prevail, and on principle it appears correct, the clause in question will never be applicable to dormant partners. But until this reasoning has been adopted in bankruptcy, some uncertainty on this important point must exist." But there have been two later decisions confirming the principle of *Reynolds v. Bowley*,—namely, *Ex parte Dorman* (L. R., 8 Ch. App., 51), and *In re Bainbridge* (L. R., 8 Ch. D., 218). In *Ex parte Dorman* (L. R., 8 Ch. App., 51), Lord Justice MELISH said:—"There are no words in the clause which enable us to distinguish between cases which we might think within the mischief intended to be prevented and cases to which the clause was plainly not intended to apply. We cannot, for



instance, make a distinction between cases in which the partner of a bankrupt is solvent and cases where he is insolvent, though for some reason he is not made bankrupt."

The main difficulty which affected me in considering the case arose from the fact that Smith's absence in England put it out of the power of his trade creditors to make him an insolvent here. But a similar difficulty occurred in *Ex parte Dorman* (L. R., 8 Ch. App., 51), where one of the partners was an infant, and therefore not within the Bankrupt Act.

I am of opinion that the goods and chattels of the firm, which [654] were covered by the mortgage and further charges, did not vest in the Official Assignee upon the insolvency of Morgan and Forbes.

A question was raised by Mr. Allen, whether, in consequence of the assignee being in *de facto* possession at the date of Smith's insolvency, Mr. Gubboy can now claim possession. But, in the first place, it is evident, that such *de facto* possession was the result of arrangement, and to be treated without prejudice to the rights of the parties on the 12th May; and in the next place, it cannot be said that, after the 12th May, the assignee was in possession with the consent of the true owner so as to allow the section to operate.

I am, therefore, of opinion that Mr. Gubboy is entitled to the benefit of his mortgage and further charges. But the effect of those deeds must be enquired into and adjudicated on by the lower Court; and for this purpose the case must be remitted there. Mr. Gubboy must have his costs in both Courts. The assignee will be entitled to his costs out of the estate.

Garth, C. J.—I am quite of the same opinion.

The rule laid down in the case of *Ex parte Dorman* (L. R., 8 Ch. App., 51) appears to me to be founded upon the most manifest justice.

It must be quite understood that all questions as to what property of the firm Mr. Gubboy was entitled to under his mortgage-deeds, are left open by our judgment. All we decide is, that he has not been deprived of that property, whatever it was, by force of the provisions of s. 23.

*Appeal allowed.*

Attorney for the Appellant: Mr. Gregory.

Attorneys for the Official Assignee: Messrs. Barrow and Orr.

# NOTES.

[See also (1902) 25 Mad. 406.]



[656] CRIMINAL REFERENCE

The 22nd January and 3rd February, 1881.

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE  
MITTER AND MR. JUSTICE MACLEAN.

The Empress

versus

M. J. Vyapoory Moodeliar.\*

*Evidence, Admissibility of—Receiving illegal gratification—Penal Code (Act XLV of 1860), ss. 161, 165,—Evidence of subsequent but unconnected Receipt, showing footing on which parties stood—Evidence Act (I of 1872), ss. 5-13 & 14.*

The accused was charged with having received illegal gratification from C. and Co., on three specific occasions in 1876. In 1876, 1877, and 1878, C. and Co. were doing business as commissariat contractors, and the accused was the manager of the Commissariat office. Held, that evidence of similar but unconnected instances of receiving illegal gratifications from C and Co. in 1877 and 1878, was not admissible against him under ss. 5 to 13 of the Evidence Act.

Held, per GARTH, C. J. (MACLEAN, J. concurring), the evidence was not admissible under s. 14.

Per GARTH, C. J.—Section 14 applies to cases where a particular act is more or less criminal or culpable according to the state of mind or feeling of the person who does it; not to cases where the question of guilt or innocence depends upon actual facts, and not upon the state of a man's mind or feeling.

Per MITTER, J.—If the receipt of the illegal gratifications mentioned in the charge be considered proved by other evidence, and if it were necessary to ascertain whether the accused received them as a motive for showing favour in the exercise of his official functions, the alleged transactions of 1877 and 1878 would be relevant under s. 14, but they would not be relevant to establish the fact of payments in 1876.

THIS was a reference to the High Court, on a difference of opinion between two Judges sitting as the Special Court of British Burma.

The case referred was as follows :

"The accused was charged under s. 161 of the Penal Code with receiving illegal gratifications, on three distinct occasions, [656] at Tonghoo, in the year 1876, from the firm of Cohen and Co.; and there were also three counts charging him under s. 165 of the Penal Code with reference to the same sums. He was tried before the Additional Recorder and a jury, and acquitted by a majority of the jury on all the charges; and the Additional Recorder, dissenting from the opinion of the majority, referred the case to the Special Court under s. 263 of the Criminal Procedure Code.

"At the trial evidence was admitted of similar, but unconnected, receipts of illegal gratifications by the accused from the same firm of Cohen and Co. during the years 1877 and 1878 at Thayetmyo. At both places, and in the three

\* Criminal Reference, No. 1 of 1880, and Letter No. 8-1, from R. J. Crosthwaite, Esq., and C. F. Egerton Allen, Esq., Judges of the Special Court of British Burma, dated 12th November 1880.

years, 1876, 1877, and 1878, the firm of Cohen and Co. were doing business as commissariat contractors, and the accused was the manager of the Commissariat office, first at Tonghoo, then at Thayetmyo.

"The Officiating Judicial Commissioner, at the hearing before the Special Court, was of opinion that the evidence as to the similar but unconnected receipts of illegal gratifications at Thayetmyo, during the years 1877 and 1878, was not admissible to prove the specific charges relating to the year 1876, and therefore thought that the verdict of the majority of the jury acquitting the accused should not be interfered with. The Additional Recorder was of opinion that that evidence was admissible, and that the verdict of the majority of the jury should be reversed.

"The Officiating Judges, therefore, being unable to agree in a judgment, referred the case under s. 80 of the Burma Courts Act (XVII of 1875) to the High Court of Judicature at Fort William.

"The point as to which the Officiating Judges differ is as follows :

"Whether, in trying the three specific charges of receiving illegal gratifications from the firm of Cohen and Co. at Tonghoo in 1876, evidence of similar, but unconnected, instances of receiving illegal gratifications from the same firm at Thayetmyo in the years 1877 and 1878, is admissible."

The *Standing Counsel* (Mr. Phillips) for the Crown, contended that the evidence was admissible. The footing on which these [687] sums were received may have remained unchanged during the years 1876, 1877, and 1878. It now appears that, in 1878, the footing on which the money was received from the firm of Cohen and Co. by the prisoner was such, that the receipt of the sums was with a corrupt motive; if they were on the same footing in 1876, it would go to show the prisoner's guilt; then it is submitted that the evidence is admissible. [GARTH, C. J.—Could you give evidence to show what happened even at a longer interval, say ten years?] Yes, I submit so. The subsequent conduct of the parties can be looked at to show on what footing Cohen and Co. and the prisoner were. The longer the interval the less would be the probability of the footing having remained the same, and therefore of the evidence being conclusive, but it would be admissible. [GARTH, C. J.—Does it not depend on intention? Is there any question of intention here?] Yes, it is submitted there is; see s. 161, Penal Code. [GARTH, C. J.—Suppose a man charged with theft in 1876: the fact of his having stolen something in 1877, a year afterwards, would be no evidence of the former crime.] In that case there would be no constant element: here we have the parties possibly in the same relation to one another, and on the same footing, subject to alteration of place and detail, which would be immaterial. The evidence cannot be said to be absolutely irrelevant. Proof of subsequent utterance of coin or notes is admissible: see Taylor on Evidence, 7th Ed., § 345, though possibly not if the notes or coin were of a different description.—*Id.*, note 1. Thus in *Rex v. Smith* (4 C. & P., 411), and *Rex v. Taverner* (4 C. & P., 413, note), the evidence was held inadmissible on that account. So in *Rex v. Harris* (7 C. & P., 429). Here the footing was probably the same therefore, evidence of subsequent illegal receipt of money is admissible. Suppose the footing an innocent one. Might not a prisoner give evidence of the footing on which he stood with another person to show he was innocent? Why can evidence not be admitted of the subsequent footing to prove his guilt? The basis would be the same,—*viz.*, that the footing remained identical. The question here is, not whether the evidence is sufficient to convict, but whether it is absolutely [688] inadmissible? In the case of

*Boddy v. Boddy and Grover* (30 L. J., P. & M., 23) evidence of acts of adultery subsequent to the date of the last act charged was held to be admissible for the purpose of showing the character and quality of previous acts of improper familiarity. In the present case, what we want to show is the quality and character of these acts of receiving money. We have not a series of isolated acts, but acts which must have been done on some footing, which may have remained the same throughout. [GARTH, C. J.—The evidence shows that the arrangement was changed in 1877.] There is evidence here to show that there was a previous agreement for a monthly sum, but the purpose is not stated. Now in 1877, the purpose appears,—may evidence not be given to connect them? They are probably parts of a continuous transaction. Under the Evidence Act, s. 6, this evidence would be admissible. It would be for a jury to say if the acts were done on the same footing, and if this evidence is excluded, the jury would be prevented entirely from finding out what the footing was to which the parties were in 1876, so as to see if the footing was the same. Sections 8, 9, 14, and 15 of the Evidence Act were also referred to, and it was contended the evidence was relevant also under those sections.

*Cur. adv. vult.*

The following **Judgments** were delivered :—

**Garth, C. J.** (MACLEAN, J. *concurring*).—The prisoner in this case was tried before the Special Court at Rangoon upon three charges for receiving money illegally as a public servant, contrary to the provisions of ss. 161 and 165 of the Indian Penal Code.

The transactions upon which the charges were based are all said to have occurred in the year 1876, and the nature of them was, that the prisoner, being then the managing clerk in the commissariat office of Tonghoo, where Messrs. Cohen Brothers carried on business as Commissariat contractors, accepted certain remuneration from Messrs. Cohen for services, which he is said to have rendered them in his official capacity.

[659] The case for the prosecution was that these services were rendered, and the remuneration received, by the prisoner under some arrangement, which existed between the parties in the year 1876, but which came to an end in January 1877.

In the year 1877, the prisoner was transferred to the Commissariat office at Thayetmyo; and it was alleged by the prosecution, that in that year Messrs. Cohen, who also carried on business as commissariat contractors at the latter place, made a similar arrangement there with the prisoner, and that certain sums were given to him as remuneration in that year for similar services.

Upon the trial evidence was adduced on the part of the prosecution, to show the receipt of these sums and the existence of this arrangement in 1877. But the learned Judges in the Special Court differed in opinion as to whether the evidence was admissible, and therefore, under s. 80 of the Burma Courts Act, they have referred the question to us in the following terms (*reads the point referred*).

It has been contended by Mr. *Phillips* for the Crown, that the evidence was admissible under some one or more of the sections from 5 to 14 of the Evidence Act, as showing the illegal nature of the transactions between Messrs. Cohen and the prisoner in 1877, and the probability that, if sums were received by the prisoner from them for an illegal consideration in that year, the sums which were received from them by the prisoner in the previous year were also for an illegal consideration.

I believe that we are all agreed that this evidence was not admissible under any of the sections from 5 to 13 of the Evidence Act; but my brother ~~Phillips~~ is of opinion that it might be admissible, under s. 14, upon the grounds stated in his judgment.

After carefully considering this point and the authorities to which our attention was called by Mr. *Phillips*, I have come to the conclusion that the evidence was not admissible.

Section 14 seems to me to apply to that class of cases which is discussed in Taylor on Evidence, 6th edition, ss. 318 to 322,—that is to say, cases where a particular act is more or less criminal or culpable, according to the state of mind or feeling of the person who does it; as, for instance, in actions of slander or [660] false imprisonment, or malicious prosecution, where malice is one of the main ingredients in the wrong which is charged, evidence is admissible to show that the defendant was actuated by spite or enmity against the plaintiff; or again, on a charge of uttering counterfeit coin, evidence is admissible to show that the prisoner knew the coin to be counterfeit, because he had other similar coin in his possession, or had passed such coin before or after the particular occasion which formed the subject of the charge. The illustrations to s. 14, as well as the authorities cited in Taylor, show with sufficient clearness the sort of cases in which this evidence is receivable.

But I think we must be very careful not to extend the operation of the section to other cases, where the question of guilt or innocence depends upon *actual facts*, and *not upon the state of a man's mind or feeling*. We have no right to prove that a man committed theft or any other crime on one occasion, by showing that he committed similar crimes on other occasions.

Suppose, for example, that usury was a crime by the law of this country, and that a prisoner was charged with having taken usurious interest from *A B* in a transaction which occurred in 1870. It seems quite clear to me, that, for the purpose of proving the nature of this transaction in 1870, evidence could not be given of some other usurious transaction having taken place between the same parties in 1871. The question in such a case would be, not whether the prisoner had a mind prone to the commission of usury, or whether he was in the habit of making usurious contracts, but whether, in the particular instance, the prisoner had, *in point of fact, been guilty of usury*.

Now, as I understand, the argument for the Crown in the present case amounts to this. In the year 1876, Messrs. Cohen were commissariat contractors at Tonghoo, and the prisoner was the managing clerk in the Commissariat. In the year 1877, these parties were employed respectively in the same way at Thayetmyo. In the year 1876, the prisoner is charged with receiving certain sums of money as bribes from Messrs. Cohen for showing them some favour in his official capacity, and he is proved to have actually received those sums. Under these circumstances, Mr. *Phillips* argues, that evidence is admissible that [661] in the year 1877 he received other sums from Messrs. Cohen as bribes, in order to prove that the sums which he received in 1876 he also received as bribes. But it seems to me that the question, whether he took the sums in 1876 as bribes for doing a favour to Messrs. Cohen, is in each case purely a question of fact. It is not, as it seems to me, a matter of intention, or feeling, or knowledge; and I think that, in such a case, evidence is no more admissible to show that he took bribes from Messrs. Cohen in 1877, than it would be to show that he stole some of the Government money in 1876, because he afterwards stole some in 1877.

I would, therefore, answer the question referred to us by saying that, in my opinion, the evidence is not admissible.

Mitter, J.—The facts of the case in which this reference has been made are briefly these:—

The accused was committed for trial on twelve separate charges of receiving illegal gratification, as a public servant, under ss. 161 and 165, the receipt of these several sums of money extending over a space of three years,—1876, 1877, and 1878.

At the trial the prosecution elected to proceed on three charges. The transactions out of which they are alleged to have arisen all happened in the year 1876. The accused was the managing clerk in the Commissariat office at Tonghoo in the year 1876, where Cohens transacted business as commissariat contractors. The evidence for the prosecution is, that there was an understanding between Cohens and the accused, under which he had agreed for certain remuneration to show to them certain favour in the exercise of his official functions; that this agreement came to an end in January 1877, when the accused was transferred to the Commissariat office at Thayetmyo; that in the month of June of that year the Cohens, who also transacted business as commissariat contractors at the latter place, entered into a similar agreement with the accused, and the evidence of payments of money to him in 1877 and 1878 at Thayetmyo, under the last-mentioned agreement, was adduced in the course of the trial. The question of law that has been referred to us is as follows (*reads the point referred*).

[662] I am of opinion that receipt of illegal gratification in the years 1877 and 1878 at Thayetmyo cannot be proved, in order to establish that the accused received the three sums of money mentioned in the charges for which he was tried. The two sets of transactions are not so connected as would make them relevant to one another within ss. 5 to 13 of the Evidence Act. Section 6 cannot apply, because the payments of 1877 and 1878 are not so connected with the facts in issue in this case as to form part of the same transaction. The alleged agreement of 1876, according to the case for the prosecution, came to an end in January 1877, and the alleged payments in 1877 and 1878 were said to have been made under a different understanding.

The next section, under which it was contended, in the lower Court, that the transactions in 1877 and 1878 were relevant, was s. 8. But it seems to me that it cannot be said that they show or constitute a motive or preparation for the facts in issue. Neither can the conduct of the accused, as shown in the alleged transactions 1877 and 1878, be said to have been influenced by the facts in issue in the sense in which these words are used in the section. No doubt, a person who commits a crime with impunity, may ordinarily be found more ready to commit another crime of a similar nature, and in that sense the second crime may be considered to have been influenced to a certain extent by the commission of the first crime. But it seems to me that that kind of connection is not contemplated by this section. If it did, then where a person is charged with an offence, the whole of the previous history of his life would be relevant, because, every event of his life that preceded the commission of the crime may be considered to have influenced it in some way. But that is not the meaning of the section. The influence referred to here must be direct and obvious; and in this sense I cannot say that the transactions of 1877 and 1878 were in any way influenced by the facts in issue. The same observation will apply to the contention based upon s. 11. There also the words "*highly proba-*

*ble*" point out that the connection between the facts in issue and the collateral facts sought to be proved must be so mediate as to render the co-existence of the two *highly* probable.

[663] The only other section which it is necessary to notice is s. 14. Under that section collateral facts specified therein can be proved if the question be as to the existence of any state of mind. In this case if the receipt of the several sums of money mentioned in the charges be considered to have been proved to the satisfaction of the Court by *other* evidence, and if it be necessary to ascertain whether the accused *received* them as a *motive* for showing favour in the exercise of his official functions, the alleged transactions of 1877 and 1878 may, in that case, be relevant under this section. But they are not relevant for the purpose of establishing the *fact* of payment in the year 1876.

#### NOTES.

#### [EVIDENCE ACT—ADMISSIBILITY OF SIMILAR TRANSACTIONS—

On this subject the following cases may be consulted:—(1874) 11 B. H. C. 90; (1883) 8 Bom. 223; (1892) 16 Bom. 430; (1890) 15 Bom. 502. The provisions in the Acts are, in these cases, generally regarded as co-extensive with the English law.

Under the English Law, the other acts must be of the *same specific* kind:—*R. v. Fisher* (1910) 1 K. B. 149; *R. v. Ellis* (1910) 2 K. B. 746; *Makin v. A.-G. for New South Wales*, (1894) A. C. 57. Connection in point of time, there should be:—*R. v. Walford* (1907) 71 J. P. 215; *R. v. Smith* (1905) 92 L. T. 208; *R. v. Wyatt* (1904) 1 K. B. 188. The evidence is admissible even though there may have been acquittals on those acts:—*R. v. Ollis*, (1900) 2 Q. B. 758.]

[6 Cal. 663]

#### ORIGINAL CIVIL.

*The 21st August, 1880.*

PRESENT :

MR JUSTICE WILSON.

Soobhul Chunder Paul

*versus*

Nitye Churn Bysack.

*Attaching Creditor—Right to Redeem Mortgage—Civil Procedure Code (Act X of 1877), ss. 276, 282, 295.*

An attaching-creditor has not, as such, any right to redeem a mortgage subsisting prior to his attachment.

THE facts of this case sufficiently appear from the **Judgment**.

Mr. Jackson and Mr. Trevelyan for the Plaintiff.

Mr. Kennedy and Mr. Phillips for the Defendant.

**Wilson, J.**—The plaintiff obtained a decree against one Kristo Chunder Chowdry; and, in execution of that decree, he attached a house of his judgment-debtor. The defendant held a mortgage of the house. The plaintiff in this suit claims to redeem that mortgage.

The case came on for settlement of issues. The first question that arises is, whether an attaching-creditor is entitled, as such, to redeem a mortgage subsisting prior to his attachment. [664] If this question be answered in the negative, it is unnecessary to consider any of the other questions of law or of fact which have been raised.

The position of an attaching-creditor and his rights with respect to the land are dependent entirely upon certain sections of the Civil Procedure Code. The governing section is s. 276: "When an attachment has been made by actual seizure or by written order duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, mortgage, or otherwise, and any payment of the debt or dividend, or a delivery of the share to the judgment-debtor during the continuance of the attachment, shall be void as against all claims enforceable under the attachment." The attaching-creditor may follow up his attachment by sale. And in that case, he and all other creditors who obtain orders of attachment before realization will share the proceeds rateably; s. 295\*.

Under English law, as a general rule, any person interested in the equity of redemption may redeem. The interest may be limited in time, as an estate for life or perpetual. It may be limited to a portion of the land, or affect the whole of it. The person so interested is entitled to redeem, subject of course to the equities of all other persons interested—*Pearce v. Morris* (L. R., 5 Ch., 227). I do not think that the interest of an attaching-creditor is an interest at all closely similar to those which have been held to give a right to redeem. There is no analogy between the position of an attaching-creditor here and that of an execution-creditor in England. Under English law, in case of a legal interest in real property, the creditor takes under his *elegit* an actual legal estate in the land as tenant by *elegit*, and receives satisfaction out of the rents and profits. An equity of redemption being, not a legal but an equitable interest, is not affected by an *elegit*, and the intervention of a Court of Equity is requisite to make it available in execution. But when an order of Court has been obtained, the interest taken by the execution-creditor is closely analogous to that of the tenant by *elegit*. In this country the attaching-creditor [665] neither has, nor can ever as such acquire, any beneficial interest in the property attached.

But the Code has not left the matter to rest upon general principles. It has dealt expressly with the attaching-creditor's rights in relation to mortgages,

\* [S. 295.—Whenever assets are realized by sale or otherwise in execution of a decree, and more persons than one have, prior to the realization, applied to the Court by which such assets are held for execution of decrees for money against the same judgment-debtor, and have not obtained satisfaction thereof, the assets after deducting the costs of the realization, shall be divided rateably among all

Proceeds of execution sale to be divided rateably among decree-holders.

such persons.

Provided that, when any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale.

Proviso where property is sold subject to mortgage.

Provided also that property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the assent of the mortgagee or incumbrancer, order that the property be sold, free from the mortgage or charge giving to the mortgagee or incumbrancer the same right against the proceeds of the sale as he had against the property sold.

If all or any of such assets be paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets. Nothing in this section affects any right of the Government.]



and an examination of the clauses bearing upon the matter makes it, I think, tolerably clear, that the Legislature did not intend to give an attaching-creditor the right to redeem a mortgage.

Mortgages are dealt with in two sections. Section 282 is one of a group of sections which deal with claims raised adversely to the attaching-creditor. It says,—“If the Court is satisfied that the property is subject to a mortgage or lien in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or lien.” If it had been intended that the attaching-creditor should have the alternative right to redeem the mortgage, it must, I think, have been so stated.

Mortgages are again dealt with in s. 295, a section whose subject is the sale of properties attached. It says,—“provided that, when any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not as such be entitled to share in any surplus arising from such sale.” “Provided also that when any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the assent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same right against the proceeds of the sale as he had against the property sold.” Here again, if it were intended that the attaching-creditor should have a right to redeem, I think it must have been so said.

The first paragraph of the same section confirms this view. It prescribes how the proceeds of an execution are to be applied: “Whenever assets are realized by sale or otherwise in execution of a decree, and more persons than one have, prior to the realization, applied to the Court by which such assets are held for execution of decrees for money against the same judgment-debtor, and have not obtained satisfaction thereof, the assets, after deducting costs of the realization, shall be divided [666] rateably among all such persons.” It cannot be supposed that the attaching-creditor is to be at liberty to take an assignment of the mortgage, and then sell, subject to the mortgage, retaining the mortgage for his own benefit. But if he is to sell the property discharged from the mortgage, how is he to get credit for what he has paid to discharge, it? It would, I think, be a strained construction of the words “costs of realization” occurring in the context in which they do, to make them include a mortgage debt paid off.

I am of opinion that an attaching-creditor has not, as such, any right to redeem a mortgage.

This suit will, therefore, be dismissed with costs on scale No. 2.

*Suit dismissed.*

Attorney for the Plaintiff : Mr. Goodall.

Attorney for the Defendant : Baboo B. M. Doss.

#### NOTES.

#### [WHETHER ATTACHING CREDITOR MAY REDEEM—

A similar rule was laid down in (1881) 3 All. 418 ; but see now, the Transfer of Property Act, 1882, sec. 91 cls. f and g. See also (1906) 30 Mad. 207 = 17 M.L.J. 84; (1891) 14 Mad. 491.]



[6 Cal. 306]

## APPELLATE CIVIL.

*The 22nd December, 1880.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE. AND MR. JUSTICE FIELD

Akbur Ali.....Plaintiff

*versus*

Bhyea Lal Jha and others.....Defendants.\*

*Onus of Proof—Suit to have certain Lands declared Mal—Documents once received without objection by lower Court.*

Where it is admitted that the defendants hold certain lands within the plaintiff's zemindari, some at least of which are rent-paying ; the defendants, if desirous of proving that any of these lands are rent-free, are bound to give some *prima facie* evidence of the fact, before they can call upon the plaintiff, the zemindar, to prove that the whole or any part of the lands are mal.

[667] An Appellate Court has no right to refuse to admit on technical grounds a document which has been received and read in the Court below without objection.

THE plaintiff, one Akbur Ali, stated that one Bechan Biswas had formerly held a rent-paying tenure within his patni ; and that, on the death of Bechan, the land was held by his widow Darshunia and by his brother Lokhun Biswas (the defendants in the suit) ; that one Bhyea Lal Jha obtained a decree against Darshunia and Lokhun, and in collusion with them, in execution of that decree, caused thirty-five bighas of Bechan's tenure, containing four distinct plots, to be sold on the 16th August 1877 as a rent-free holding, and that at such sale Bhyea Lal Jha himself became the purchaser.

On the 7th August 1878, the plaintiff brought the present suit, asking that the lands in question might be declared to be his mal lands, and that the sale of August 1877 might be reversed, and for the ejection of the defendants from these lands. Bhyea Lal Jha contended, that plots 1 and 2 and 4 in the lands in question were milik, and not mal lands, but that as neither the plaintiff nor his superior landlord had claimed the land for more than twelve years before the institution of the suit, the claim was barred ; and that lot No. 3 was mal, but that he had relinquished it to the plaintiff. The other defendant did not enter appearance.

The Munsif held, that the onus of proving the lands to be mal was on the plaintiff, and that he had failed to establish that fact ; and further found that, on the evidence adduced by the defendants, plots Nos. 1, 2, and 4 were rent-free lands, and that the plaintiff had failed to prove that he had realized rent for these lands within twelve years preceding the suit ; and that, therefore, the suit was barred.

The plaintiff appealed to the District Judge, who held that the onus of proof lay on the plaintiff, and that he having failed to adduce proof that the lands included in plots 1, 2, and 4 were mal, he dismissed the suit ; that as regarded plot No. 3, it was admitted that it was mal, but as that plot appeared to be a portion of the rent-paying tenure of Bechan, and as the holders

\* Appeal from Appellate Decree, No. 1787 of 1879, against the decree of F. Cowley, Esq., Judge of Purneah, dated the 28th May 1879, affirming the decree of Baboo Prosunno Coomar Bose, Munsif of Arrah, dated the 13th February 1879.

[688] had a right of occupancy, no decree for possession could be made as to that plot. In the course of the hearing, he refused to take as evidence certain copies of chakbunds, which had been admitted without objection as evidence in the lower Court, in the absence of the original documents and of proof of the circumstances under which secondary evidence could be given.

The plaintiff appealed to the High Court.

The defendants filed cross-objections as to the question of the admission of the documents last mentioned.

Moonshee Mahomed Yusuff for the Appellant.

Baboo Taruck Nath Sen for the Respondents.

The following **Judgments** were delivered:—

**Garth, C. J.**,—I think that this case ought to go back to the Court below for retrial.

It seems to me that the lower Appellate Court has thrown the burden of proof upon the wrong party.

The suit is brought to have it declared that four plots of land, which lie within the zamindari of which the plaintiff is the patnidar, are the mal lands of the zamindari; and the occasion which gave rise to the suit is this:

The defendants Nos. 2 and 3 were the tenants to the plaintiff of a large portion of land within the zamindari; and a judgment was obtained against them by the defendant No. 1, under which certain plots of land lying within the ambit of the zamindari, and as far as we know, within the ambit of the lands held by the defendants Nos. 2 and 3 as tenants to the plaintiff, were sold as being the rent-free lands of the defendants Nos. 2 and 3, and they were bought by the defendant No. 1. The plaintiff, therefore, brings this suit to have those plots declared to be his mal lands.

Assuming that these plots were within the ambit of the land which was held by the defendants Nos. 2 and 3 as the plaintiff's tenants, I think that the rule that has been applied to enhancement suits would also apply here,—namely, that it being admitted that the defendants hold lands within the zamindari, some of which at least are rent-paying, if they want to show that any [689] of those lands are rent-free, they ought to give some *prima facie* evidence of it, before they can call upon the zamindar to prove that the whole or any part of the lands are mal (see Full Bench case of *Gooroo Persad Roy v. Juggobundoo Mozoomdar* (W. R., Sp. No., 15), *Nehal Chunder Mistree v. Huree Pershad Mundul* (8 W. R., 183), and *Beebee Ashrufoomissa v. Umung Mohun Deb Roy* (5 W. R., Act X Rul., 48). The plots in dispute are numbered 1, 2, 3, and 4; and with regard to plot No. 3, it is now admitted that it belongs to the plaintiff.

The question remains with regard to plots Nos. 1, 2, and 4.

Those plots were shown to the satisfaction of the first Court to be rent-free; and accordingly that Court, as to those plots, dismissed the suit. The lower Appellate Court, on the other hand, appears to have thrown the burden of proving that those plots are mal upon the plaintiff. The Judge, no doubt, goes into the question, whether the defendant has given any proof that the plots in question are rent-free; but the evidence upon that head is, to say the least of it, unsatisfactory, and it seems very doubtful whether he really intended to find that the defendant made out a *prima facie* case that they were so. In the latter portion of his judgment he certainly says, that "the burden of proof lies entirely upon the plaintiff;" and if he has acted upon that principle, it appears to me that he has not tried the case.

If the fact is, as I understand it to be, that the plots in question adjoin, or are contained within the ambit of the land held by the defendants Nos. 2 and 3 as tenants, then the defendant No. 1 must first satisfy the Court by *prima facie* proof that those plots, or some or one of them is rent-free. If he does so, then the onus of proof will be thrown upon the plaintiff to prove such plot or plots to be mal.

Then there have been cross-objections filed by the defendant with reference to certain documents, which appear to me to call for some notice from the Court.

The defendants filed copies of chakbunds dated respectively the 5th of Kartick, the 11th of Zikhand, and the 29th of Ramzan 1168, and also the copy of a sanad dated 4th Bysack 1168. As far as I can see, the first Court admitted copies of these documents as evidence without any objection being made by the [670] other side, and if it did, then the lower Appellate Court had no right to reject them as *inadmissible*, because it is clear that where copies of documents are admitted and read in the Court of first instance without objection, no objection to their admissibility can afterwards be taken in a Court of Appeal.

"I observe," he says, "that in the absence of the original documents, and of proof of the circumstances under which secondary evidence could be given, these go for nothing." By this I understand him to mean, that as the originals of these documents were not produced, and as no facts were proved which would justify the Court in receiving secondary evidence of them, they ought not to have been admitted in the lower Court; and consequently the Court of Appeal is bound to reject them. Now, in this he was clearly wrong. Of course the Appeal Court has a perfect right to attach such weight to the documents as it thinks proper, or to say whether they ought to be treated as evidence as against particular parties to the suit, but it has no right to refuse to admit on technical grounds a document which has been received and read in the Court below without objection. The case will go back to the Court below to be tried again with reference to the above remarks; and the costs in both Courts will abide the result.

**Field, J.**—The plaintiff in this case is the patnidar of Talook Danti Maldwar. One Bechan Biswas held a considerable jote within that patni. Bechan Biswas is dead, and has been succeeded by his widow Darshunia and his brother Lokhun. Bhyea Lal Jha, the defendant No. 1, in execution of a decree against Darshunia and Lokhun, brought to sale, and himself purchased, four plots of land, which form the subject of this suit. These plots were sold and purchased as lakhiraj lands, but the plaintiff in the present case contends that they are not lakhiraj but mal lands. and he brings this suit to obtain a declaration "to this effect and to recover possession of the land comprised in the four plots."

As to plot No. 3, the real defendant Bhyea Lal Jha does not now contend that it is milik or lakhiraj land; and in respect of this plot the decree ought to be a simple declaration that the land comprised therein is mal land.

[671] With respect to plots 1, 2, and 4, the first point to be considered is, whether the District Judge has rightly started by casting the entire burden of proof upon the plaintiff. It appears to me that he has not. The person under whom Bhyea Lal Jha claims title, was admittedly a tenant of the plaintiff for a considerable portion of land, and the substantial allegation of Bhyea Lal Jha is, that a certain other portion of land within the same zemindari and in the occupation of the same tenant is not mal but lakhiraj.

It appears to me that the Full Bench decision quoted by the District Judge is applicable to those cases only in which the zemindar sues to resume

or assess land held under a lakhiraj title (alleged invalid), such land being either held by a person who is not a tenant of the plaintiff for other land, or being occupied as a separate parcel or holding, or otherwise in such a manner as to be entirely distinct from any other land held by the same person as a tenant under the plaintiff.

There are a number of decisions of this Court, which go to establish the proposition that this principle is not applicable to the case of a person who is admittedly a tenant of the zemindar, and who sets up the plea of lakhiraj in respect of a portion of the land held by him, which portion is not distinguished in the manner which I have described from the rest of the land, as to which he admits a tenancy.

Now, in this case it has been contended, that these four plots of land are so distinct from the land which constitutes the jote of Bechan Biswas that the principle of the Full Bench decision ought to apply. The pleader who has put forward this contention has, however, been unable to point out to us upon the map that these four plots constitute a separate holding of this nature, and therefore I think that the case falls within the principle to which I have adverted, and that it lay upon Bhyea Lal Jha, claiming title under Bechan Biswas, to start his case by giving some *prima facie* evidence that these plots, Nos. 1, 2, and 4, are lakhiraj.

The District Judge must, therefore, in the first place, consider whether this *prima facie* evidence has been given, and then proceed to consider whether the plaintiff has or has not [672] sufficiently rebutted such *prima facie* evidence. In considering whether the defendant has given such *prima facie* evidence, the plot No. 2 and the plots Nos. 1 and 4 will have to be separately considered. As to plot No. 2, the District Judge was of opinion that the oral evidence without further corroboration was not sufficient to show that the land was milik or lakhiraj. As to plots Nos. 1 and 4, the Judge was of opinion that the oral evidence was corroborated by a map and khusra, which showed that these plots were, on a previous occasion, measured as rent-free lands of Bechan Biswas. It has been admitted at this hearing that as the map and khusra contain no boundaries, and as no local investigation was made by an Amin in order to identify plots 199 and 201 with plot No. 1 of the plaint, and plot No. 50 of the map and khusra with plot No. 4 of the plaint, it is impossible to say from a mere inspection of the map and khusra, and a comparison of them with the plaint, that the lands are identical. It follows that, in respect of plots 1 and 4, the corroboration relied upon by the District Judge fails; and he must, therefore, see whether in respect of those plots the rest of the evidence to be found in the case satisfies him that the defendant has established a *prima facie* case of lakhiraj.

With reference to the copy of the chakbund dated the 5th Kartick 1168 and of another dated the 11th Zikand 1168, and of a third dated 29th Ramzan 1168, and also the copy of a sanad to one mehal dated 9th Bysack 1168, we think it right to say that the parties ought to have an opportunity of producing any such additional evidence as may have the effect of supplying any link of proof which may be desirable from those documents. There is nothing on the face of those papers to show exactly under what circumstances the chakbunds were made, and we abstain from pronouncing any opinion as to the weight which ought to be attached to them when they are connected by such additional evidence with the land in question. The plaintiff will also be at liberty to adduce fresh evidence to rebut any evidence which may be produced by the defendant as to these chakbunds and sanads.

*Appeal allowed, and case remanded.*

NOTES.

[ONUS OF PROOF

I In (1883) 9 Cal. 813 ; (1885) 12 Cal. 182 this case was distinguished on the special facts of the case which led to the inference that the lands in dispute were within the mal ambits of the zemindari. See also (1906) 4 C. L. J. 548.

II RECEPTION OF EVIDENCE IN LOWER COURT WITHOUT OBJECTION.

A similar view as in this case was taken in the following 2 cases (1903) 31 Cal. 155 dissenting from (1898) 26 Cal. 53 ; (1907) 34 Cal. 1059 ; (1897) 23 Bom. 65 ; (1900) 24 Bom. 599 ; (1886) 11 Bom. 320.]

[673] *The 31st January, 1881.*

PRESENT :

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE BROUGHTON.

Madhub Doss and others.....Defendants

*versus*

Jogendro Nath Roy.....Plaintiff.\*

*Beng. Act VIII of 1869, ss. 38, 40—Order that Tenures have lapsed—Procedure to enforce attendance of Witnesses in Proceedings for Measurement of Lands.*

The Collector, in proceedings for measurement of lands under s. 38 of Beng. Act VIII of 1869, cannot be said to have made a "due enquiry," and therefore should not make an order under that section that the tenures have lapsed, until he has made use of all the powers given him by s. 40 in order to procure the attendance of witnesses.

ON the application of the plaintiff in proceedings taken under s. 38 of Beng. Act VIII of 1869, an Amin was appointed to measure the lands on an estate of which the plaintiff was the proprietor ; the Amin went to the spot on the 15th of March and remained until the 1st June, but none of the defendants, the ryots on the estate, except two, Bechu and Namdah, would attend, notwithstanding notices were served on them, both by the Amin and by the Collector. As they did not attend, the Collector made an order under s. 38 of the above Act, that the tenures, otherwise than those of the two defendants who attended, had lapsed.

From this order the defendants appealed.

Baboo Kally Mohun Doss and Baboo Bungshee Dhur Sen for the Appellants.

Baboo Mohesh Chunder Chowdhry, Baboo Mohiny Mohun Roy, and Baboo Rashbehary Ghose for the Respondent.

The **Judgment** of the Court (CUNNINGHAM and BROUGHTON, JJ.) was delivered by

**Cunningham, J.**—The first objection in this case is, that [674] the Court below ought not to have granted the application of the respondent without

\* Appeal from order No. 277 of 1880, against the order of Baboo B. P. Roy, Subordinate Judge of Burdwan, dated the 6th July 1880.

better evidence of the inability of the applicant to measure the lands, and without ascertaining who are the persons liable to pay rent.

It appears that the respondent, who is the proprietor of the land in question, filed a verified petition, in which he stated that he had endeavoured to measure the land, and had been unable to do so; and that thereupon the Court below made the order under s. 38 of Beng. Act VIII of 1869, now appealed against. We think that that was a rightful proceeding, and that there is no ground for setting aside the order on that account.

But with regard to the procedure adopted by the Collector, we are not satisfied that there was a "due enquiry" sufficient to comply with the requirements of s. 38.

That section is a highly penal one, and we are bound to construe it with the utmost strictness. It appears that, by s. 40, the Collector, in conducting an enquiry of this kind, is empowered to make use of all the powers conferred on a Civil Court by the Code of Civil Procedure in procuring the attendance of witnesses and otherwise taking evidence.

Now, it does not appear that the Collector in this case did put that section in force, or make use of all the powers which the Code gives a Civil Court to procure the attendance of witnesses. The consequence is, that if we upheld the present decision, we should be enforcing a very severe penalty against the witnesses, whom the Collector might, if he had chosen to exercise the powers vested in him by law, have brought before the Court, and thus avoided the penalty coming into force.

Under these circumstances, we think that the order appealed against should be set aside, and the Collector directed to institute another enquiry, using all the powers that the law gives him to bring the witnesses before him. If he is still unable to ascertain and record who the persons in occupation of the land are, and to measure the land, he will then be at liberty to make the lapsing order under s. 38.

*Appeal allowed.*

#### **NOTES.**

[See also 8 Cal. 848; 10 Cal. 507; 13 Cal. 57.]

[676] ORIGINAL CIVIL.

*The 14th August and 3rd September, 1880.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE BROUGHTON.

In the matter of Upendro Lall Bose, an Attorney.

*Practice—Verification of plaint—Information and belief—Personal knowledge—Civil Procedure Code (Act X of 1877), ss. 50, 51—Act XII of 1879, s. 11.*

In all cases, whether a plaint is verified by the plaintiff or by some other person, the party verifying should state shortly what paragraphs he verifies of his own knowledge, and what paragraphs he believes to be true from the information of others.

In this case a rule had been obtained calling upon Baboo Upendro Lall Bose, an attorney of the High Court, to show cause why he should not be suspended from practising for having improperly verified a plaint in the suit of *Jodoonath Law v. Prokash Chunder Mitter*. The plaint in that suit, which was for an account and for sale of certain properties and for other relief, stated an assignment by the defendant to one Mohindro Lall Mitter of the share of the defendant in certain Government securities and in certain zemindaries, and a subsequent assignment by the defendant to the plaintiff of the balance of his share in the same properties after payment of the amount due to Mohindro Lall Mitter. The plaint further stated that notice of the assignment had been given to the karta of the family to which the defendant belonged, and also to Mohindro Lall Mitter; that the defendant had subsequently conveyed the whole of his property to one Rajendro Dutt, who had paid off Mohindro Lall Mitter; and that there was a sum of Rs. 2,091-8 due to the plaintiff for principal and interest. The plaint was signed by Jodoonath Law by his constituted Attorney Upendro Lall Bose.

The verification was as follows:—"I, the plaintiff abovenamed, do declare, that what is stated in the foregoing plaint is true [676] to my knowledge, except as to matters stated on information and belief, and as to those matters I believe it to be true.

JODOONATH LAW,

*by his constituted Attorney,*

*Upendro Lall Bose.*

At the hearing of the suit, Upendro Lall Bose was called as a witness by the Court and stated as follows:—

"About two years ago, Brojonath Sen called at my house and enquired about a certain deed of assignment executed by Prokash Chunder Mitter in favour of Mohindro Lall Mitter, and after that told me to draft a deed, and said three promissory notes were owing. I did draft the deed. I don't know what took place with the draft, which I handed to Brojonath Sen, after that. It might be at the beginning of August. Brojonath Sen produced A (the first deed) to me, and told me to take notice of it. Prokash was not there. It was produced to me at my house. I did not see it executed or any money lent. It was brought to me after execution to give me notice of its execution as I was acting for Mohindro Lall Mitter. I verified the plaint as the constituted attorney of Jodoonath Law from information I received. I state about the

execution of the deed from information. I was told by Brojonath Sen about its execution. When the plaint was drawn I was not constituted attorney. The verification is in the usual form. I got the power in January or December, and the plaint was drawn in September. I am an attorney of this Court. I only knew personally about the execution of the first deed in favour of Mohindro Lall Mitter. I also know of the notice given by Brojonath Sen of the execution of A to me as attorney of Mohindro Lall Mitter. I have not compared A with the draft. I drafted it at home, and made the draft over immediately to Brojonath Sen. I know the contents of the fourth and fifth paragraphs of the plaint from information and belief. The first paragraph I know personally. As to the second, I know I drafted the deed, and the rest I know from information received from Brojonath Sen. I did not compare the draft with A. I speak from recollection that it [677] corresponds with my draft. As to the third, fourth, and fifth paragraphs, I make statements from information received, as to the sixth paragraph that appears on the face of the deed and from calculations made from it. The plaintiff resides in Aheerestollah Street in Calcutta. I cannot say how long he has resided there. When the plaint was filed he was residing at Bankipore. I cannot say how long he had been there. I was told he was ill by Brojonath Sen."

Mr. *Kennedy* and Mr. *Hill* showed cause.

The **Judgment** of the Court (GARTH, C. J., and BROUGHTON, J.) was delivered by

**Garth, C. J.**—There is no doubt that the plaint in this case has been verified in an irregular way; but having heard Mr. *Kennedy's* explanation, we have already informed him, in the course of the argument, that we entirely acquit his client of any intentional impropriety.

The mistake which he has made in the form of verification has evidently arisen from his confounding the permission to verify the plaint itself, which is provided for by s. 51\* of the Code, with the power to sign the plaint on behalf of his client, which is provided for in the addition to that section made by the amending Act XII of 1879, s. 11.†

He obtained leave upon the usual petition to verify the plaint himself, and then, instead of doing so, he signed the plaintiff's own name to the verification, describing himself as the plaintiff's attorney for that purpose.

The result is, that neither the plaintiff nor his attorney could be made criminally responsible for any false statements there may be in the plaint.

If Upendro Lall Bose really meant, having obtained the leave of the Court for that purpose, to verify the plaint himself, he should have signed the verification on his own account, and not as the plaintiff's attorney.

If he meant to sign the verification merely as the plaintiff's attorney, the plaintiff himself ought to have seen the plaint and verification, and authorized the attorney to sign the verification for him.

[678] The discussion which has taken place upon these points has raised a question of very general importance as to what should be the form of

\* [Sec 51:—The plaint shall be subscribed by the plaintiff and his pleader (if any) and

Plaint to be subscribed and verified. shall be verified at the foot by the plaintiff or, with the permission of the Court, by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.]

Amendment of Section 51. † [Sec. 11:—To Section 51 the following proviso shall be added (namely):—

"Provided that, if the plaintiff, by reason of absence or for other good cause, is unable to sign the plaint, it may be signed by any person duly authorized by him in this behalf."



verification. We have taken occasion to consult some of the other Judges upon it, and we think that it may probably be found necessary to frame a rule or rules upon that subject. Meanwhile, we think that, in all cases, whether the plaint is verified by the plaintiff or by some other person, the party verifying should state shortly what paragraphs he verifies of his own knowledge and what paragraphs he believes to be true from the information of others.

This is the form of verification used in affidavits for the purpose of interlocutory applications (see s. 196 of the Code of Civil Procedure). There is no inconvenience, so far as we are aware, in adopting it, and it is really the only means of securing anything like truthful statements in the plaint.

The rule against Upendro Lall Bose will, of course, be discharged, and he is entirely acquitted of all blame which can affect his character.

#### NOTES.

#### [VERIFICATION OF PLEADINGS—

See the express provisions on this subject contained in the C. P. C. 1908, Sch. I, Or. 6 r. 15.

To a similar effect were the decisions in (1892) 15 All. 59, (1896) 18 All. 396.]

[6 Cal. 679]

#### SMALL CAUSE COURT REFERENCE.

*The 8th February, 1881.*

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, and MR JUSTICE PONTIFEX.

Buddree Doss and others

*versus*

Ralli and another.\*

*Contract—Breach of Contract—Time for performance.*

A contract for the sale of seed contained the following provision —“Refraction guaranteed at four per cent., with usual allowance up to six per cent, exceeding which the seller is to reclean the seed at his expense within a week; failing which buyers to have the option of cancelling that portion of the contract tendered, or of buying against the seller, or taking the parcel as it stands, with usual allowance for excess refraction. Delivery from seller's godown in pile up to the 15th of July next.” On the 10th July, the vendor tendered the seed. On examination the refraction was found to be above the contract rate. It was agreed that the vendor should reclean the seed; and on [679] the 13th July, the purchasers went to take delivery of the seed, which was found still to be not sufficiently cleaned. On the 15th July, the vendor said that he should require a week longer for that purpose. The purchasers then cancelled the contract. In a suit by the vendor for damages for breach of contract,—

*Held*—(1), that the breach of the contract was with the plaintiff.

(2), that the week allowed for recleaning commenced from the 10th July; and that as the plaintiff had not succeeded in reducing the rate of refraction to the contract rate, the defendants had a right to reject the seed; and that the plaintiff was not entitled to further time to reclean it again.

\* Case stated for the opinion of the High Court under the provisions of Act XXVI of 1864 by H. Millet, Esq., First Judge of the Calcutta Court of Small Causes.

THIS was a suit to recover damages for the breach of a contract dated the 8th June 1880 for the purchase of a hundred tons of teal seed. The contract contained the following provision:—"Refraction guaranteed at four per cent., with usual allowance up to six per cent., exceeding which the seller is to reclean the seed at his expense within a week; failing which buyers to have the option of cancelling that portion of the contract tendered, or of buying against the seller, or of taking the parcel as it stands, with usual allowance for excess refraction. Delivery from seller's godown in pile up to the 15th of July next." On the 10th July, the defendants went to take delivery, and found that the refraction of the seed tendered was over the contract rate. It was then agreed that the seed should be recleaned. On the 13th July, the defendants went again to take delivery, and found that the refraction was still over the contract rate. On the same day the plaintiffs wrote to the defendants asking them to take delivery. On the 14th July, one of the plaintiffs had an interview with the broker who had negotiated the contract, when he said that he would require another week to clean the seed. A meeting at the defendants' office was arranged for the next day. At this meeting, Buddree Doss, who represented the plaintiffs, asked for another week's time to reclean. This was refused. On the same day the defendants made an attempt to tender the price, but it was not successful. In the evening the plaintiff's attorney wrote to the defendants requiring them to take delivery, and the defendants wrote to the plaintiffs tendering the price of the goods and asking for delivery, and notifying that if the delivery was not completed [680] they would consider the contract as cancelled. The plaintiffs now sued for the difference between the market-rate and the contract price, and contended that as they had one week within which to perform the contract, they had up to the 22nd July within which to deliver the goods, if previous to the 15th they turned out to be above the stipulated refraction. The learned First Judge of the Small Cause Court, however, held, that the meaning of the contract was, that the plaintiffs were entitled only to one week from the time when the refraction was ascertained to be above the rate mentioned in the contract, and that they were not entitled to reclean as often as they liked, and then to take the week over and above the due date of the contract, and, contingent upon the opinion of the High Court on the following questions, gave judgment for the defendants:—

(1). Whether the breach of the contract on the evidence before the Court was not clearly with the defendants, the contract providing one week for recleaning, and the evidence being that the plaintiffs were willing, on the 15th July, to reclean within one week?

(2). Whether the one week for recleaning the seed provided in the contract is to commence from the 16th July, or from any prior date according to the construction of the contract?

Mr. T. A. Apcar for the Plaintiffs.

Mr. Agnew for the Defendants.

The Opinion of the Court (GARTH, C. J., and PONTIFEX, J.) was delivered by

Garth, C. J.—We think that the first question should be answered in the negative.

As to the second question, we think that the week allowed for recleaning the seed commenced from the 10th July, when the refraction was found to be thirteen per cent. The time occupied by the plaintiff in recleaning was only two days ; but as they did not succeed in reducing the refraction to the rate of six per cent., the defendants had a right to reject the seed. [681] It is clear that the plaintiffs were not entitled by the terms of the contract to any further time to re-clean it again.

The defendants are entitled to the costs of this reference.

Attorney for the Plaintiffs : Mr. *Camell*.

Attorneys for the Defendants : Messrs. *Sanderson & Co.*

[6 Cal. 681]

ORIGINAL CIVIL.

*The 11th January, 1881.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE AND MR. JUSTICE PONTIFEX.

Juggernath Khan and others.....Defendants

*versus*

J. E. MacLachlan.....Plaintiff.

*Contract, construction of—" Delivery in whole of November on seven days' notice from Buyer"—Breach of Contract.*

A contract for delivery by the defendants to the plaintiff of 1,000 bags of ginger, stated that "delivery was to be taken and given in the whole of November on seven days' notice from the buyer." On the 5th November, the plaintiff gave notice to the defendants, requiring delivery to be given "within seven days"; and again on the 11th, that he was prepared to take delivery on the following day. On the 12th, the defendants wrote to the plaintiff, stating that they would give delivery on the 28th, 29th, and 30th November. On the 15th, the plaintiff gave notice that he considered the contract at an end. In a suit for damages for non-delivery,—*Held* (affirming the decision of the Court below), that the words "on seven days' notice from the buyer" were intended to give the buyer the right of fixing the particular time in November at which the delivery was to commence, and that the defendants were therefore bound to commence delivery on the expiration of the seven days' notice.

APPEAL from a decision of BROUGHTON, J., dated the 29th June 1880.

The suit was brought for damages for non-delivery of 1,000 bags of dry ginger under a contract dated the 11th October 1879, which stated that the defendants agreed with the plaintiff for the sale by them to him of 1,000 bags of dry ginger at the [682] rate of Rs. 5-11 per bazaar maund, "delivery to be taken and given in the whole of November 1879 on seven days' notice from the buyer."

The only question material to this report is as to the construction to be put on these words.

On the 5th November, the plaintiff gave notice to the defendants by letter requiring delivery of the ginger to be given "within seven days." On the 11th November, the plaintiff, having heard nothing in the meantime from the defendants, wrote that he should be ready to take delivery on the following day. On the 12th November, the defendants wrote to the plaintiff, stating that they should be prepared, under the terms of the contract, to give him delivery of the ginger on the 28th, 29th, and 30th of November, and that they would pile the ginger on the 27th to avoid any delay in the delivery. On the 15th November, the plaintiff gave notice to the defendants that he considered the contract at an end, and demanded from them the amount now sued for, being the amount of damages he alleged he had sustained by their refusal to commence delivery on the 12th.

Mr. T. A. Apcar for the Plaintiff.

Mr. Bonnerjee for the Defendants.

The decision appealed from was as follows:—

Broughton, J.—Mr. Bonnerjee contends that the sellers had from the expiry of the notice to the end of November to deliver, and that they might commence delivery on any day prior to the end of November. Mr. Apcar contends that delivery should commence at the end of the seven days, and go on for a reasonable time. Mr. Bonnerjee puts the case of a contract, supposing it to be without the words "on seven days' notice," and says that if that were the case they would have all November to deliver: what they contracted for, was for delivery in November with words "on seven days' notice, &c.," in the contract. The construction must depend on the intention [583] of the contracting parties according to the well-established rule, and the question is what was that intention

If the seller is to have the whole of November, those words "on seven days' notice" from the plaintiff in the contract appear to have no meaning. The contract gave the purchaser a right by notice to fix when the delivery should begin. That is a very reasonable and intelligible clause, for when a merchant has to take a large delivery, he must be prepared with accommodation to store the goods in. This view is supported by the conduct of the parties. On the 5th November 1879, Mr. MacLachlan wrote to the sellers and stated that he would be prepared to take delivery of the 1,000 bags of ginger within seven days from the date thereof. He received no reply till the 11th, when he wrote again and very fairly says, that if the defendants considered the contract different from what he contended for, they should have stated that he was mistaken in his construction.

Mr. Bonnerjee quoted *Coddington v. Paleologo* (L. R., 2 Ex., 193) and *Bettini v. Gye* (L. R., 1 Q. B. D., 183). *Coddington's* case appears to me to have the most bearing on the present case, but the words were not identical. The contract was for delivery between 17th April and 8th May. The sellers made no delivery on the 17th. The next day the purchaser rescinded the contract, and an action was brought for non-acceptance, and the Court of Exchequer was divided. The Chief Baron and Baron Parke took one view, and thought that the plaintiff was not bound to give delivery on the 17th April. Bramwell, B., thought that he ought to have commenced delivery on the 17th. Martin, B., agreed, but the Chief Baron did not go as far as Mr. Bonnerjee contends in this case, when he held that the contract was satisfied by the delivery of the

whole quantity between the 17th April and the 8th May, inclusive, in such portions and at such intervals as a jury might think reasonable with reference to the nature and effect of the whole contract.

*Bettini v. Gye* (L. R., 1 Q. B. D., 183) turns on a different point. Bettini agreed to sing in concerts as well as in operas, and also not to sing anywhere out of the theatre in the United Kingdom of Great [684] Britain and Ireland, from the 1st January to the 31st December 1875, without the written permission of Mr. Gye, except at a distance of more than fifty miles from London and out of the season of the theatre, and also to come over before the season began for the purpose of rehearsals. Mr. Gye sought to rescind the engagement, because Bettini did not come to rehearse. It was held that the stipulation as to rehearsals was not a condition precedent. The case of *Fleming v. Koeqler* (I. L. R., 4 Cal., 237) would be in point if the words after "seven days' notice from the shipper" had been used, instead of "after completion of two country voyages."

The conclusion I arrived at is, that the proper construction of the contract in this case is that the purchaser had the option to fix the time during November when the seller should begin to give delivery, and the seller had no right to refuse beginning delivery on the 12th. The letter of the 5th was not answered till the 12th. On the 15th, three days after, the plaintiff gave notice that the contract was at an end: the defendants had declined by their letter of the 12th to give delivery, and the plaintiff was justified, on the 15th, in treating the contract as abandoned and sending in the bill. The first issue must be answered by stating that the defendants were bound to commence delivery on the 12th, and continue delivering with reasonable despatch. The second issue must be answered that the plaintiff was ready and willing to take delivery, and had done all things necessary to entitle him to delivery on the 12th. The letters of the 5th and 11th are sufficient to show this, and the plaintiff had provided funds for the payment. As to the third issue, what is the measure of damages? It is the difference between Rs. 5-11 and the ruling price on the 15th November. There is no evidence on the defendants' side. The plaintiff's evidence is not uniform.

One witness, a large dealer, brought his books and showed that 400 maunds were sold on the 15th at Rs. 7-13, and said that 1,000 would sell at Rs. 7-11. Mr. Stewart speaks to a sale on the 15th November to Messrs. Ernsthausen and Oesterley at Rs. 8-8; both are actual sales, and don't tally at all. The plaintiff claims [685] damages at Rs. 8-12. I think if I give him Rs. 7-13, he will get all he is entitled to. Damages will be for 1,000 bags at the difference between Rs. 5-11 and 7-12, or Rs. 2-1 per maund. Each bag contains 1 cwt., or 1 maund 14 seers and 10 chittaks.

From this decision the defendants appealed.

Mr. *Evans* (Mr. *Bonnerjee* with him), for the appellants, contended that the defendants had the whole of November in which to give delivery. Had the words "on seven days' notice from the buyer" been omitted, time would have been of the essence of the contract, and they would have been bound to deliver at or before the end of November: see s. 55 of the Contract Act. There the words are "at or before." In this contract, there is no stipulation to do anything "at" any specific time, because "on," which is used here, means "after"—*Queen v. Arkwright* (12 Q. B. 960). The plaintiff was not entitled to delivery at any rate until after the 12th, according to the words of the notice he gave. The effect of the addition of those words was to make a condition precedent; and the defendants were not bound to deliver before they got

notice to do so; the additional stipulation only enabled the plaintiff to fix a time before which he would not take delivery, and did not alter the whole contract as to time, nor take away the right the defendants had under the previous words to have the whole of November to give delivery—Benjamin on Sale, 559. To construe the contract as the plaintiff wishes would be to introduce a new term as to time into it. The plaintiff had no right to treat the contract as being at an end. He ought to have taken delivery, as we offered it, at the end of November, and then, if he was damaged, sued for breach of the contract. Pollock on Contracts, 2nd Ed., pp. 443-445, and *Coddington v. Paleologo* (L. R., 2 Ex. 193) were also referred to.

Mr. *Branson* and Mr. *T. A. Apcar* for the respondent were not called upon.

The **Judgment** of the Court (GARTH, C. J., and PONTIFEX, J.) was delivered by

**Garth, C. J.**, (who, after shortly stating the facts and refer-[686] ring to the letters of the 5th, 11th, and 12th November, continued).—It is clear from these letters, that the construction which the plaintiff put upon the contract, and which has been adopted by the Court below, was that, although the whole of November was the period mentioned in the contract for giving and taking delivery of the goods, the particular time in November at which the delivery was to commence was to be determined by a seven days' notice, which was to be given by the buyer. The buyer had thus the option of fixing the time for delivery; and at the expiration of the seven days' notice, the sellers would be bound to commence to deliver, although, of course, they would be allowed a reasonable time after the expiration of the notice for completing the delivery.

The defendants, on the other hand, contended that they had the whole month of November in which to deliver the ginger; and that although the seven days' notice might have been given by the plaintiff on the 1st of November, the defendants would still have until the last day of the month to complete the delivery.

I am of opinion that the view which has been taken by the Court below is the correct one. No doubt if the words had been "delivery to be taken and given during the whole of November," the sellers would have had the whole month in which to deliver. But it seems to me that the words "on seven days' notice from the buyer" are intended to give the buyer the right of fixing the particular time in November at which the delivery was to take place. If this were not so, the words seem to me to have no meaning.

I think, therefore, that the defendants were bound to commence delivery on the 13th of November, and that the breach of contract occurred when the sellers virtually refused to deliver until the 28th of the month.

It has also been suggested by Mr. *Evans* that the seven days' notice which the plaintiff gave was insufficient, because it required the delivery to be made "within seven days" instead of at the expiration of seven days from the 5th November. But this is at best a mere formal objection; and I think it clear from the correspondence that the defendants understood and treated the [687] notice as a seven days' notice under the contract. If the notice had not been given, the sellers would not have been bound to deliver at all; but the defendants evidently considered themselves bound by the notice to deliver according to the true meaning of the contract. Moreover, this point as to the form of the notice was neither taken in the correspondence between the parties, nor in the written statement of the defendants, nor in the Court below, nor in the grounds of appeal to this Court.

The only other point which has been made by the appellants is, that the Judge, in estimating the damages, has given the plaintiff two annas a bag too much. This is a small point, and Mr. Branson does not contest it. The damages, therefore, will be reduced by two annas a bag. But as the appeal has substantially failed, it will be dismissed with costs on scale No. 2.

*Appeal dismissed.*

Attorneys for the Appellants: Messrs. Ghose and Bose.

Attorney for the Respondent: Baboo Kalinath Mitter.

[6 Cal. 687.]

*The 7th, 10th, and 11th, January, and 7th February, 1881.*

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE PONTIFEX.

Bibee Solomon.....Plaintiff

*versus*

Abdool Azeez and another.....Defendants.

*Compromise, Suit to set aside—Fraudulent Representations—Sanction by Court of Compromise entered into by a minor—Misapprehension or mistake as to material facts—Contract Act (IX of 1872), s. 20—Inquiry as to whether it would be for benefit of Minor to set aside Compromise.*

The plaintiff, a minor, was, as daughter and one of the heirs of A, entitled to 7-24ths of his estate. The value of A's estate was uncertain, and depended on whether or not A had been a partner in business with M, and whether or not a sum of Rs. 30,000 had been paid by M to A; in satisfaction of all claims which A had against M in respect of the estate of K, a deceased brother of A, and a former partner in the same business. M having, on A's death, possessed himself of all the estate of A, the plaintiff brought a suit against M in which a decree was made, ordering an account to be taken of the estate of A which had come into the hands of M. Pending such account, M died, leaving a will, by which he appointed the son of A and [688] another his executors, and the suit was revived against them. In their application for probate they stated that the value of M's estate, so far as they had been able to ascertain and were aware, was Rs. 4,41,000. Shortly after probate was granted, negotiations were entered into between the executors and the advisers of the plaintiff for a compromise, and a petition was, with the concurrence of the executors, presented by the plaintiff to the Court, asking for its sanction to the terms agreed upon by the parties, which were, that the plaintiff should receive Rs. 20,000, in full of all demands, and Rs. 5,000 for her costs of suit. This petition took as the value of M's estate the amount stated by the executors in their application for probate, and stated that the value of A's estate, in case the abovementioned payment by M was proved, would be Rs. 30,000, and in case it was not proved, then a moiety of the estate of M; and that, considering the difficulties the plaintiff had to meet in proving her case, and with a view to put an end to further trouble, litigation, and expense, the above terms had been agreed to on her behalf. These terms of compromise were sanctioned by the Court on the 11th September 1876. Shortly afterwards, further property was discovered belonging to the estate of M. The plaintiff brought a suit against the executors to set aside the compromise, alleging that the terms had been accepted by her on the faith of the representation made by the executors in their application for probate, and charging them with wilful and fraudulent concealment. There was evidence to show that some of the property subsequently discovered was such that the defendants as executors ought to have known, even if they did

not of its existence at the time of the compromise. *Held*, that even though the executors had no such knowledge, and there was no actual fraud, yet there was such culpable ignorance and neglect of duty on their part as to amount to fraud, and carry with it the consequences of knowledge, and as the compromise had in consequence been entered into by the parties and sanctioned by the Court under a misapprehension of material fact, the plaintiff was entitled to have the compromise set aside, and the parties restored to their rights in the former suit at the time it was effected.

*Per* PONTIFEX, J.—In cases where the sanction of the Court is required, as where there is an infant concerned, each party is bound to see that the materials on which the sanction of the Court is asked for are unimpeachable.

*Per* PONTIFEX, J.—*Quere*.—Whether in this suit, if the questions were found to arise, it would be necessary for the Court to consider whether it would be for the benefit of the minor that the compromise should be set aside?

*Per* GARTH, C. J.—*Semle*.—Even if it only appeared that the compromise had been entered into and sanctioned under an entire mistake of the parties and of the Court with regard to the subject-matter of the agreement, it ought to be set aside under s. 20\* of the Contract Act.

*Per* GARTH, C. J.—In a substantive suit by a minor to set aside a compromise made with the sanction of the Court obtained by fraud or mistake, it is [389] not the province of the Court to inquire whether it would or would not be for the benefit of the minor that the compromise should be set aside; though it might be otherwise on an application for review to the Court which granted the sanction.

APPEAL from a decision of WILSON, J., dated the 30th June 1880.

The plaintiff in this suit was a minor, and sued by Syad Ahmed, her next friend, to set aside a compromise made between herself (her mother Bibee Rubbia acting on her behalf) and the defendants Abdool Azeez and Ahmedool-lah, the latter of whom died pending the appeal. The compromise was alleged to have been made on the faith of representations made by the defendants to the plaintiff, which afterwards turned out to be untrue.

The material facts are fully set out in the judgment of PONTIFEX, J.

Wilson, J., dismissed the suit, finding on the evidence that the compromise had not been agreed to on the faith of the representations as alleged, such representations never having been made.

The plaintiff appealed from this decision.

Mr. Phillips and Mr. T. A. Apcar for the Appellant.

Mr. Kennedy and Mr. Bonnerjee for the Respondents.

The following cases were referred to in argument:—*Hall v. Turner* (L. R., (14 Ch. D., 829), *Brooke v. Lord Mostyn* (2 De Gex J. & S., 373; s.c., 33 Beaven, 457), *Rawlins v. Wickham* (De Gex & J., 304), *Gilbert v. Endean* (L. R., 9 Ch. D., 259), *Baboo Lekraj Roy v. Baboo Mahtab Chand* (14 Moo. P. C., 393; s.c., 10 B. L. R., 35), *Trigge v. Lavallee* (15 Moo. P. C., 270), *Flower v. Lloyd* (L. R., 10 Ch. D., 327). Section 20\* of the Contract Act was also referred to.

Agreement void where both parties are under mistake as to matter of fact.

\* [Sec. 20:—Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

*Explanation*:—An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement, is not to be deemed a mistake as to a matter of fact.]



[690] The following Judgments were delivered :—

**Pontifex, J.**— The plaintiff is a minor, and sues by her next friend to set aside a compromise sanctioned by this Court in a former suit.

In that suit her title was stated in the following way :—

One Sudickjee, of Cashmere, carried on large business operations in Calcutta, other parts of British India, and Cashmere. He died, nearly fifty years ago, intestate. His business was carried on in partnership with Khajah Mussijee and Koodoor Mullick. He left two sons, Khaluckjee and Ackbarjee, and a daughter, Fatima, who was the wife of his partner Khajah Mussijee.

That, after Sudickjee's death, his son Ackbarjee had charge of the Calcutta business.

That Khajah Mussijee died in 1854, having bequeathed the residue of his estate to his son Khajah Moheeoodeen and Khaluckjee. That Khaluckjee died in 1859 intestate, leaving Ackbarjee one of his heirs.

That Ackbarjee died in 1868 having been jointly interested in the business with Khaluckjee and Khajah Mussijee up to the death of the latter; and from his death, with Khaluckjee and Moheeoodeen until the death of Khaluckjee; and after his death with Moheeoodeen until his own death in 1868.

That Ackbarjee left, among other heirs, a son, the defendant Abdool Azeez and a daughter, the infant plaintiff, her share as an heir being 7-24ths of the estate left by Ackbarjee. That it was alleged that Ackbarjee left a will, by which, after giving certain legacies, he bequeathed a sum of Rs. 30,000 in trust for his son Abdool Azeez. That such will contained a recital that Moheeoodeen had given the testator the said sum of Rs. 30,000 in full satisfaction and discharge of all claims which he might have against the estate of his deceased brother Khaluckjee.

But the infant plaintiff denied that she had ever given any consent to the will of Ackbarjee, which would, therefore, be inoperative against her.

This suit of the infant plaintiff was instituted on the 21st December 1871 against the executors of the will of Ackbarjee [691] and against Moheeoodeen, alleging that the latter had possessed himself of the whole of Ackbarjee's estate.

Now if these allegations were true, Ackbarjee would have been a partner in the aforesaid business and interested in the property thereof, partly on his own account and partly as being one of the heirs of his brother Khaluckjee.

The infant plaintiff's suit was tried by Mr. Justice PHEAR. He had dismissed the executors named in Ackbarjee's will from the suit, as they had never taken out probate, or in any way intermeddled with the estate.

The only question considered by Mr. Justice PHEAR was, whether Moheeoodeen was accountable to the plaintiff for assets of Ackbarjee come to his hands. In his judgment he said: "Moheeoodeen is, without doubt, the principal defendant in this suit; and although Abdool Azeez, now somewhat feebly advances a personal responsibility for the Rs. 30,000, I should be shutting my eyes to all the *indicia* afforded by the conduct of the parties to the suit if I did not perceive that Moheeoodeen is the person really concerned in the fate of this trial. I have no sort of doubt that, on the death of Ackbarjee, all his estate and effects came into the hands of Moheeoodeen, and so far as they have been administered at all, have been administered by him. He must, therefore, account in this suit. And regard being had to the share he had in putting the will into its existing shape, I think the release contained in the last clause must not be used as evidence in his favour in the accounts." It is

observable that Mr. Justice PHEAR expressed no opinion as to whether Ackbarjee had been a partner in the business as alleged by the plaintiff, or as to what his estate consisted of. That of course was a matter reserved for further consideration in a later stage of the cause when the inquiries and accounts directed by the decree had been made and taken.

By Mr. Justice PHEAR's decree it was declared that Ackbarjee's will was inoperative against the infant plaintiff; and the following accounts and inquiries were ordered to be taken and made :—

1. An account of the estate of Ackbarjee come to the hands of Moheeoodeen.

[692] 3. An inquiry as to what part (if any) of Ackbarjee's estate is outstanding and undisposed of.

And further consideration was reserved with liberty to apply.

Under the account numbered 1 and the inquiry numbered 3, it was competent to the infant plaintiff to prove that Ackbarjee was a partner in the business, and that part of his estate was represented by part of the capital and profits thereof.

The judgment and decree of Mr. Justice PHEAR were confirmed by the Appeal Court on the 28th March 1876, with this modification,—That it was ordered that, in taking the said accounts, no regard was to be had to the statement in the last clause of Ackbarjee's will except as *corroborative evidence*, and until after other substantive proof had been given of the said alleged release and the payment of the sum of Rs. 30,000 therein mentioned.

The suit was, accordingly, remitted to the lower Court for the purpose of proceeding with the accounts and inquiries.

But before any progress could be made with the said accounts and inquiries, Khajah Moheeoodeen died on the 12th of April 1876, leaving a will, whereby he appointed Abdool Azeez and Ahmedoollah, who are defendants in the present suit, his executors. Ahmedoollah has since died.

It is to be observed that the last clause in Ackbarjee's will, even if established to be true by other substantive proof, applies only to his claim in respect of his brother Khalujkjee's estate; and in no way relates to his claim as a partner in the business if such claim can be substantiated. But the amount of this latter claim, if substantiated, might depend to a very great extent on the true value of the estate of his alleged partner Moheeoodeen, who, as surviving partner, would have succeeded to the entire business. The value and nature of his estate might furnish some index of the value of the business.

On Moheeoodeen's death the original suit was revived as against his executors.

On the 1st of May 1876, Moheeoodeen's executors applied for and obtained probate of his will.

In their application for probate they stated that Moheeoodeen [693] left property in British India, the approximate value of which was Rs. 4,41,124 as shown by an annexed schedule.

That schedule is set out in the 5th paragraph of the plaint in the present suit. Its particulars consist of houses in Calcutta, debts due to the deceased in Bombay, debts due to the deceased in Bengal, debts due to the deceased from his own Cotee in Umritsur, and certain personal articles.

According to common form the executors stated that so far as they had been able to ascertain and were aware, there was no other property belonging to Moheeoodeen in British India besides the items specified in the schedule.

It is to be observed that the schedule says nothing whatever about Government paper, or stocks, or shares, or balance at the deceased's bankers. Yet Doorga Churn Law, the banker, who has been examined, says—"At the time of Moheeoodeen's death, the balance of the account was against us. It was a pretty large balance."

Shortly after probate was granted some negotiation must have been entered into for a compromise of the infant plaintiff's claim. For, ultimately it was agreed between the adviser of the infant plaintiff and the executors of Moheeoodeen, that the infant plaintiff should accept Rs. 20,000 in full of all demands, together with Rs. 5,000 for her costs of suit; and that the approval of the Court should be obtained on behalf of the infant.

It was of course equally important for both parties that the Court's approval should be obtained; and in my opinion it was the duty of both parties to take care that the Court should have correct materials on which to form its judgment.

According to the arrangement, the infant, by her next friend, presented a petition to the Court, asking for its approval to the compromise, such petition having been previously submitted for consideration to the executors.

The petition, after stating generally the plaint and decree in the original suit, and the result of the appeal therefrom, and the death and will of Moheeoodeen, proceeded in its 7th, 14th, and 15th paragraphs as follows:—

"7th.—That, in the petition filed by the said executors of the said defendant Khajah Moheeoodeen, and in which they applied [694] for probate as aforesaid, they declared that the estate and effects of the said defendant Khajah Moheeoodeen left by him at the time of his death consisted" [of certain specified property, the estimated value of which was Rs. 441,124], as on reference to the said petition, which is now filed on record, will more fully appear.

"14th.—That the estate of the said Ackbarjee, deceased, in case the alleged payment is proved, will amount to Rs. 30,000, subject to certain legacies in his said will mentioned; but in case such payment is not proved, *the same will be a moiety of the estate and effects of the said defendant Khajah Moheeoodeen, deceased.*

"15th.—That, under the circumstances of the case, and considering the length of time, trouble, and expense which have already been involved in this, and which may hereafter be entailed in bringing it to a close, and considering other difficulties which the plaintiff has to meet in the matter, and with the view to put an end to further litigation, trouble, and expense, and to save the estate from being swallowed up by costs, I, as mother and guardian of the infant plaintiff and her said stepfather as her manager and agent, have, under the advice of Counsel, agreed with the defendants to certain terms of settlement in respect of all claims and demands of the infant plaintiff, which terms are hereto annexed and marked A."

The proposed terms of settlement were the following:—

1. "That the defendants do bring into Court Government promissory notes of the 4½ per cent. loan for Rs. 20,000, in full of all the plaintiff's (Bibee Solomon's) claims and demands in respect of the matters in suit, and in full of

all her claims and demands whatsoever against the estate of the late Ackbarjee or against the executors of his will, or against Moheesodeen or his heirs and representatives, or his or their estate and effects.

2. "That the said Company's paper be placed to the separate credit of the said Bibee Solomon in this suit, and the interest thereof paid out for her benefit during her minority to her mother and guardian Bibee Rubbia.

3. "That the defendants do pay all the costs of this suit and of all proceedings relative to the will of Khajah Moheesodeen on [695] scale No. 2 as between attorney and client, such payment to be made (as to plaintiff's costs) through the plaintiff's attorneys Messrs. Orr and Harriss.

4. "That the defendants do pay to the defendant Doorga Churn Law and others costs directed to be paid by the plaintiff to them, so that the said Company's paper for Rs. 20,000 may without deduction be placed to her credit herein as aforesaid.

5. "That the books of account, which were brought in and now are in Court in this suit, be forthwith delivered out to the defendants."

This petition, as it happened, was heard by me then sitting on the Original Side of the Court; and according to my note both parties appeared at the hearing. I think I may trust my memory so far as to say that I refused to make any order on the petition until the statements contained in it were verified by affidavit, which, when the petition was presented, had not been done. Subsequently, the petition having been verified by affidavit, it was my duty to consider whether or not the Court ought to approve the arrangement. I find from my note-book the petition was before me on the 4th and 11th of September 1876.

Now, it would be exceedingly dangerous for me to charge my memory with the reasons which led me to grant the approval of the Court to this compromise. But looking at the petition and the order made upon it as if it had been made by some one other than myself, it is clear that the Court had before it only certain data on which to found its order. Those data are contained in the 14th paragraph read with the 7th, and in the 15th paragraph.

According to the 14th paragraph, the infant plaintiff was entitled to either one of two sums, taking the outside value of each; that is to say, not allowing for any other claims against the funds—namely, either to 7-24ths of Rs. 30,000 or Rs. 8,750, or to 7-24ths of a moiety of Rs. 4,41,124, or somewhere about Rs. 64,000.

The claim in the 14th paragraph to a moiety of the estate of Moheesodeen must of course have been in respect of the alleged partnership.

[696] Then there was the further datum, namely, the allegations contained in the 15th paragraph of the petition.

Now, the sum offered by way of compromise was Rs. 20,000 of  $4\frac{1}{2}$  per cent. Government paper, down, and all costs, which exceeded Rs. 5,000.

It was upon those data, and those data only, that the Court approved the compromise by an order dated 10th September 1876.

It appears by proceedings in the present suit that Moheesodeen's executors paid Rs. 5,000 in respect of costs alone under the order.

The compromise having been confirmed, the executors of Moheesodeen suddenly discovered, before the Rs. 20,000 and the costs were paid, that property at all events of the value of three lacs, or, as estimated by the plaintiff

in this suit, of the value of nine lacs, was belonging to the estate of Moheeoodeen, though not mentioned in the schedule to the application for probate, or in the petition for the Court's approval.

The order confirming the compromise having been made on the 11th of September, Mr. Paliologus, the defendants' solicitor, writes on the 20th of September as follows :—

"The Company's papers for Rs. 20,000, and 5,000 towards your costs, are with me ; and if you have a copy of the decree, will you please lodge it, or let me have it, that I may do so with the Company's papers."

"I have this day learnt that two lacs more of Company's papers belonging to the estate of Moheeoodeen have been found, and I have received instructions to apply that further duty from the estate be received upon this sum."

"This, however, I think you will agree with me in no way affects the settlement in this case."

The letter does not say, and there is no evidence to show, when the defendants first learned of this addition to their testator's estate. And the last paragraph of the letter to my mind is rather suggestive of doubt in the mind of the writer whether the discovery did not affect the compromise.

But however that may be, the writer of the letter seems to have forgotten that his clients were dealing with a minor ; and that it might be right to bring this discovery to the notice of [697] the Court before payment of the Rs. 20,000 was made. Before this letter (which was written at the commencement of the vacation) was answered, the Rs. 20,000 was transferred to an account in the infant's name, and Rs. 5,000 was paid for costs. But on the 29th of January 1877, the plaintiff's attorney wrote as follows :—

"With reference to your letter to us of the 20th September last, we are instructed by our client's guardian to say that the sum of Rs. 20,000, which she accepted for settlement of the infant plaintiff's claim, was so done on the statement of the assets contained in the petition of the executors filed on the 1st May 1876 ; but as since the settlement was made so large a sum as Rs. 2,00,000 more has been discovered, she thinks that the plaintiff is fully entitled to a proportionate sum in addition to the sum of Rs. 20,000 paid as aforesaid ; and is, therefore, desirous of bringing this matter to the notice of the Court."

"The desire is, we consider, reasonable, and we have no doubt you will agree with us as to the propriety of having the matter mentioned to the Court with the view to further directions."

On the 29th of January and 24th of February, Mr. Paliologus wrote the following letters :—

*"January 29th.*

"It is strange that such a time has been allowed to go by without anything being done, and now that the executors are in Cashmere, it is proposed to reopen the question. I can at present only refer a copy of your letter for instructions."

*"February 24th.*

"I forwarded a copy of your letter of yesterday's date to the manager of the Cotee here, and he instructs me to say that he has no power to consent to open this matter which was considered settled by the executors before they left Calcutta. Your first letter has been forwarded to them, and the manager expects a reply in two or three days. A copy of your last letter will also be sent up by this day's date."

The foregoing are the circumstances under which the present suit was instituted on behalf of the infant plaintiff on the 20th of March 1879.

Her plaint states the proceedings in the former suit, the defendants' petition for probate, and the schedule annexed thereto, and the petition and order for compromise.

In the 6th paragraph the plaintiff alleges that the *executors* of Moheecodeen conducted the negotiation; and represented the estate of Moheecodeen to consist only of the property mentioned in the application for probate of his will, with the sole exception of a house in Cashmere, and that the terms of settlement were accepted on the faith of such representation. The plaint then refers to the letters of the 20th September 1876 and the 29th of January 1877; and in the 12th paragraph states that, in addition to the Company's papers for two lacs of rupees, other property has been discovered as belonging to Moheecodeen, consisting of railway, bank, and other shares, houses and other property of the estimated value of many lacs of rupees.

The 16th paragraph charges wilful and fraudulent concealment, but submits that even if the estate had been under-estimated by mistake, the settlement should be reopened; and the 1st, 2nd, and 6th paragraphs of the prayer are as follows:—

1. "That the said agreement for settlement and the said decree may be declared not binding upon the plaintiff, and may be set aside or cancelled.
2. "That the accounts ordered to be taken by the said decree of the 28th March 1876 may be proceeded with.
3. "That so far as may be necessary, this suit may be considered supplemental to the said suit of the plaintiff and the said Bibee Rubbia."

The defendant Abdul Azeez alone put in a written statement, the other defendant Ahmedoollah having died after the institution of the suit.

The plaintiff having charged that the *executors* had made certain representations, Abdool Azeez in his written statement denies that allegation, but we have no denial by Ahmedoollah. It is true that, according to the plaintiff's evidence, Abdul Azeez himself joined in the representations—nay was the principal party in making them. This of course he was in a position to deny; but in his evidence he admits that "Ahmedoollah took some part in the settlement, but he does not know [399] what part." Obviously, therefore, he was not in a position to deny the plaintiff's allegation so far as it related to Ahmedoollah.

In the 7th paragraph of his written statement Abdool Azeez says:—  
 "This defendant says that from the best enquiries that he and his said co-executor have been able to make, they have found, and he charges that it is true, that the said Ackbarjee had received Rs. 30,000 from the said Khajah Moheecodeen in full satisfaction of all the claims of the said Ackbarjee against the said Moheecodeen in respect of the estate of the said Mussijee in the will of the said Ackbarjee mentioned."

Now, as a matter of fact, we are told that the only evidence adduced by the defendants to the plaintiff's advisers in the former suit with respect to the alleged payment of this Rs. 30,000 were certain entries in Moheecodeen's books; and that these entries refer to three Government papers of Rs. 10,000 each, which have been identified with three papers which Doorga Churn Law, the banker of Moheecodeen, states in his evidence in this suit, that he held for Moheecodeen and transferred to Rohim Shaw, the gomastha of

Is it conceivable that Rohim Shaw, the gomastah, had made no inquiry of Doorga Churn Law, or was ignorant of the existence of the Company's papers for two lacs or some part of it?

The defendant now admits the existence of these two lacs; but we do not even know how, where, or when they were discovered.

Even if the executors were really ignorant of this large addition to the estate at the time of the compromise, though the discovery was made suspiciously soon, ten days afterwards, was it not such culpable and wilfully blind ignorance, at all events as to the securities on deposit with Doorga Churn, as to be equivalent to or carry with it the consequences of knowledge. In the case of *Bell v. Gardner* (4 Man. & Gr., 24), C. J. TINDAL says:—"We can in fact regard the possession of the means of knowledge only as affording a strong observation to the jury to induce them to believe that the party had actual knowledge of the circumstances." And again: "There may be cases where the existence of the means of knowledge might lead irresistibly to the inference that the party had actual knowledge"; and Mr. [703] Justice CRESSWELL added, "Where a party has the means of knowledge it may be evidence of actual knowledge." Exercising the functions of a jury, I think it would be difficult not to arrive at the conclusion that the executors of Moheeoodeen had actual knowledge of the securities with Doorga Churn Law. But with respect to the two lacs of Company's paper, I have no materials to form an opinion beyond the suspiciously sudden discovery immediately after the sanction of the compromise.

Now a transaction very similar to this was discussed by the Lords Justices in the case of *Brooke v. Lord Mostyn* (2 DeG. J. and S., 373). In that case a compromise had been approved by the Court on behalf of an infant. For the purposes of the compromise it was necessary to ascertain the value of an estate. A document relative to the valuation of the estate, and which the Lords Justices considered material, was in the possession of the party to be charged, and was not produced. On that ground the Lords Justices set aside the compromise. On appeal to the House of Lords, that decision was reversed only on a question of fact and not of law.

Lord Justice TURNER, at p. 416, considers what circumstances will furnish sufficient ground for impeaching a compromise made under the order of the Court. He says with respect to a compromise between adults:—"If there be no fraud, and equal knowledge on both sides, the compromise cannot be disturbed; but if there is knowledge on one side, which is withheld, the compromise cannot stand, because the withholding of the knowledge amounts, in the view of a Court of Equity, to fraud." And he proceeds to say, that the rule is the same when a compromise is sanctioned by the Court on behalf of an infant.

I confess I am myself inclined to think that even a higher degree of good faith is due when the Court's sanction is required, because that sanction is equally necessary for both parties; and each party is in my opinion bound to see that the materials before the Court are unimpeachable. The Lord Justice proceeds, p. 423:—"It may be said, perhaps, that the master was satisfied with the information laid before him and called for no [704] further information; but the question is not whether the master called for further information,



but whether *the parties* having this further information in their possession were justified in withholding it."

I am of opinion that if the plaintiff's allegations as to the partnership are true—which question has not yet been tried—the extent of Moheesooden's estate may be material, and that at all events the petition for compromise led the Court to believe so. The compromise was confirmed under that impression; and the representation as to the extent of Moheesooden's estate in the petition was due either to the fraud (which issue has not been tried), or the culpable and wilful ignorance of the executors in a matter which it was their duty to have thoroughly inquired into, and as to which, at least so far as respects the property in Doorga Churn Law's custody, they had an easy and natural means of knowledge.

I am of opinion, therefore, that the judgment appealed against should be reversed, and the case remitted to the lower Court for the trial of all the issues.

Of course, if the compromise is set aside, the parties must be replaced in their former positions, and the Rs. 20,000 retransferred. But it may not be necessary to deal with the Rs. 5,000 paid for costs, as the plaintiff's admitted rights in the Rs. 30,000 would exceed that sum.

It may, however, be questionable whether there may not be a difficulty in trying this case as long as the plaintiff's minority continues, as it may be argued that it may be necessary for the Court to consider whether it will be for the benefit of the plaintiff to set this compromise aside, and in the consideration of that question, the truth of the plaintiff's allegations in the original suit might have to be investigated.

However it will be for the lower Court to consider whether that question arises. All that we decide now is, that the case must be remitted to the lower Court to try all the issues with respect to the compromise. The costs, both of this appeal and of the original hearing, will abide the result.

**Garth, C. J.**—I quite agree that this case has been imperfectly tried in the Court below; and it seems to me that the [705] question of misrepresentation by the executors has been dealt with both by the Court and by the parties on too narrow a footing.

The question to be tried, as stated by the learned Judge at the commencement of his judgment, was this, "whether the story told by Bibee Rubbia and Mahomed Gouse as to the interviews and oral communications during the negotiations for a settlement are to be accepted as true."

Now it seems to me, that without going minutely into the nature of the representations made by the executors, or of the negotiations which resulted in the compromise, the following broad facts are abundantly clear:—

*1st.*—That, from the very nature of the arrangement, the actual value of the estate and effects of Moheesooden was a most important matter both for the parties and for the Court to ascertain, in order to determine whether the proposed compromise was one which, in the interest of the minor, ought to have been sanctioned;



*2nd.*—That the basis of the compromise in this respect was the statement made by the executors in their petition for probate, confirmed by their subsequent declaration. In the petition to the Court to sanction the compromise that statement was brought prominently forward as the basis of the proposed arrangement ;

*3rd.*—That not only Bibee Rubbia, but the Court, acted upon the assumption that this statement of the value of Mohecoodeen's property was substantially correct ; and

*4th.*—That the executors might and ought to have known, and had certainly the means of knowing, if they had made proper and reasonable enquiry, that this statement was not true, and that Mohecoodeen's property was of much larger value than they had represented.

I think, therefore, that the compromise was entered into by the parties, and sanctioned by the Court, under a serious misapprehension of material facts ; and that this misapprehension was caused either by the actual fraud of, or at any rate by a culpable neglect of duty, of the executors, sufficient, as I consider to amount to fraud in the view of a Court of Equity.

[706] As at present advised, therefore, unless something further should be proved in the Court below, of which I am not aware, I think that the compromise ought to be set aside, and the parties restored to their position and rights in the former suit at the time when it was effected.

I confess, if it were necessary to decide the further question, I should be disposed to set aside the compromise, even though no fraud of any kind had been established ; and it only appeared that the arrangement had been brought about by an *entire mistake of both parties and of the Court* with regard to the subject-matter of the agreement.

Thus, for example, suppose that, in an administration suit an agreement under the sanction of the Court were made with legatees, some of whom were minors, that they should accept a proportionate part of their legacies in satisfaction of the whole upon the supposition by all parties, and by the Court, that the estate to be administered was not sufficient to pay the legacies in full, and it turned out afterwards that the estate was much larger than was supposed, and that there were ample funds to pay all the legacies in full, it seems to me, as at present advised, that the compromise ought to be set aside, under such circumstances, on the ground of mutual mistake.

I rather think that s. 20 of the Contract Act is intended to meet a case of that kind ; and, therefore, if this case rested upon nothing more than the mistake of both sides and of the Judge who gave the sanction, I think that the compromise should be set aside.

There can be no difficulty here, as there might be in some cases, in putting both parties in *statu quo* ; because all that has been done is the mere payment of Rs. 25,000, which can be readily repaid or adjusted.

And it seems to me\* that this view is by no means opposed to the law as laid down by Lord Justice TURNER in the case of *Brooke v. Lord Mostyn* (2 DeG. J. and S., 373), because he was then dealing with a very different state of things, and the question of mutual mistake was not present to the mind of the Court.

I should add with regard to the last observation made by my [707] brother PONTIFEX, that I rather doubt much whether, in a substantive suit brought by a minor to set aside a compromise obtained by fraud or mistake, it is the province of the Court to enquire whether it would or would not be beneficial for the minor that the compromise should be set aside. I rather think that this is a question for the adviser of the minor only; and that the minor has a right, at his option, to the relief prayed, if it is proved that there are proper grounds for it.

It might be a different matter, if an application were made to the learned Judge in the former suit who sanctioned the compromise to set it aside on motion for review. He might then have to consider, perhaps, whether it was proper in the minor's interest to interfere. But here is a substantive suit to set aside a compromise on the ground of equitable fraud; and if the minor *has a right* to the relief prayed, I doubt whether the Court has any power to consider whether it would be beneficial to him to grant the relief.

This, however, will be a question for the Court below to consider when the case comes again before it.

*Appeal allowed and case remanded.*

Attorney for the Appellant: Mr. Pittar.

Attorneys for the Respondents: Messrs. Harriss & Co.

#### **NOTES.**

##### **[I. COMPROMISE UNDER MISTAKE :—**

English Law takes the same view :—(1897) 2 Ch. 534, (1895) 2 Ch. 273; (1895) 2 Ch. 638. Whether consent operates as estoppel, see, (1905) Ch. 158; (1900) 1 Q. B. 54.

##### **II. COMPROMISE ON BEHALF OF MINOR.—**

As to how it can be set aside, see, 3 C. L. J. 119; 31 Cal. 111, 15 Bom. 594; 26 Bom 109; 3 Bom. L.R. 565.

The formalities of the Civil Procedure Code as to sanction are imperative, See (1913) 19 I. C. 515 P. C., (1913) 21 I. C. 288 P.C.]

[6 Cal. 707]

APPELLATE CIVIL.

*The 28th January, 1881.*

PRESENT :

MR. JUSTICE MORRIS AND MR. JUSTICE TOTTENHAM.

In the matter of the petition of Ishan Chunder Roy.\*

*Application for Probate—Limitation Act (XV of 1877,) Sched. ii, art. 178.*

The Limitation Act is not applicable to an application for probate; such an application, therefore, is not barred by art. 178 of sched. ii of that Act.

THE facts material to this report sufficiently appear in the Judgment.

[708] Baboo Troyluckyanath Mitter and Baboo Grish Chunder Chowdhry for the Appellant.

The Judgment of the Court (MORRIS and TOTTENHAM, JJ.) was delivered by

**Tottenham, J.**—This is an appeal from an order of the District Judge of Tippera, rejecting, on the ground that it was barred by limitation, an application for probate of the will of one Obhoy Chunder Roy, who died on the 23rd of Pous 1281 (corresponding with the 6th January 1875).

The application was made on the 11th March 1880,—that is, five years and two months after the death of the testator. The Judge appears to have called for an explanation of the delay, and to have considered that no sufficient reason was made out. He rejected the application as being barred under art. 178, sched. ii of the Limitation Act.

We think that the lower Court was mistaken in applying the Limitation Act to a petition for probate. If the article quoted be read alone, it does indeed seem capable of the widest extension to every possible application that can be made to the Court, "for which no period of limitation is provided elsewhere in this schedule, or by the Code of Civil Procedure, s. 230."

But the preamble to the Act distinctly shows that it is not intended to apply to all, but to *certain*, applications to Courts: and an examination of the 3rd division of sched. ii, which deals with applications, shows that every article therein contained, No. 178 only excepted, specifically relates to some case pending or already decided.† Article 178 must be construed with reference to the wording of the other articles, and can relate only to applications *ejusdem generis*, and

\* Appeal from Original Order, No. 76 of 1880, against the order of W. F. Meres, Esq., District Judge of Tippera, dated the 31st March 1880.

† [Mitra in his Limitation (1911) Vol II p. 1228 observes with reference to this remark here that "this statement is strictly correct, except so far as an application under sec. 526 of the Code (see Art. 176 L. A. 1877) is concerned.]

therefore not to such an application as the one now before us. We find this principle has already been enunciated in this Court on the Original Side, in the case of *Govind Chunder Goswami v. Rungunmoney* (*ante*, p. 60). It is to be observed that in the previous Limitation Acts, XIV of 1859 and IX of 1871, no such article as this article (No. 178) was included, and under those Acts no question of limitation could have arisen in respect of an application for probate. It [709] may fairly be presumed that, had the Legislature intended to apply for the first time a period of limitation to such applications, there would have been some provision in regard to them similar to that contained in s. 2 in respect of suits for which the new Act prescribes a shorter period of limitation than was previously allowed.

Altogether, we are of opinion that no law of limitation governs applications for probate. Of course long unexplained delay may, in certain cases, throw doubt on the genuineness of the will propounded ; but that is a different thing from saying that probate is barred by limitation. The appellant is entitled to have his application decided on its merits.

The lower Court's order is, therefore, set aside ; and the case will be returned to it to be dealt with according to law.

*Appeal allowed.*

#### **NOTES.**

##### **LIMITATION—RESIDUARY APPLICATIONS—**

Similar views have been held as regards the applicability of Art. 173 to probate proceedings, foreclosure proceedings, etc. —

7 Bom. 213 ; 8 Mad. 207 ; 19 Cal. 48 ; 7 Cal 333 ; 4 O. C. 224 ; 11 C. P. L. R. 114 ; 17 Mad 379. But see 31 Mad. 24 where the machinery of the C. P. C is put in motion though under right conferred, say, by the Madras Revenue Recovery Act (II of 1864).

Similarly applications under the Cr. P. C are not within the Act,.—10 All. 359 · 20 Bom. 543.]

[6 Cal. 709]

The 28th January, 1881.

PRESENT:

MR. JUSTICE MORRIS AND MR. JUSTICE TOTTENHAM.

Kangali Churn Sha and another.....Defendants

versus

Zomurrudonnissha Khatoon.....Plaintiff."

*Limitation—Possession, Suit for—Limitation Act (XV of 1877), sched. ii, art. 47.*

In a dispute between *A* and *B* concerning the possession of a certain taluq, the Criminal Court made an order under s. 530 of the Code of Criminal Procedure retaining *B* in possession; and this order was, in a proceeding under ss. 295†, 296 of the Code of Criminal Procedure, confirmed by the Court of Session. *Held*, that a suit by *A* for the recovery of the land must be brought within three years from the date of the Magistrate's order, and not from the date of the order passed by the Court of Session.

Article 47† of sched. ii, Act XV of 1877, refers to immoveable as well as moveable property. *Akilandammal v. Periasami Pillai* (I. L. R., 1 Mad., 309) approved.

In this case the plaintiff sued for possession of a certain taluq, which she had purchased, in 1871, at an auction-sale in [710] execution of a decree. The defendants, who claimed to be in possession of the property as owners, had, in 1875, instituted proceedings respecting it against the plaintiff in the Criminal Court at Bogra, under s. 530 of the Code of Criminal Procedure; and on the 30th of June 1875, the Magistrate passed an order directing that the defendants should be retained in possession. The plaintiff, under ss. 295 and 296 of the Code of Criminal Procedure, then applied to the Judge of Rungpore for a reversal of the Magistrate's order, but the Judge confirmed the order on the 5th of April 1876. The present suit was instituted

\* Appeal from Order, No. 218 of 1880, against the order of Baboo Jeebunkishto Chatterjee, Subordinate Judge of Pubna, dated the 15th June 1880, reversing the order of Baboo Juggobundhoo Gangoollee, Munsif of Bogra, dated the 18th December 1879.

† [Sec. 295 :—Any Court of Session or Magistrate of the District may, at all times call for and examine the record of Session and Magistrate to call for record of subordinate Courts. purpose of satisfying itself or himself as to the legality of any sentence or order passed, and as to the regularity of the proceedings of such subordinate Courts.]

For the purposes of this section, every Magistrate in a Sessions Division shall be deemed to be subordinate to the Sessions Judge of the Division.]

† [Art. 47 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
By any person bound by an order respecting the possession of property made under the Code of Criminal Procedure chapter XL or Mamlatdars Courts Act or by any one claiming under such person, to recover the property comprised in such order.	Three years.	The date of the final order in the case.]

on the 1st of March 1879, and the only question was, whether the suit was barred by limitation. The Court of first instance held that the claim was governed by art. 47 of sched. ii of Act XV of 1877 ; that the final order spoken of in that clause was the order of the 30th of June 1875, and not the order of the 5th of April 1876 ; and dismissed the suit as barred by limitation. On appeal, the Subordinate Judge held, that the three years' limitation did not apply, because the suit was for the recovery of land by establishment of the plaintiff's title, and because no evidence was given to show that the land, which was the subject of the Magistrate's order, had comprised the whole of the land claimed in the present suit ; and he cited the case of *Undhoob Narain v. Chutturdharee Singh* (9 W. R., 480).

The defendants appealed.

Baboo *Shosheebhoosun Dutt* for the Appellants.

Baboo *Sreenauth Doss* and Baboo *Jogesh Chunder Roy* for the Respondent.

The **Judgment** of the Court (MORRIS and TOTTENHAM, JJ.,) was delivered by

**Morris, J.**—We think that the Subordinate Judge is wrong, and the first Court is right in holding that, so far as this suit is brought to recover property comprised in the order of the Magistrate made under chap. xl of the present Code of Criminal Procedure, it is barred under art. 47, sched. ii, Act XV of 1877. No doubt the order, being passed on the 30th June [711] 1865, comes under the operation of the former Limitation Act, IX of 1871. But by s. 2 and sched. v of Act X of 1872, chap. xl of that Act (X of 1872) has been substituted for chap. xxii of Act XXV of 1861; consequently the order of the Magistrate, which is the cause of action in this suit, is governed by the provisions of Act XV of 1877. We are unable to assent to the argument that the property, to recover which a suit may be brought under art. 47, is moveable property only. It seems to us to have reference to immoveable as well as moveable property. This view is in accordance with that of the Madras Court in the case of *Akulandammal v. Periasami Pillai* (I. L. R., 1 Mad., 309).

[The rest of the judgment is not material for the purposes of this report.]

[6 Cal. 711]

The 11th February, 1881.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Goluk Chunder Mahinta and others.....Decree-holders  
*versus*  
 Surbomangala Dabi and another.....Judgment-debtors.\*

*Execution of Mortgage-Decree—Beng. Act VII of 1868—Sale of mortgaged property—surplus sale-proceeds—Attachment of surplus sale proceeds..*

The purchaser of property, sold subject to the incumbrances thereon, at a sale under Beng. Act VII of 1868, subsequently became the purchaser of a decree passed prior to the sale in a suit upon a mortgage of the property, such decree being declared not only a charge on the mortgaged property, but also personal against the mortgagor.

*Held*, that the purchaser was not entitled to execute the decree against the surplus sale-proceeds under such sale, although he abandoned his lien on the property.

IN this case it appeared that certain property belonging to the judgment-debtors had been put up for sale under the provisions of Beng. Act VII of 1868, and had been purchased by the petitioners, subject to the incumbrances then existing thereon, amongst which was a mortgage-decree, which was [712] declared to be both personal against the judgment-debtors as well as a charge upon the property. After the sale a portion of the decree was purchased by the petitioners, or by some persons on their behalf, and they then, after having paid off some of the other incumbrances on the property, applied to be allowed to execute that decree against the surplus sale-proceeds, which were then in the Collectorate at the credit of the judgment-debtors. The latter objected, on the ground that the decree-holders were bound first to proceed against the property, the subject of the mortgage, and then, if the decree remained unsatisfied, they might attach the surplus sale-proceeds. Thereupon the petitioners relinquished their lien on the property, and applied for permission forthwith to attach the surplus sale-proceeds. The Subordinate Judge, relying on *Mirza Futeh Ali v. Gregory* (6 W. R., Mis. Rul., 13), *Lalla Mitterjeet Singh v. Scott* (17 W. R., 62) and *Byjonnath Sahoy v. Doolhun Biswanath Koor* (24 W. R., 83), held, that they were first bound to attach and sell the mortgaged property, and then, if the proceeds of such sale were insufficient to satisfy their decree, they were at liberty to attach the other properties of the judgment-debtors, but that the latter were not to be allowed to take out the surplus sale-proceeds then in the Collectorate until further orders.

Against this order the petitioners appealed to the High Court.

Baboo Mohin? Mohun Roy and Baboo Jogesh Chunder Roy for the Appellants.

Baboo Busunto Coomar Bose for the Respondents.

The Judgment of the Court (McDONELL and FIELD, JJ.) was delivered by

McDonell, J.—We think that the order of the Subordinate Judge in this case ought not to be interfered with, though we do not agree with the reasons upon which he has based his decision. The property, Bazzapti Mehal Kulliar-

\*Appeal from order, No. 300 of 1880, against the order of Baboo Bany Madhub Mitter, Subordinate Judge of Backergunge, dated the 17th August 1880.

chur, belonged [713] to the judgment-debtors. They mortgaged it to one Kalachand Mahinta. Kalachand brought a suit upon the mortgage-bond and obtained a decree, which was a personal decree against the judgment-debtors, and also a decree against the mortgaged property. Meanwhile the mortgaged property was brought to sale under the provisions of s. 16 of Beng. Act VII of 1868. That sale was in all respects the same as a sale in execution under the Code of Civil Procedure; in other words, it was a sale of the right, title, and interest of the judgment-debtors. The right, title, and interest of the judgment-debtors was, therefore, the equity of redemption. The sale under Beng. Act VII of 1868 took place on the 26th of July 1878; and the appellants in the present case became, either directly or through a mesne conveyance, the purchasers of the interest which passed by this sale.

We are satisfied upon the facts, although the property was purchased in the name of a lady, that the appellants in the present case were the real purchasers. That being so, the appellants, on the 1st of September 1878, purchased a moiety of the mortgage-decree obtained by Kalachand, and which at that time was unexecuted. We may observe that, in our opinion, they were in the same position as purchasers of this moiety as if they had purchased the whole decree. Meanwhile a sum of money, the surplus sale-proceeds of the sale under Beng. Act VII of 1868, was lying in deposit in the Collectorate; and the appellants now seek to execute the decree purchased by them against those sale-proceeds. The Subordinate Judge has decided that they are not entitled to do this, and he relies upon the cases of *Byjonath Sahoy v. Doolhun Biswanath Kooer* (24 W. R., 83), and *Lalla Mitterjeet Singh v. Scott* (17 W. R., 62),—which were decided upon a principle not directly applicable to the present case. The simple aspect of this case is as follows: The appellants purchased the property subject to the mortgage lien. Whether notice of the mortgage was or was not distinctly given at the time of the sale under Beng. Act VII of 1868 is not very material. All that could have been sold was the right, title, and interest of the judgment-debtors; and that [714] right, title, and interest, seeing that the property had been mortgaged, consisted merely of the equity of redemption. If the purchasers at that sale omitted to make proper enquiries and so ascertain the existence of the mortgage lien, such laches will not alter the effect of the sale. Having then purchased the equity of redemption, the appellants next bought in the mortgage lien; and to our minds the effect of this was, that the appellants became entitled to hold the property discharged from the lien; but they contend that they are entitled to something more. They seek to execute the mortgage-decree against the surplus sale-proceeds, which must be taken to represent the value of the equity of redemption; that is, having purchased and paid for the equity of redemption and the mortgage lien, they now desire not only to have the unincumbered property, but also to get back the whole of the price which they have paid for the equity of redemption.

We think that they cannot be allowed to do this.

Under these circumstances, we think that so much of the order of the Subordinate Judge as directs the surplus sale proceeds not to be taken out until the further orders of the Court, which is in fact an attachment of these sale-proceeds, until the judgment-debtors have proceeded against the property, must be expunged. In other respects, the order of the Subordinate Judge will be confirmed.

*Lower Court's order modified.*



APPELLATE CRIMINAL.

*The 28th February, 1881.*

PRESENT:

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE PRINSEP.

In the matter of the Petition of Deela Mahton.....Petitioner

*versus*

Sheo Dyal Koeri.....Opposite Party.\*

*Evidence—Summoning Witnesses—Refusal of a Magistrate to summon Prisoner's  
Witnesses—Criminal Procedure Code (Act X 1872), s. 359.*

A Magistrate is not at liberty to refuse to summon a witness tendered by an accused person, except on the grounds specified in s. 359 of the Criminal [715] Procedure Code ; and if he does refuse, he is bound to proceed under that section. The fact that the accused declines to examine a witness is no reason for refusing to summon him to meet fresh evidence given subsequent to the defence being closed.

Mr. R. E. Twidale appeared for the petitioner on this motion.  
THE facts of this case appear sufficiently, for the purposes of this report, from the **Judgment** of the Court (CUNNINGHAM and PRINSEP, JJ.), which was delivered by

**Cunningham, J.**—We think that the Magistrate was not at liberty to refuse to summon the witnesses tendered by the accused, except on the grounds specified in s. 359† of the Code of the Criminal Procedure; and that if he did refuse on those grounds, he ought to have proceeded under that section. The fact that the accused stated that they did not wish to examine those witnesses when the case closed, was no reason for refusing to summon them to meet fresh evidence which had been taken by the Magistrate after hearing the arguments on behalf of the defence. We must, accordingly, direct that the proceedings be recommenced from that stage, and that the Magistrate do either take the evidence or record his reasons for not doing so, and proceed as directed by law.

*Case remanded.*

\* Criminal Motion, No. 90 of 1881, against the order of E. Stewart, Esq., Deputy Magistrate of Barth, dated the 22nd November 1880.

Refusal to summon unnecessary witness, unless deposit made. † [Sec. 359 :—If the Magistrate thinks that any witness is included in the list for the purpose of vexation or delay or of defeating the ends of justice he may require the accused person to satisfy him that there are reasonable grounds for believing that such witness is material.

If the Magistrate be not so satisfied, he shall not be bound to summon the witness ; but in doubtful cases, he may summon such witness, if such a sum is deposited with the Magistrate as he thinks necessary to defray the expense of obtaining the attendance of the witness.]

[6 Cal. 715]

## APPELLATE CIVIL.

The 16th February, 1881.

PRESENT:

MR. JUSTICE MORRIS AND MR. JUSTICE TOTTENHAM.

Sundhya Mala .....one of the Defendants

*versus*

Dabi Churn Dutt and others.....Plaintiffs.\*

*Res judicata*—Civil Procedure Code (Act X of 1877), s. 13.

The plaintiff sued to recover certain lands, claiming them as a portion of A, and alleging that A was portion of a mouza which had been leased to him in patni by the zemindar. The suit was dismissed, on the ground that [716] though A was known as a part of the plaintiff's mouza, yet it had been included in a patni lease of an adjoining mouza, which the zemindars had granted to the defendants previously to the date of the plaintiff's lease. The plaintiff brought a second suit claiming another portion of A on the same title.

*Held*, that the claim was barred as *res judicata*.

*Mohidin v. Muhammad Ibrahim* (1 Mad. H. C. Rep., 245), *Nund Kishore Singh v. Hurree Pershad Mundul* (13 W. R., 64), *Pran Nath Sandyal v. Ram Coomar Sandyal* (2 C. L. R., 33), and *Gobind Chunder Koondoo v. Taruck Chunder Bose* (I. L. R., 3 Cal., 145) followed.

THIS was a suit for possession of certain lands known by the name of Bund Mahata. The parcels in dispute, and which made up the whole of Bund Mahata, were described in three schedules annexed to the plaint and marked Nos. 1, 2, 3. The plaintiffs claimed that these lands were included in Mouza Mermah, a patni potta of which had been granted to them by the second defendant, their landlord, on the 15th Assin 1273 (28th June 1866); while the first defendant claimed them as included in a potta of an adjoining mouza, Mouza Simrail Kandi, which had been granted by the second defendant to her predecessor in title on the 6th Srabun 1272 (20th July 1865).

It appeared from the evidence that a previous suit had been brought by the plaintiffs against the first defendant in 1872, for the lands comprised in schedules Nos. 2 and 3, on the same title as that put forward in the present case. That suit, which was carried up to the High Court on appeal, was dismissed with costs, on the ground that though Bund Mahata was in reality a portion of Mouza Mermah, yet it was included in the first defendant's potta, which being prior to that of the plaintiffs, of course, prevailed. Some time after the decision just mentioned, the plaintiffs brought a suit for arrears of rent against one Panye, who then held the lands included in schedule No. 1, but the suit was dismissed, on the ground that the lands did not belong to the plaintiffs. The present suit was then brought, and the chief contention was whether the claim was *res judicata*. The Court of first instance and the Court of appeal held, that the claim was barred as to the lands included in schedules Nos. 2 and 3, but gave the plaintiffs a decree for possession of the lands included in schedule No. 1. The first defendant appealed to the High Court.

\* Appeal from Appellate Decree, No. 890 of 1879, against the decree of Baboo Kally Doss Dutt, Second Subordinate Judge of Tipperah, dated the 23rd January 1879, affirming the decree of Baboo Ram Chunder Dhur, Munsif of Chanki Nasirnugger, dated the 28th February 1879.

[717] Baboo *Doorga Mohun Doss* and Baboo *Bhoobun Mohun Doss* for the Appellant.

Baboo *Hurry Mohun Chuckerbutty* for the Respondents.

The **Judgment** of the Court (MORRIS and TOTTENHAM, JJ.) was delivered by

**Morris, J.**—We think that this appeal must prevail upon the authority of the decisions which have been quoted to us, *viz.*, *Mohidin v. Muhammad Ibrahim* (1 Mad. H. C. Rep., 245), *Nund Kishore Singh v. Hurree Pershad Mundul* (13 W. R., 64), *Pran Nath Sandyal v. Ram Coomar Sandyal* (2 C. L. R., 33), and the Full Bench decision in the case of *Gobind Chunder Koondoo v. Taruck Chunder Bose* (I. L. R., 3 Cal., 145). It is clear that the self-same right and title, which are in issue in this case, have been substantially in issue and adjudicated upon in the previous case decided between the same parties on the 9th December 1874. In that case the subject of dispute was a plot of land forming part of what is called Bund Mahata; it was claimed by one side as appertaining to Mermah, and by the other side as appertaining to Simrail Kandi, and each party set up a certain potta from the same lessor in proof of title. It was found that although the land of Bund Mahata appertained to Mouza Mermah, yet, under the potta of the defendant, which was prior in date to that of the present plaintiffs, the superior title rested in the defendant. There, too, in respect of another portion of Bund Mahata, the same title is set forth, and therefore it seems to us that the principle of *res judicata* applies.

The judgments of the lower Courts are reversed, and the suit of the plaintiffs dismissed, with costs in all Courts.

*Appeal allowed.*

#### NOTES.

[See the judgment of MOOKERJEE, J., in (1904) 9 C. L. J. 597 at 602-603, also **Hukm Chand** on *Res judicata* (1894) at pp 40-49.]

[718] APPELLATE CRIMINAL.

The 18th February, 1881.

PRESENT:

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

In the matter of the Petition of Jubdur Kazi and Golab Khan.

The Empress

versus

Jubdur Kazi and Golab Khan.\*

*Practice—Cumulative Sentence—Separate Charges—Criminal Procedure Code (Act X of 1872), s. 454, illus. (f)—Penal Code (Act XLV of 1860), ss. 147, 148, and 324.*

Under s. 454† of the Criminal Procedure Code, the collective punishment awarded under ss. 147, 148, and 324 of the Penal Code must not exceed that which may be awarded for the graver offence.

*Quere.*—Whether separate convictions under ss. 147 and 324 of the Penal Code are legal?

THESE two appeals arose out of the same trial. The prisoners Jubdur Kazi and Golab Khan having been members of an unlawful assembly, some of whom were armed with spears and shields, and some with lathees, which took place on the 12th Kartick 1256, corresponding with the 28th October 1879, and resulted in the death of one man named Guru Churn, and in severe injury to another named Babul Chund. The prisoners were charged, along with others, on several charges under the Indian Penal Code, but the Sessions Judge, concurring with the assessors, acquitted Jubdur Kazi of the graver charges under s. 302 and s. 304, and Golab Khan of those under s. 324 and s. 326; but convicted them both under s. 148, and also under s. 149, coupled with s. 324, and sentenced them each, under s. 148, to three years' rigorous imprisonment; and further, under s. 149, coupled with s. 324, to a further term of two years' rigorous imprisonment, to commence on the expiry of the former sentence; and further sentenced the first prisoner Jubdur Kazi, under s. 148, to pay a fine of Rs. 200, or in default to suffer a further term of six months' rigorous imprisonment. Against these sentences both the prisoners appealed to the High Court.

\* Criminal Appeals, Nos. 22 and 15 of 1881, against the order of C. A. Kelly, Esq., Sessions Judge of Furrirdpore, dated the 17th November 1880.

† [Sec. 454 :—I. If in one set of facts so connected together as to form the same transaction,

I.—Trial of more than one offence. more offences than one are committed by the same person, he may be charged with and tried for every such offence at the same time.

II.—If a single act falls within two separate definitions of any law, in force for the time

II.—One offence falling within two definitions. being, by which offences are defined or punished, the person who does it may be charged with each of the offences so committed, but he must not receive a more severe punishment than could be awarded, by the Court which tries him for either.

III.—If several facts of which one or more than one would by itself constitute an offence form, when combined, an offence under the provisions of any

III.—Acts severally constituting more than one offence, but collectively coming within one definition. law, in force for the time being, by which offences are defined or punished, a person who does them may be charged with every offence which he may have committed, but he must not receive for such offences, collectively, a punishment more severe than that which might have been awarded, by the Court trying him. for any one of such offences, or for the offence formed by their combination.]

[719] Mr. L. M. Ghose and Baboo Boido Nath Dutt for the Appellant, Jubdur Kazi.

Baboo Juggodamund Mookerjee for the Crown.

No one appeared on behalf of the other Appellant, Golab Khan.

The Judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

Mitter, J.—These appeals arise out of the same trial. The appellants have been convicted of being members of an unlawful assembly, in which one Guru Churn received fatal injuries and one Babul Chund was less severely hurt.

It seems that they were acquitted of any offence as respects the death of Guru Churn, the conviction being for rioting armed with deadly weapons under s. 148, and for hurt caused to Babul Chund under s. 324, read with s. 149 of the Penal Code. The periods awarded being three years under s. 148, and two years under ss. 149 and 324.

The learned counsel who appeared for Jubdur Kazi, appellant in No. 22, confined himself to urging that the sentences passed upon his client were in excess of what could be passed according to law, and that the injuries caused to Babul Chund by one of the members of the unlawful assembly, not found to be his client, were not caused in prosecution of the common object of the assembly.

The learned counsel's contentions apply equally to the case of Golab Khan, for whom, however, he did not appear.

The first point turns upon s. 454 of the Criminal Procedure Code, which provides for collective punishment either for one offence falling within two separate definitions of law, or for acts severally constituting more than one offence, but collectively coming within one definition. In the former case one punishment, and in the latter separate punishments, may be awarded; but in the former case it must not exceed what can be awarded for either offence, and in the latter they must not collectively amount to more than could have been awarded for any one of [720] the several offences, or for the combined offence. Illustration (f), which is referred to by the Judge, shows that offences under ss. 147, 324, 152 may be separately dealt with.

In this case the conviction is for offences under ss. 147 and 324, and this Court has held that separate convictions under those sections are not legal: *vide* the case of *Queen v. Durzoola* (9 W. R., Cr., 33). There is, however, a contrary ruling in the case of *Queen v. Callachand* (7 W. R., Cr., 60), followed apparently in *Empress v. Ram Adhin* (I. L. R. 2 All., 139); but whether there can be separate convictions or not, it is certain that, under s. 454, Criminal Procedure Code, the collective punishment must not exceed that which may be given for the graver offence: *Reg. v. Tukaya Bin Tamana* (I. L. R., 1 Bom. 214).

We shall, therefore, reduce the sentences on these appellants to three years in each case.

It is not necessary to discuss the second question raised in the appeal of Jubdur Kazi.

*Sentence modified.*

NOTES

[See (1885) 11 Cal. 849; (1887) 10 All. 58 where this case has been distinguished.]

[6 Cal. 720]

PRIVY COUNCIL.

*The 12th November, 1880.*

PRESENT :

SIR J. W. COLVILE, SIR M. E. SMITH, AND SIR R. P. COLLIER.

Bhubaneswari Debi.....One of the Defendants

*versus*

Harisaran Surma Moitra.....Plaintiff.

[*On Appeal from the High Court at Fort William in Bengal.*]

[=8 C. L. R. 337]

*Evidence—Secondary Evidence of Contents of Document.*

By the law of evidence administered in England, which has been in a great measure, with respect to deeds, made the law of India, the first condition of the right to give secondary evidence of the contents of a document not produced in Court, is the accounting for the non-production of the original.

APPEAL from a decree of the High Court of Bengal (22nd December 1874), modifying a decree of the Subordinate Judge of the District of Rungpore (13th December 1872).

[721] The suit, out of which this appeal arose, was brought by the daughter and heiress of one of the five sons of Romanath Lahiri, deceased, to obtain a declaration of her right to that son's full share in the paternal joint estate. For the defence was set up the fact of an unequal distribution among the sons having been made many years before; and, in order to prove it, reference was made to two written instruments. Of these one was an "anumati patro," purporting to have been executed by the plaintiff's grandfather, Romanath Lahiri, in Kartick 1233, or by the English style, October 1826. The other was an instrument of sale alleged to have been executed by the plaintiff's mother when in possession of her husband's (the plaintiff's father's) share, as his widow and heiress, of a portion of that share. The "anumati patro" of 1826 was not produced.

The first Court held that there was sufficient evidence of this document, but not of the instrument of sale, having been executed. The High Court held, that neither document was proved to have been made as alleged.

The principal question in this appeal was, whether secondary evidence of the contents of the "anumati patro" was admissible, that evidence having been held inadmissible in the High Court.

Mr. R. V. Doyne appeared for the Appellant.

Mr. C. W. Arathoon for the Respondent was not called upon.

The facts of the case are stated in their Lordships' Judgment, which was delivered by

**Sir R. P. Collier.**—The facts necessary to the understanding of this case are as follows :—Romanath Lahiri, who died in October 1831, had five sons, and left a widow, who died in the year 1849. One of his sons, Roghoomoni, died in 1842, leaving his widow and heiress Chundramoni, who died in October 1858, leaving Uma Soonderi heiress to her father; she was the plaintiff in this suit. Her son has been since substituted, but it will be convenient to treat her as the plaintiff. She sued as defendants, three members of the family, *viz.*, the widow of [722] Sibnath, the youngest son of Lahiri, who died about May 1861 having been the manager of the property from his father's death to that time; Nilcomul, who was a son of the third son of Romanath Lahiri; and Konuk Tara, the widow of the eldest son of Romanath Lahiri. Neither Nilcomul nor Konuk Tara appears in this appeal, the only appellant being Bhubaneswari, widow of Sibnath. The claim of the plaintiff was in right of her father to a fifth share of the property of her grandfather, and of the accretions to that property which had subsequently accrued during the management of Sibnath. With reference to the property left by the grandfather, she admitted that she had been in possession for some time of a two-anna share. Therefore she only claimed the difference between that 2 annas share and the fifth,—that is to say, an one-anna and four-ganda share. With respect to the rest, the subsequent accretions, she claimed the fifth, being 3 annas and 4 gandas. It has been found by both Courts that these accretions consisted of acquisitions made by Sibnath out of the family property, and not, as he contended, out of his separate funds, and therefore they became part of the family property, the family remaining joint, as has been found by both Courts, until the death of Sibnath.

The main defence to the claim of the plaintiff consisted of two deeds set up by the defendants. The first is called a deed of "anumati patro," alleged to have been executed by Romanath Lahiri in 1826, wherein he made a distribution of his property somewhat different from that which would have been made by the law. According to that deed, as alleged by the defendants, he retained a 3-anna share of the property for himself, he gave a 3-anna share of it to his eldest son, and a  $2\frac{1}{2}$ -anna share to each of his four younger sons; and therefore, under that deed, it was contended by the defendants that the share of the plaintiff, instead of being to a fifth, was to only to a  $2\frac{1}{5}$ -anna share. It was further contended that Chundramoni, the mother of the plaintiff, during her widowhood, *viz.*, in 1856, had executed another deed, whereby she had sold to Sibnath one-fifth of her  $2\frac{1}{5}$ -anna share, that is, a  $\frac{1}{5}$ -anna share, in consideration of money advanced by Sibnath and of Sibnath having, as was alleged by the deed, paid a portion of his father's debts out of [723] his own property. With respect to this deed the findings of the Court are as follows :—The Judge of first instance doubted its execution by Chundramoni; he thought that, if executed, the execution was obtained from her by fraud and coercion, and he was further of opinion that no consideration for it had been proved. The High Court agreed with him, at all events on the latter point, and the result is, that, by the judgment of two Courts on what is a question of fact, that deed has no validity, and may be at once disposed of.

The two Courts differ with respect to the first deed; the Judge of first instance holding that the deed had been properly proved—that is to say, that secondary evidence of it was admissible and had been sufficiently given, the

deed itself not being produced. The High Court were of opinion, in the first place, that the original deed had not been sufficiently accounted for to admit secondary evidence of its contents : and, secondly, that if secondary evidence were admissible, satisfactory secondary evidence had not been given. It is necessary, therefore, to inquire how the case stands with reference to this deed.

Their Lordships can entertain little or no doubt that a deed of the description which the defendants allege was executed by Romanath Lahiri. Such a deed is referred to in some judicial proceedings. It is referred to in a proceeding in the year 1832, whereby it appears to have been filed by one Kasinath Moitra, who then acted as a solicitor for some of the members of the family. It is also shown to have been filed in 1837 by the same person and returned to him. It further appears that what may be assumed to be the same deed was filed in the Court of Goalpara in 1857 by Ramottum Mullik, who acted on behalf of Konuk Tara, widow of the eldest son, and one of the defendants in this suit, though said to be only *pro forma* a defendant. It appears that Ramottum Mullik, who was the muktear of this lady, obtained a copy of this deed ; and further that he got back from the Court the original and signed a receipt for it on the 7th December 1857. There may possibly be a question whether Mullik was or was not authorised to act on behalf of this lady, but it appears to [724] their Lordships that, whether he was or not, the custody of the deed is tolerably well shown. If Mullik acted on behalf of the lady, the presumption would be, that he returned the deed to her. If he did not act on her behalf, it is shown to be in his custody, and has not been shown to have come out of it. Under these circumstances it appears to their Lordships that the very first duty of the defendants was to endeavour to obtain the deed from the custody either of Ramottum Mullik or of Konuk Tara, one of the defendants. But no attempt whatever appears to have been made to obtain it from either of them, or even to enquire whether or not it was in their custody, or in whose custody it was. In short, no search for it, or inquiry respecting it, of any kind, has been shown. Under these circumstances, by the law of this country, which has been in a great measure, with respect to deeds, made the law of India, it appears to their Lordships that the first condition of the defendants' ability to give secondary evidence—namely, the accounting for the non production of the original—has not been complied with ; and on that ground they are of opinion that the judgment of the High Court was right, and that secondary evidence was not admissible. That being so, it is not necessary to determine whether, if secondary evidence was admissible, the evidence given was sufficient. Their Lordships do not, however, desire to indicate any difference of opinion between themselves and the High Court upon this subject.

It has, indeed, been further argued by Mr. Doyne that the general conduct of the family shows that a family arrangement, such as is contained in this deed, was acted upon and recognised by the family. But whatever arrangement there was, according to his case, was under a deed, and at the most the evidence which he relies upon, the conduct of the family, could have no greater effect than to corroborate the secondary evidence of the contents of the deed, if secondary evidence were admissible.

The only other aspect in which the conduct of the family could be held to be material would be with respect to the application of the Statute of Limitations, that conduct tending to show that there had been a partition beyond the statutable [725] period. But here again there is a finding of two Courts that there was no division of the family until May 1861, within the period of limitation.



Under these circumstances, their Lordships are of opinion that the judgment of the High Court was right, and they will humbly advise Her Majesty to affirm that judgment and to dismiss this appeal with costs.

*Appeal dismissed.*

Solicitors for the Appellant: Messrs. Oehme and Summerhays.

Solicitor for the Respondent: Mr. T. L. Wilson.

NOTES.

[See 5 C. W. N. 393.]

[6 Cal. 725]

APPELLATE CIVIL.

*The 24th January, 1881.*

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE WHITE,  
AND MR. JUSTICE MACLEAN.

Kally Churn Sahoo and others.....Plaintiffs

*versus*

The Secretary of State for India in Council.....Defendant.\*

*Suit for Possession—Diluvion—Possession on re-formation—Subsequent Diluvion—Possession—Limitation Act (IX of 1871), sched. ii, arts. 143, 145.*

Per GARTH, C. J.—Where a person can show that he has been in possession of certain lands prior to such lands becoming diluviated, his possession must be considered as continuing during the time of diluvion, until such time as he becomes dispossessed by some other person; and in such a case, the onus lies upon the dispossessor to show that he has acquired a title under the law of limitation which has put an end to the rights of the original possessor.

*Koowur Singh, v. Nund Loll Singh* (8 Moore's I. A., 199) and *Radha Gobind Roy v. Inglis* (7 C. L. R., 364) distinguished.

Per WHITE, J.—The dispossession, or discontinuance of possession, mentioned in art. 143,\* sched. ii of Act IX of 1871 is that which occurs where the property is taken actual possession of by another, and does not apply to [726] the case where the property is submerged by the act of God, and so made impossible of occupation and actual possession.

\*Appeal from Appellate Decree, No. 717 of 1879, against the decree of J.M. Lewis, Esq., Judge of Bhaugulpore, dated the 10th January 1879, affirming the decree of Hafizabddul Kurim, First Subordinate Judge of that district, dated the 13th May 1878.

Owners of land, which has suffered from successive diluviations and re-formations, must, if they wish to preserve their rights, bring their suit within twelve years of the time when adverse possession is first taken of land re-forming on the original side, whether at the time of suit the land is capable of occupation or is lying under water in consequence of a second diluvion.

THE plaintiffs, on the 7th September 1877, sued to recover possession of certain milik lands, in Mouza Ghurghut, which they alleged to be part of their estate. They stated that the greater portion of these lands had become diluviated prior to 1847, at which time a survey had been made, and the lands in question had been entered in the thak and compass maps of Mouza Ghurghut Milik; that before the next survey in 1865, accretion had commenced, but the lands again became diluviated in 1869; that the lands commenced to re-form in 1870-71, and had become culturable in 1874-75, at which time the defendant wrongfully took possession of them, notwithstanding the fact that the plaintiffs had, during the time of diluviation, paid Government revenue to the defendant. The defendant contended that the land did not belong to the plaintiffs' estate, but that it formed part of an adjoining estate called Binda Deara belonging to him, that, in consequence of certain disputes as to the boundary of the defendant's estate, a survey had been held in 1865, and the lands determined to be a part of Binda Deara, and that from that date up to 1869 the land had been held by him. That, in 1869, the land again became diluviated, that on its re-formation in 1875, he had again taken possession of it; and that even supposing the plaintiffs to be entitled to the land, their suit was now barred.

The Subordinate Judge found that, according to the evidence of the defendant's witnesses, which was supported by the survey proceedings of 1865, the land had, on the first accretion, been taken possession of by the defendant, and that he must be held to have been in possession of it during the time of diluvion, up to the time of the second accretion; and that, therefore, the present suit, being brought more than twelve years after 1865, was barred.

[727] The plaintiffs appealed to the Subordinate Judge, who held that the plaintiffs had not proved that they had been in possession of the land within twelve years prior to the institution of the suit, and that therefore the suit was barred.

The plaintiffs appealed to the High Court.

The Judges of the High Court (WHITE and MACLEAN, JJ.) differed in opinion; the case was referred to the Chief Justice under s. 575 of the Civil Procedure Code, and re-argued before the three Judges.

\* [Art. 148 :—

Description of suit	Period of limitation.	Time when period begins to run.
For possession of immovable property, when the plaintiff, while in possession of the property has been dispossessed or has discontinued the possession.	Twelve years ...	The date of the dispossession or discontinuance.]

Mr. C. Gregory (with him Baboo Ram Churn Mitter), for the appellants, contended that the suit was not barred, inasmuch as the cause of action did not arise in 1865, but arose at the time when the lands last appeared in 1875; that the survey proceedings of the Collector, in 1865, were not evidence against the plaintiffs, they being no party to such proceedings; and that the fact of the defendant being in possession in 1865 was of no value, as the land had been washed away since that, and that during such diluvion there was nothing for the plaintiffs to sue for; that if the defendant took possession of the land in 1865, it was as a trespasser; and that the land being diluviated in 1869, his possession as trespasser ceased, and the plaintiffs must be held to have been in possession from that time.

Baboo Unnoda Prasad Banerjee for the respondent contended that the possession of defendant did not cease during the diluvion, he having been in possession previously thereto, and that the suit was barred under art. 145,\* sched. ii, Act IX of 1871.

The **Judgments** of the Court were delivered as follows:—

**Garth, C. J.**—This suit is brought by the plaintiffs to recover from the defendant possession of about 140 bighas of milik land, forming part of their estate of Mouza Ghurghut, for which they have paid rent to Government for many years past.

The plaintiffs say that this land was diluviated previously to 1865; that it then partially re-formed, and was diluviated again in 1869; that it reappeared in 1875, and was then wrongfully appropriated by the Government.

[728] The answer to the claim is, that the land in question does not belong to the plaintiffs' mouza at all, but forms part of an adjoining estate, called Binda Deara, belonging to Government; and that even if it does form part of the plaintiffs' mouza, it was surveyed by the Collector in the early part of 1865 as part of Binda Deara and was held by the Government as such until the year 1869, when it was again diluviated; and that when it re-formed in 1875, it was taken possession of by the Government, who have held it up to the present time.

The defendant, therefore, says that, in either case, the suit must fail. If the land is not part of the plaintiffs' mouza, the plaintiffs of course have no claim. If, on other hand, it is part of the plaintiffs' mouza, then the suit is barred by limitation. The Limitation Act which governs the case is Act IX of 1871, and whether art. 143 or art. 145 applies, the defendant contends that the plaintiffs are equally barred.

Both the lower Courts have decided against the plaintiffs upon the plea of limitation. There has been no express decision, whether the land formed part of the plaintiffs' mouza or not; but it would seem that in a survey map made in 1847, a portion of it, if not the whole, was demarcated as forming part of

\* [Art. 145:—

Description of suit.	Period of limitation.	Time when period* begins to run.
For possession of immovable property or any interest therein not hereby otherwise specially provided for.	Twelve years *	When the possession of the defendant, or of some person through whom he claims, became adverse to the plaintiff.]

that mouza, and there certainly seems reason for supposing that, so far as the original title is concerned, the plaintiffs have a good case; but, as it is found that they have not been in possession for upwards of twelve years before suit, both Courts have held that their suit is barred.

On second appeal to this Court, as the learned Judges of the Division Bench differed in opinion, the case was referred to myself as a third Judge, and we have heard the whole matter argued again on both sides.

The plaintiffs contend, on the one hand, that even if it is shown that the Government took possession of the land in question previously to 1865, they did so as trespassers; and that as the land was diluviated again in 1869, their possession as trespassers then ceased, and the true owners of the property must be considered as having been in possession from that time till the Government again took possession in 1875. They contend that, strictly speaking, no one can be considered as in [729] actual possession of land covered by water, and that no suit could have been brought by the plaintiffs against the Government from 1869 to 1875; but that if any one is to be considered in point of law as constructively in possession whilst the land was diluviated, it is the true owner, and not a party who previously to the diluvion was a mere trespasser upon the property.

They say, moreover, that, apart from the question under the Limitation Act, the proceedings of the Collector in 1875 were improperly received in evidence in both Courts against the plaintiffs, as proving that previous to 1865 the Government had taken possession of the property, these proceedings not being evidence against the plaintiffs, who were not parties to them.

On the other hand, the defendant says that as the Government was found to have held undisturbed possession from 1865 to 1875 under a claim of right, their possession did not cease at the time when the land was diluviated in 1869, but must be presumed to have continued until it re-formed in 1875; that, during all that time, the plaintiffs might, if they pleased, have brought a suit against the Government to recover possession; and that, consequently, the possession of the Government has been continuous from the beginning of 1865 to the present time. They contend, moreover, that, having regard to the strict language of arts. 143 and 145 of the Limitation Act, the suit is barred, and as regards the evidence upon which the lower Courts founded their decision, they say that there was oral evidence, besides that of the Collector's proceedings, to show that the Government took possession more than twelve years before suit.

Now it seems to me very clear that if the plaintiffs in a case of this kind could show that the land in question was in fact a part of their mouza, of which they had been in possession before it was diluviated, their possession must be considered in law as continuing during the time of the diluvion, and, indeed, until they were dispossessed by some other party. It is not because land becomes covered with water, and it therefore becomes difficult or impossible for the owner [730] to turn it to any useful purpose, that it therefore ceases to be in the owner's possession.

It seems to me that the possession of the owner in such a case must be deemed to continue during the diluvion, and in fact until he has proved to have been dispossessed by some other person; and I think that this view of the law is quite in accordance with *Lopez's case* (13 Moore's I. A., 467), and with the decision of the Privy Council in *Radha Prosad Singh v. Ram Coomarr Singh* (I. L. R., 3 Cal., 800). We certainly acted upon that principle in this

Court in deciding the important case of *Mohunt Chutterbhooj Bharto v. The Secretary of State for India* (Reg. Ap. No. 184 of 1877), which, I believe, is not reported, but against which, so far as I am aware, no appeal has been preferred.

The plaintiffs in that case were shown to have been in possession of an estate in the year 1846, which soon afterwards became diluviated, and upon its reappearance many years afterwards, it was taken possession of by the Government, and resettled with other persons. We held, that, under such circumstances, the plaintiffs' possession must be considered as continuing during the period of diluvion and until possession was shown to have been taken of the land by the Government.

It is contended by the defendant that this principle is opposed to the law as laid down by the Privy Council in the case of *Moharajah Koowur Singh v. Nund Loll Singh* (8 Moore's I. A., 199), and with other cases decided by this Court in accordance with what was supposed to be their Lordships' view, see *Syud Ameer Ali v. Maharani Indurjeet Koor* (15 W. R., 43), *Nilgaree v. Muejeeboollah* (19 W. R., 209), *Coomar Runjit Singh v. Schoene Kilburn* (4 C. L. R., 390), and *Mahomed Ibrahim v. M. B. Morrison* (I. L. R. 5 Cal. 36). Some of these cases appear to have turned rather upon the question, on whom the onus of proof lies in a suit for dispossession, than upon the question, whether the possession of an owner of diluviated land is presumed by law to continue during the period of the dilu-[731]vion. But the two questions are often almost inseparable in cases of this kind, and it certainly seems rather difficult at first sight to reconcile the case of *Moharajah Koowur Singh v. Nund Loll Singh* (8 Moore's I. A., 199) with the late decision in *Radha Gobind Roy v. Inglis* (7 C. L. R., 364) which, as it seems to me, lays down the true rule upon the subject very clearly.

In the case of *Moharajah Koowur Singh* (8 Moore's I. A., 199), the plaintiff brought his suit to recover a large tract of land, which as he contended, had been adjudged to be part of his estate of Gopaulpore by certain decrees made in suits between his own and the defendants' ancestors, in the year 1816. The defendants, on the other hand, contended, that by those very decrees the land in question had been adjudged to be part of their estate of Rampore. There was considerable difficulty in ascertaining which of the parties was right in this contention, but it was admitted that, as regards possession, the defendants had been possessed of the disputed land for at least eleven years before suit, and the plaintiff had not proved to the satisfaction of the Court that he was in possession within twelve years before suit. The law of limitation in force, when the suit was brought, was the Beng. Reg. III of 1793, s. 16.

Upon this state of facts their Lordships say:—

“Again, their Lordships concur with the majority of the Sadr Court in thinking that the issue of possession is the first to be considered in this case, and that it is wholly independent of the boundary question. The appellant is seeking to disturb the possession, admitted to have existed for about eleven years, of the defendants, who insist on a possession of much longer duration as a statutory bar to the suit. It clearly lies on him to remove that bar by satisfactory proof that the cause of action accrued to him (for that is the way in which the Regulation puts it) on dispossession within twelve years next before the commencement of the suit; and therefore, that he or some person through whom he claims, was in possession during that period. No proof of anterior title, such as would be involved in the decision of the boundary question in his favour, can relieve him from this burden, or shift it upon his [732] adversaries by compelling them to prove the time and manner of dispossession.”

This would seem to show that, according to the law then in force, a plaintiff bringing a suit upon a dispossession by the defendant, although he may have proved a clear title, *is also bound to show that he has had actual possession of the property within twelve years before suit*. Otherwise he must fail. On the other hand, the case of *Radha Gobind Roy v. Inglis* (7 C. L. R., 364) was as follows:—

The plaintiff sued to recover possession of certain land, which, as he alleged, formed part of his estate, but which was originally covered by water, and formed a large bheel or lake. He alleged that of late years the water had receded from this land, so that it had become dry and culturable; that it had then been taken possession of by the defendant; and that, in certain proceedings which had been taken under s. 530 of the Criminal Procedure Code, the Magistrate had decided the question of possession in favour of the defendant.

The plaintiff then brought his suit to recover possession from the defendant, and the first question raised was one of title. This was decided in favour of the plaintiff; and the Privy Council further found upon the evidence, that one Bebi Luchmi, who was the plaintiff's predecessor in title, was many years ago the possessor, under the Government of the taluk, of which the land in question formed a part.

The defendant was thus driven to rely upon his possession, which had, undoubtedly, been found by the Magistrate in his favour; and considering the nature of the case, and the difficulty in ascertaining when the bed of the bheel had become dry, and had first been taken possession of by the defendant, the question upon whom the onus of proving the dispossession lay became a very material one.

Upon this point their Lordships say:—"The question remains, whether the disputed land, which must now be taken all to be within the yellow line, had or had not been occupied by the defendant for twelve years before the suit was instituted, so as to give him a title against the plaintiff by the operation [733] of the Statute of Limitation. On this question, undoubtedly, the issue is, on the defendant. The plaintiff has proved his title; the defendant must prove that the plaintiff has lost it by reason of his (the defendant's) adverse possession. The High Court came to the conclusion that the defendant had not satisfied the burden of proof thrown upon him, and their Lordships are not prepared to reverse that judgment."

Now here, as in the case of *Moharajah Koowar Singh* (8 Moore's I. A., 199), the suit was brought *as upon a dispossession by the defendant*. The Limitation Act which governed the case was Act IX of 1871; and I am not aware that there had been, since the year 1846, any change in the law as to the party upon whom the onus of proof lies in such a case, or as to the nature of the proof which a plaintiff bringing such a suit is bound to bring forward.

The distinction, as I conceive, between the two cases is this: In the case of *Moharajah Koowar Singh* (8 Moore's I. A., 199) *the plaintiff had not proved any possession at all of the land in dispute at any time before suit*. He had only attempted to prove a title to it under the decree of 1816. And their Lordships say that, even if he had proved such a title, there was no proof of his possession, either actual or constructive, within twelve years before suit. Whereas in the case of *Radha Gobind Roy* (C. L. R., 364) the plaintiff not only proved his title, but a possession in his ancestor, which was equivalent to a possession in

himself ; and that possession was presumed by their Lordships to have continued until the dispossession by the defendant ; so that the onus was thrown upon the defendant to prove when his dispossession first occurred.

I am aware that this view of the law is opposed to several decisions in this Court ; but I think that those cases have proceeded upon a misapprehension of the true meaning of the Privy Council. I consider myself bound to follow this last decision of their Lordships, which I trust will set the question at rest ; and it certainly seems to me that any other view must needs be productive of the greatest injustice.

Take for example the case of an area of jungle land, which [734] a man buys and takes possession of by going upon the land, laying down boundary marks, or the like. He does nothing more upon it for twenty years ; and at the end of that time he finds a wrong-doer cultivating a portion of it, and he brings a suit against him to recover possession. Under these circumstances, unless the possession, which the true owner had twenty years before, is presumed to continue till the contrary is shown, the plaintiff's suit must fail. He may be quite unable to prove at what particular time the defendant first took wrongful possession ; that must be a matter within the defendant's own knowledge. All the plaintiff would probably know, and all he could reasonably be expected to prove in such a case, is, that whereas he was possessed of the land and had a good title to it twenty years ago, he now finds the defendant wrongfully in possession. It is obviously unjust to oblige the plaintiff to prove, under such circumstances when the defendant's dispossession first occurred. Every successive moment that the defendant holds wrongful possession of that land is a dispossession of the plaintiff. And it is surely enough for the plaintiff to prove *prima facie* his title and possession, and that the defendant has been in wrongful possession within twelve years before suit, leaving the defendant, if he can, to prove a statutory title by a twelve years' adverse possession. And the same with diluviated land : a man may prove title to and possession of land twenty-five years ago. The land is then diluviated for several years. It then reappears, and is taken possession of by a wrong-doer. The true owner finds the wrong-doer in possession and brings his suit. According to the rule laid down by the Privy Council, the onus lies upon the defendant to show that he has a twelve years' title by the law of limitation which has put an end to the plaintiff's rights.

And the same principle must surely apply in every case. There cannot be one principle applicable to the case of jungle land, or diluviated land, and another principle applicable to the case of other land. The Limitation Act and the Civil Procedure Code made no distinction between different kinds of land. The presumption must, in one case, be the same as in another. Dispossession must mean the same thing in one case as in [735] another, and the reason of the law applies equally in the case of cultivated land, as in the case of jungle land, or land covered by water.

A man may have been in possession of cultivated land fifteen years ago, but by reason of his absence from home, or from droughts or some other cause he may have ceased to occupy it, and left the place for years. On his return he finds a wrong-doer in possession, and brings a suit to eject him. It seems to me that it would be, under such circumstances, a monstrous injustice to say that the burthen of proving exactly when the defendant took possession should be thrown upon the plaintiff.

In my opinion, therefore, if the plaintiffs in this case could have proved that the land in question formed part of their mouza, and that they were in

possession of it before it was diluviated, the diluvion, although it lasted for more than twelve years, would not have affected their rights, if the dispossession by the defendant took place within twelve years before suit.

The plaintiff's difficulty here is, that their dispossession by the Government is found by the lower Courts to have taken place in 1865 or earlier, at any rate more than twelve years before suit; and if that finding is correct, unless they can show that they have since resumed possession, either actually or constructively, it seems to me that their claim is barred.

But their contention is, that if the Government were in fact wrong-doers whilst they remained in possession from 1865 till 1869, no presumption ought to be made in favor of their possession continuing after the land became diluviated, as if they had been the rightful owners. But it seems to me very difficult to act upon that principle. If the Government had merely committed a casual act of trespass, that would not have had the effect of permanently disturbing or discontinuing the plaintiffs' possession. But if what they did amounted to putting the plaintiffs, the true owners, out of possession, and they kept possession themselves under a claim of right for so long a period as four or five years, I see no reason why the fact of the land becoming diluviated should be considered as putting an end to their possession. If this were the law, it would have a most [736] important effect upon many titles in Bengal, which are founded upon adverse possession, because we all know that large tracts of land are always, more or less, covered with water during the rainy season; and if the fact of their becoming thus covered with water had the effect of putting an end to the possession of any person other than the true owner, and of restoring the true owner to possession during the time that the submersion continued, it would cause a very material change in the law of limitation.

I think, therefore, that if the Government were in possession under a *bona fide* claim of right at the time when the land became diluviated in 1869, their possession must be considered as continuing up to the time when they resumed actual possession, and therefore virtually up to the commencement of this suit.

It follows that, if the Government did actually take wrongful possession of the land in question more than twelve years before suit, the plaintiffs are barred, whether the case comes under art. 143 or art. 145 of the Limitation Act. If it comes under art. 143, the plaintiffs *were dispossessed* more than twelve years before suit; if it comes under art. 145, the possession of the Government *became adverse* more than twelve years before suit.

There are some points, however, in this case which in my opinion the lower Courts, and especially the lower Appellate Court, do not appear to have tried satisfactorily; and as the plaintiffs desire to have those points considered and decided, I think they are entitled to a remand for that purpose.

It should be distinctly ascertained by the lower Appellate Court, in the first place, whether the land in dispute, or any and what portion of it, formed part of the plaintiff's mouza; and, in the next place, whether the Government took possession of that land, or any and what part of it, so long ago as twelve years before suit.

The plaintiffs are clearly entitled to any part of the property in question which belonged to their mouza, and which cannot be distinctly proved by the defendant by legal evidence to have been taken possession of by the Government at least twelve years before suit.



[737] For the purpose of ascertaining these facts, the proceedings before the Collector are clearly not admissible as against the plaintiffs. The plaintiffs were no parties to them, and those proceedings were improperly admitted as evidence in the Court below. The lower Appellate Court will be at liberty to receive any fresh evidence that may be adduced by either party on the above points.

If the plaintiffs establish their right to recover the land in question, or any part of it, they will be entitled to costs from the defendant, proportionate to the quantity of land recovered, in all the Courts, including the High Court.

If the plaintiffs can prove that the land in question, or any substantial part of it, formed part of their mouza, and they are defeated upon the plea of limitation only, each party will pay his own costs in this Court and in the lower Appellate Court; because in that case it will be clear that, the Government have been wrongfully appropriating land, which belongs, properly speaking, to the plaintiffs, *and for which the plaintiffs have been paying revenue* to them up to the present time. This would undoubtedly be a great injustice to the plaintiffs, and the attention of the proper authorities might, with good reason, be invited to the subject.

On the other hand, if the land in question never formed any part of the plaintiffs' mouza, it is only right that the plaintiffs should pay the defendant's costs in all the Courts.

**White, J.**—This is an appeal against a decree of the District Judge of Bhaugulpore, confirming a decree of the Munsif, which has dismissed the suit of the appellants.

The object of the appellants' suit is to recover possession of certain chur land, on the ground that it had reformed on the site of a portion of milik land within their Mouza Ghurghut and lying to the north of the mal land of the same village. The quantity of land is stated in the plaint to be 139*b.* 14*c.* and 6*d.*, but on measurement the Amin of the first Court has found it to be 140*b.* 3*c.* 6*d.* The appellants allege, and it does not appear to be disputed, that since the diluviation they have continued to pay revenue to Government for the whole of their milkeit land in Ghurghut.

[738] The Officiating Collector of Monghyr, on behalf of the Secretary of State for India, who is the respondent and the defendant below, alleges that the lands in suit does not form part of the milik lands of the plaintiffs' Mouza Ghurghut, but is parcel of Mouza Binda Dearn, which belongs to Government. He further pleads that the plaintiffs are barred by the law of limitation. Both the lower Courts have held this suit to be barred.

The specific land which is sought to be recovered admittedly did not appear as dry land until 1875, and as this suit was brought on the 5th of September 1877, no question, under ordinary circumstances, could be raised founded on the law of limitation. But it is also admitted that, upon the site of the land in suit, land of nearly the same extent had previously appeared and been washed away. In other words, the site of the disputed land has been the subject of a double diluviation and a double re-formation of chur land within a comparatively recent period. It is out of this somewhat unusual circumstance, coupled with the fact the Government on both occasions of the re-formation took possession of the re-formed land, that the plea of limitation has been raised, and by the lower Courts sustained. The dates of the first diluviation and re-formation and of the possession taken by Government of the land that first re-formed are not given by the lower Appellate Court, but it seems that the site was diluviated for the first time shortly before 1847; that it continued for some years under water; that a year, or a few years, before 1865, land re-

formed upon the site which Government then, or shortly before, took possession of, and which was nearly equal in extent to the land in suit; that Government kept possession of the re-formed land until 1869, when the site was again diluviated. In 1875, land was again formed upon the site and taken possession of by Government, in whose possession it still is.

The District Judge has held that it was for the plaintiffs to show that they had been in possession within twelve years before the suit, and that as they could not do this, their suit must fail.

The Judge has applied s. 141\* of the Indian Limitation Act of 1871 (the Limitation Act which was in force when this suit was brought). But I think that the plaintiffs' suit does not fall [739] within that article or any of the other descriptions of suit specially provided for by Part VIII of the first division of the 2nd schedule of the Act, but it is governed by art. 145, which prescribes twelve years from the time when the possession of the defendant became adverse to the plaintiffs.

I think that the dispossession, or discontinuance of possession, mentioned in s. 140† is that which occurs where the property is taken actual possession of, or is capable of being taken such possession of, by another, and does not apply to the case where the property is submerged by the act of God, and so made impossible of occupation or actual possession.

Taking into account the admitted fact that land re-formed twice on the same site, and that on both occasions Government took possession of the land which so re-formed, the question is, when did the possession of Government become adverse to the plaintiffs?

When this case was first argued, I was of opinion that, as regards the land in suit, the period of limitation began to run against the plaintiffs when Government took possession of the land which re-formed in 1875. It appeared to me that as the possession which Government took of the land which re-formed on the site previously to 1865 was the possession of a wrong-doer, Government could not avail itself of the doctrine of constructive possession in order to connect its possession of the first re-formation in 1865 with its possession of the second re-formation in 1875; and that its possession of the first re-formation was in fact swept away or put an end to by the second diluviation. I was struck with the apparent hardship which

\* [Sec. 141 :—

Description of suit.	Period of limitation.	Time when period begins to run.
By a remainderman & reversioner, (other than a landlord) or a devisee, for possession of immoveable property.	Twelve years.	When his estate falls into possession.]

† [Sec. 140 :—

Description of suit.	Period of limitation.	Time when period begins to run.
By a landlord to recover possession from tenant.	Twelve years.	When the tenancy is determined.]

was involved in a construction of the law of limitation which should permit a wrong-doer, who might have held possession of a newly formed chur for only a year before it was again washed away, to oust the true owner in the event of land subsequently re-forming a second time, although an interval of twenty or more years might elapse before the second re-formation took place. It seemed to me contrary to justice that a wrong-doer's possession should thus ripen, as it was, under the water into a title, although his actual and possible occupation of the land in question only continued for a year.

**[740]** But after hearing the case reargued, and having had the advantage of reading the judgment which his Lordship the Chief Justice has delivered, I have come to the conclusion that my first opinion was wrong, and that as the law of limitation is at present framed by the Legislature, and as that law has been construed by this Court, Government is, in the case before us, entitled to date its adverse possession of the land in suit from the period when it first took possession of the land which first re-formed upon the present site.

Assuming, as I do, for the purpose of the argument on the question of limitation that the land in suit on both occasions re-formed on the site of the plaintiffs' diluviated milkeit lands, the land, although under water, continued, after the first diluviation, in the constructive possession of the plaintiffs, until Government took possession of the lands which first re-formed on the site. That act of Government was admittedly an adverse act as against the plaintiffs, and put an end to their constructive possession. Until this suit was brought the plaintiffs did not act with a view to resume possession, and the adverse possession of Government, which commenced when it occupied the lands first re-formed, must be considered as continuing until this suit was brought, although for six years of the time its actual occupation ceased by reason of the second diluviation. It appears to me unnecessary to determine whether Government as a wrong-doer, when it first took possession, could be said to have constructive possession during the period of the second submersion. It is enough to say that the time began to run against the plaintiffs when Government first took adverse possession, and that, as the plaintiffs have not resumed or recovered possession before suit, it continued to run according to the ordinary law of computing the period of limitation, and this irrespective of whether the land was or was not capable of occupation by reason of its submersion.

The result of our decision will be that, in similar cases to the present, owners of land, which has suffered from successive diluviations and re-formations, must, if they wish to preserve their rights, bring their suit within twelve years of the time when adverse possession is first taken of land re-forming on the **[741]** original site, whether at the time of suit the land is capable of occupation or lying under water in consequence of a second diluviation. I have not in my experience known of a suit of this character being brought where the land in dispute at the time of suit had disappeared and formed part of the bed of a river; and I can foresee many difficulties in the way of such a suit, chiefly arising from the difficulty of identifying lands which are at the bottom of a river. But there is no doubt that such a suit would lie, and so long as land which is exposed to successive diluviations and re-formations is subject to the ordinary law of limitation, it will be a matter of prudence to bring such a suit.

I agree that the case should be remanded to the lower Appellate Court to try the questions mentioned in the judgment of the Chief Justice.

**Maclean, J.**—In this suit the plaintiffs claimed 139b. 14c. 6d. of land, which they alleged to be part of their estate Milik Ghurghut. They stated that the greater portion of the estate had diluviated before the "former

survey,"—that is, before 1847. Before the next survey of 1865 accretion had commenced, but this was washed away in 1273 F. (1865-66). The present land commenced to re-form in 1278 F. (1870-71), and became culturable in 1282 F. (1874-75). This suit has, therefore, been brought against the Government for possession of the land. The cause of action being laid in the last mentioned year.

The Government denies that the land is a portion of the plaintiffs' Milkeit Ghurghut as laid down in the survey of 1847. The case put forward by Government is, that the Ganges, which in 1847 flowed south of Milik Ghurghut, changed its course in 1861 and intersected the Government estate of Binda Deara, and the old channel or bed, and the land in suit, came into the possession of Government as part of Binda Deara, and was surveyed as part of it in 1865. It is admitted that the land again disappeared in 1869, and reappeared in 1876, but it is urged that the land now sued for is identical in site with the land which was held by Government from 1861 to 1869.

The first Court found that 128b. 14c. 19d. out of the land is identical in site with the land surveyed in 1865 as part of the Government estate of Binda Deara, and found to be in the pos-[742]session of the tenants of Government. It also found that the remainder is part of Binda Deara, and is not part of plaintiffs' estate of Milkeit Ghurghut. The possession held by Government in 1865 is found to have been adverse to the plaintiffs, and their suit declared to be barred by the first Court and also by the lower Appellate Court.

In this Court it is contended that, taking it as found that the land is identical in site with the land in the possession of Government in 1865, the plaintiffs are entitled to prove that it is part of their estate and re-formed upon its old site, and that their cause of action can only be said to have commenced when the last re-formation commenced.

This contention is entirely unsound, if it is established that the land held by the Government down to 1865-66 is identical in site with the present land. If that land was re-formed on the site of the plaintiffs' estate as it existed in 1847 or earlier, the plaintiffs were undoubtedly the owners of it, and entitled to take possession when it reappeared in 1861 or 1862. This was laid down as far back as 1848, in the case of *Mussamat Inam Bandi v. Hargovind Ghose* (4 Moore's I. A., 403), and again in *Roma Nauth Thakoor v. Chunder Naran Chowdhry* (Marshall 136 in 1862). *Lopez v. Muddun Mohun Thakoor* (13 Moore's I. A., 467), decided in 1870, affirmed the law laid down in these cases.

The plaintiffs, therefore, were entitled to take steps to assert their title and to rectify the survey map of 1865, but failed to do so. This neglect is not explained in any way, and we find that the proprietor of Mouza Ghurghut, within which the plaintiffs' milik lands lie, was more alive to his interests, and actually opposed the survey, alleging that the land was part of Mouza Ghurghut. He was defeated in the Revenue Courts, and took no further steps to establish his title.

The plaintiffs now seek, by a suit instituted in 1877, to disturb a possession which commenced in 1862, and continued even after the subsequent submersion in 1866. This, in my opinion, they cannot do. It was contended that the possession which commenced about 1862 did not continue after 1866, and that no [743] suit could have been brought during the submergence, which lasted from 1866 to 1876. But if the action of the Government in annexing the land to their estate of Binda Deara, by taking possession and survey, was an invasion

of the plaintiffs' title, it did not cease to be so when the land was submerged. On the contrary, the land and the water above the land continued to belong to the estate to which it had been annexed, until this state of things was put an end to by resort to law; and it is the failure of the plaintiffs to put an end to it, either during the possession, or after it had been submerged again, that is fatal to their present case. I do not agree with the argument that a suit would not lie for land submerged in a river. On the contrary, julkar, tulkar, and other rights, not to mention the right to subsequent alluvial re-formation on old sites, are all things which might be asserted in a suit: *The Government v. Baboo Radhay Singh* (20 W. R., 117). For these reasons I would affirm the decision of the lower Courts on the question of limitation.

I understand the plaintiffs now wish for a finding by the lower Appellate Court whether the land in suit is identical with the land held by the Government down to 1866. This was not pressed when the case was before the Division Bench; but the plaintiffs are, strictly speaking, entitled to the finding they ask for. If the lower Appellate Court affirms the finding of the first Court that 128*b*. 14*c*. 19½*d*. are identical with the land held by Government down to 1866, and that the remainder 11*b*. 14*c*. 19½*d*. are part of the estate of Binda Dearsa, the plaintiffs' suit will be dismissed. I concur in the order proposed by the learned Chief Justice.

*Case remanded.*

#### NOTES.

This case has been overruled in (1902) 29 Cal. 518 P. C. = 29 I. A. 104,

See also (1902) 26 Mad. 410; (1883) 9 Cal 744; (1880) 9 Mad. 175; (1909) 10 I. C. 742 where the principle finally laid down by the Privy Council case was applied.

[744] *The 2nd February, 1881.*

PRESENT :

MR. JUSTICE MORRIS AND MR. JUSTICE TOTTENHAM.

Mahomed Hamidulla Khan.....Plaintiff

*versus*

Lotful Huq and others.....Defendants.\*

*Mahomedan Law—Waqf—Consruction of Deed of Endowment—Settlement on person and his descendants to three generations, and afterwards to charity—Appropriations of property by settlement.*

A Mahomedan settled a portion of his immoveable property as follows :—“ I have made waqf of the remaining four annas in favour of my daughter B and her descendants, as also her descendants' descendants' descendants, how low soever, and when they no longer exist, then in favour of the poor and needy.” *Held*, this settlement did not create a valid waqf.

To constitute a valid waqf, there must be a dedication of the property solely to the worship of God or to religious or charitable purposes.

*Semle*—Appropriations in the nature of a settlement of property on a man and his descendants can only be treated as legitimate appropriations under the designation of waqf, where the term sadukah is used.

Even supposing they could be so treated, it would be necessary, in order to validate a waqf by making a settlement of property on himself or his descendants, for a man to reduce himself to a state of absolute poverty.

THE plaintiff was the great grandson, on the mother's side, of one Moulvie Golam Sharuff, who was possessed, among other properties not now in dispute, of an eight-anna share of an estate called Kantabari. By a registered waqfnama dated 1st Bhadro 1248 (15th August 1841), Golam Sharuff made the following settlement of his share of Kantabari, together with some of the other properties :—“ I have assigned eight annas of the abovementioned endowed properties for the mosque built by me, and the expenses thereof. Out of the remaining eight annas I have made waqf of four annas in favour of Musamat Jamila Khatun, *alias* Dhun Bibi, daughter of my daughter, and her descendants, as also her descendants' descendants' descendants, so long as they may continue to have offspring; and when they no longer exist, then in favour of the poor and needy. I have made waqf of the remaining four [745] annas in favour of my daughter Bibi Budrunnessa and her descendants, as also her descendants' descendants' descendants how low soever; and when they no longer exist, then in favour of the poor and needy . . . . After payment of the Government revenue and the collection charges, &c., and after deduction of the mutwalli's towliat right from the proceeds of all the abovementioned endowed properties, the surplus, whatever it may be, shall be divided as follows :—*i. e.*, four annas thereof shall be given to Jamila Khatun, *alias* Dhun Bibi, and four annas thereof to Budrunnessa Bibi, inasmuch as four annas share has been endowed in favour of each of the said ladies, &c.” Golam Sharuff appointed his wife, Nosima Bibi, as the first mutwalli; on her death, the mutwallis were to be Dhun Bibi and Budrunnessa Bibi, the first defendant, “ both of whom will get the towliat right in two equal shares. One

\* Appeal from Original Decree, No. 152 of 1879, against the decree of Baboo Bhubnu Chunder Mukerjee, Subordinate Judge of Dinapore, dated the 23rd January 1879.

of the male descendants of each of these two Mussamuts, so long as such descendants may continue to have offspring, shall be appointed as mutwalli of the endowed properties, and each of the two mutwallis so appointed shall get the towliat right in two equal shares."

Golam Sharuff died in 1849. After the death of his wife Nosima, and his grand daughter Dhun Bibi, Budrunnessa and the plaintiff had possession of the property as mutwallis, and administered it for some time under the waqfnama.

Subsequently, Budrunnessa, acting, as the plaintiff alleged, in collusion with her husband, the second defendant, executed a solehnama and mortgage of the entire eight annas shares of the estate Kantabari in favour of Roy Lutchniput Singh, and in execution of a decree against Budrunnessa, obtained on the solehnama and mortgage, that property was put up for sale on 2nd April 1877, and purchased by the other defendants.

The present suit was brought to set aside that sale and recover possession of the property, on the ground, that being waqf or endowed property, it could not be alienated.

The only defence raised, which is material to this report, was, that the property belonged to Budrunnessa in her own absolute right, and was not endowed property.

The Subordinate Judge was of opinion that a waqf was [746] created by the document only so far as a moiety of the disputed property was concerned. As to the share left to Dhun Bibi and her descendants, &c., and Budrunnessa and her descendants, &c., he was of opinion, referring to Baillie's Digest of Mahomedan Law, p. 571, that no waqf was created, but that those shares vested absolutely in the mutwallis.

The Subordinate Judge held, that the execution-sale was good as regarded the share which vested absolutely in Budrunnessa, amounting to two out of the eight annas, and therefore the suit was dismissed as to that share. As to the other shares the suit was decreed, four out of the eight annas to be held by the plaintiff and Budrunnessa as mutwallis, and the remaining two annas by the plaintiff alone as absolute proprietor.

The plaintiff appealed from this decision only as regards the share of the property decreed to belong to Budrunnessa absolutely. As to this he contended that it did not vest absolutely in Budrunnessa, that it was waqf property and inalienable; and that the sale of the property was therefore invalid, or at most could only stand good for the lifetime of Budrunnessa.

Baboo Obhoy Churn Bose and Baboo Doorga Mohun Doss for the Appellant.

Baboo Sreenath Doss, Baboo Tarucknath Palit, Baboo Mohuney Mohun Roy, and Baboo Gurudas Banerjee for the Respondents.

The Judgment of the Court (MORRIS, and TOTTENHAM, JJ.) was delivered by

**MORRIS, J.**—There is no question that Moulvi Golam Sharuff executed the document styled a "waqfnama," which bears date 1st Bhadro 1248. The only question raised in this appeal is, whether the four annas, or rather the fourth share of the property which he appropriated under that deed to his daughter Budrunnessa, is, under Mahomedan law, a valid "waqf," or, in other words, that it is inalienable and incapable of being attached and sold in execution of a decree against Budrunnessa.

[747] The Subordinate Judge, relying upon a passage which is to be found in page 571 of Baillie's Digest of Mahomedan Law, is of opinion, that the "defendant No. 1, Budrunnessa, became absolutely vested in the two annas

share out of the eight annas share of Kantabari, and so it became heritable and alienable." The passage in question is in these terms:—"If one should say, this my land is a *sadukah* settled on my child, and child of my child, the child of his loins, and the child of his child in existence on the day of the settlement, and those who are born afterwards are included, and the two generations participate in the produce, but none below them are included, nor the children of daughters, according to the Zahir Rewayut; and the *putma* is in accordance with it. And if he should say, 'upon my child, and child of my child, and child of the child of my child, meaning three generations, the produce is to be expended upon his children for ever, so long as there are any descendants, and is not to be applied to the poor,' &c.

The lower Court is of opinion that if a person makes a settlement of his land in favour of his descendants to the third generation, the poor are absolutely excluded from all benefit in the appropriation, and that consequently the property becomes absolutely vested in the descendants of the appropriator. But it seems to us that what was meant in this passage is, that only so long as the descendants survive shall the poor be excluded from the benefit of the appropriation. It becomes necessary, therefore, to consider whether, under Mahomedan law, the settlement which has been made by Moulvie Golam Sharuff is of the nature of a valid waqf. The terms of the deed which bear upon this part of the case are as follows: (*reads* portion of waqfnama set out, *ante*, pp. 744-5).

There has been much argument before us as to the real signification of the term "*waqf*." There is no doubt that there is a conflict of authority between Baillie and the other writers on Mahomedan law, Macnaghten and Hamilton, on this subject. But looking to the principal authority, the "*Hidaya*" as read by Abu Hanifa, who was undoubtedly a Sunori, to which sect the family of Golam Sharuff belong, and looking to the doctrines of his disciples, it seems to us that the balance [748] of authority is strongly in favour of the view as stated by the Bombay Court in the case of *Abdul Ganne Kasam v. Hussien Miya Rahimtulla* (10 Bom. H. C. R., 7 at p. 18)—*viz.*, that "to constitute a valid waqf there must be a dedication of the property solely to the worship of God, or to religious or charitable purposes." Abu Hanifa, undoubtedly, in two *Hidaya*, Hamilton, p. 334, points out that the appropriation, that is waqf, must to be some "charitable" purpose. Now here it is manifest that the appropriation in favour of Budrunnessa is not in the nature of a charity. It is simply in the nature of a settlement upon the daughter—a settlement of property which was to be heritable and to be taken by Budrunnessa's descendants in certain shares. The words are clear; each daughter is to take four annas, and in the terms of the deed "four annas share has been endowed in favour of each of the said ladies." If, therefore, the principle underlying a waqf is charity, and if the ultimate applications of property, the subject of "*waqf*," must be to objects which never become extinct, and those objects are all of a religious and charitable character, then this particular appropriation fails to answer to this description. Consequently the appropriation of the one-fourth share, which is the subject of this appeal, is invalid, and cannot be held to be "*waqf*."

There is, however, some force in the argument which has been addressed to us, that appropriations in the nature of settlement of property upon a man and his descendants have been treated by various exponents of Mahomedan law as legitimate appropriations under the designation of "*waqf*." But these settlements are all under Mahomedan law termed *sadukah*, and in the view



Apparently, Baillie, when a settlement of property is made in this way by a man in favour of his descendants, the term *sadukah* must be used.

But we do not gather that this term is employed in the deed of 1st Bhadro 1248. But further, even admitting that, under Mahomedan law, appropriations or rather settlements of this character can be made, it seems to us clear that the present appropriation falls outside the principle of "waqf." As explained in the case of *Abdul Ganne Kasam v. Hussen Miya* [749] *Rahimtulla* (10 Bom. H. C. R., 7, at p. 18), the doctrine of settlement rests entirely upon a saying attributed to the prophet—"a man giving subsistence to himself is giving alms"; but this doctrine only holds good according to Hamilton (2 *Hidaya*, 351, note), "where a man appropriates the whole of his property, and so reduces himself to poverty; in which case the charity is as effectual with respect to him (where he necessarily reserves a sufficiency from the product for his own sustenance) as with respect to any other pauper." So that to validate a "waqf" by making a settlement of his property on himself or his descendants, a man must, in the view taken by the prophet, reduce himself to a state of absolute poverty. In the present case it is clear, and it is admitted by the both sides, that there are other properties vested in the appropriator besides those which are the subject of this deed. Consequently, it cannot be said that Budrunnessa has received this property as a pauper. In both points of view, therefore, it seems to us that this appropriation of a one-fourth share, or two annas out of eight annas of Lot Kantabari, cannot be treated as a valid waqf. We, therefore, dismiss the appeal with costs.

*Appeal dismissed*

#### NOTES.

[**WAKF** The Mussalman Wakf Validating Act 1913 (VI of 1913) was passed to "declare the rights of Mussalmans to make settlements of property by way of "wakf" in favour of their families, children, and descendants." This Act renders nugatory the Privy Council decisions with reference to reservations in favour of the settlor's family. See as to the previous state of the law, (1881) 9 C. L. R. 66; (1882) 9 Cal. 176; (1887) 11 Bom. 499; (1888) 13 Mad. 66; 13 Bom. 264; (1891) 18 Cal. 399; (1892) 20 Cal. 116; (1894) 18 Mad. 201; (1902) 24 All. 257.]

[6 Cal. 749]

The 15th February, 1881.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Upooroop Tewary and others.....Defendants

versus

Lalla Bandhjee Suhay.....Plaintiff.\*

*Hindu Law—Mitakshara—Mortgage of Family Property—Sale of Interest  
of one of several Co-shareers in a joint Estate.*

In a suit on a mortgage against a member of a joint Hindu family governed by the Mitakshara law, the whole of the interest of the joint family in the estate was decreed to the mortgagees, who subsequently obtained possession of it. Afterwards a suit was brought by another member of the family, who had attained majority prior to the mortgage, to set it and the decree aside, so far as he was concerned, and to recover possession of his share of the joint family property.

[750] *Held*, that the mere circumstance of an antecedent debt was not in itself sufficient to bind him, and that the alienation was not good as against him, unless it could be shown that he had either expressly or impliedly given his consent to the mortgage.

THIS was a suit for recovery of possession of a one-anna share of Mouza Chuck Bias, on the ground that the plaintiff and his father Dabee Pershad, who constituted a joint Hindu family governed by the Mitakshara law, held and owned a two-anna share of the said mouza; and that, in execution of a decree against Dabee Pershad, his interest having been sold and purchased by the defendant, the plaintiff was dispossessed of the property in which he, according to the Mitakshara law, was entitled to a half share. It appeared that the whole two annas of the property in dispute was in the possession of the defendant, in this case, under a zur-i-peshgee executed by Dabee Pershad, and while the whole share was in his possession, on the 24th of August 1864, Dabee Pershad executed a mortgage-bond in favour of one Sreemundle Doss. Dabee Pershad in that bond hypothecated his "proprietary share" in the mouza in dispute. A suit was brought upon that bond by Sreemundle Doss against Dabee Pershad, and a decree was passed on the 7th of June 1865, declaring that the amount decreed should be levied by the sale of the mortgaged property. In the month of February 1866, in execution of that decree, the mortgaged property was sold and purchased by the defendant. Under that purchase it was not disputed that the defendant acquired possession of the whole two annas share. This suit was brought on the 6th August 1878. Intermediately another suit had been brought under the same cause of action, but it was dismissed by the Munsif, in whose Court it was brought, on the ground of want of jurisdiction.

The Subordinate Judge, on the 30th December 1878, holding that the suit was virtually one to compel partition, decreed it, and ordered that the plaintiff be put in possession of a one-anna share in Chuck Bias by proprietary right, but did not give him khas possession, inasmuch as the mortgage lien then existed.

From that decree the defendant appealed to the District Judge, who, on the 11th August 1879, in varying it, declared, [751] amongst other things, that had the plaintiff claimed it he would have been entitled to the whole two

\* Appeal from Appellate Decree, No. 2376 of 1879, against the decree of J. F. Stevens, Esq., District Judge of Shahabad, dated the 11th August 1879, modifying the decree of Moulvie Narul Hossein, Subordinate Judge of that district, dated the 30th December 1878.

annas share ; but inasmuch as he only sued for a one-anna share, the Court decreed that the plaintiff was entitled to obtain proprietary possession only of that, without any adjudication as to the extent of the share to which he was entitled. And it was further declared that the defendants had acquired by the purchase at auction-sale, on the part of their father Ishur Tewari, the share and interest of Dabee Pershad in Mouza Chuck Bias, and was entitled to take such proceedings as they might be advised to have that share and interest ascertained by partition.

The defendants then appealed to the High Court.

Baboo Mohesh Chunder Chowdhry, Baboo Chunder Madhub Ghose, and Baboo Aubinash Chunder Banerjee for the Appellants.

Baboo Doorga Proshad for the Respondent.

The **Judgment** of the Court (MITTER AND MACLEAN, JJ.) was delivered by

**Mitter, J.** (who, after stating the facts as above, continued) :—Various objections have been taken by the defendants against the plaintiff in this suit, and the lower Courts have overruled them all. Some of them have been also taken before us in this appeal, but it would be convenient to take up first the 8th and 9th grounds mentioned in the petition of appeal. These two grounds raise the question, which is in issue between the parties, as regards the title to the property. It is contended before us, that the decision of the lower Courts, that what was sold was only the interest of Dabee Pershad, is erroneous. The proceedings resulting in the execution-sale taken together with the bond of the year 1864, it is contended, show that what was sold was the entire family property. The District Judge decides this point as follows :—“ Now the words which I have just quoted apply exactly to the present case. It appears from the bond of the 24th August 1864, that the mortgage was of Dabee Pershad's right, title, and interest without any specification of share. It appears again from the decree of the 7th June 1865 on that bond that there was no mention of any specific share, but only [752] of the right, title, and interest. Finally, the proceeding of the 19th March 1866, confirming the sale, shows clearly that it was only Dabee Pershad's right, title, and interest that passed at the sale to the auction-purchaser.” Now it appears to us that the District Judge is not right in the construction which he has put upon the bond of the 24th of August 1864. No doubt, the words used in the bond, by which the hypothecation was effected, were ‘my proprietary share,’ but the share specified therein was the share of the family as contradistinguished from the shares of other coparceners, according to the true principle which governs the relations of members constituting a joint Hindu family under the Mitakshara law. Dabee Pershad, the father, could not predicate of his interest in the joint property as constituting his share. The plaintiff's case is, that at the time of the mortgage the family property was joint. Under these circumstances, it seems to us that the bond, rightly construed, hypothecated the whole share in the disputed mouza which was held by the joint family. In this view of the bond, it would follow that the decree and the sale also referred to the mortgaged property—namely, the share held and owned by the joint family ; and if the plaintiff in this case had been a minor at the time of the mortgage, the suit against the father would, in accordance with numerous decisions, have been held as brought against him in his representative character representing the joint family. But in this case the plaintiff had attained majority before the mortgage of the 24th August 1864 was executed, and therefore, the answer to the question, whether or not the plaintiff is bound by the mortgage and the subsequent decree, would depend upon the enquiry into certain questions of fact which I shall indicate hereafter, but upon which ques-

tions of fact there has been no decision by the lower Appellate Court. The law upon this subject is contained in paras. 28 and 29, Chap. I, sec. 1 of the Mitakshara. The author of the Mitakshara, treating of the power of alienation of a single member of a joint family, says in para. 28: "An exception to it follows. Even a single individual may conclude a donation, mortgage or sale of immoveable property during a season of distress for the sake of the family, and especially for pious purposes"; and in [753] para. 29 he goes on to say: "The meaning of that text is this—while the sons and grandsons are minors and incapable of giving their consent to a gift and the like, or while brothers are so and continue unseparated, even one person who is capable may conclude a gift by hypothecation or sale of immoveable property if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable." From these two paragraphs it is clear, that where the coparceners are all adults, the sale by one of them would not be valid unless made with the consent of the rest; but if some of them are minors, the members who are adults may make a valid alienation of the family property under the conditions mentioned in para. 29. It has been held by the Judicial Committee of the Privy Council, that it is a pious duty for a son under the Mitakshara law to pay such debts of his father as were not contracted for immoral purposes; and according to the Hindu Law, it is also a pious duty for a person to pay off his own debts. It has been held by their Lordships of the Judicial Committee, that from these two propositions it follows, that an alienation by a father living jointly with his sons under the Mitakshara law to pay off his antecedent debts, which debts are not proved to have been incurred for immoral purposes, is an alienation for the performance of indispensable duties within the meaning of para. 29, Chap. I, Sec. I of the Mitakshara. In this case, therefore, if the alienation—namely, the mortgage of the 24th August 1864—had been made for the purpose of paying off an antecedent debt, and if the plaintiff had been then a minor, the mortgage would have been binding upon him; but it appears that the plaintiff at that time was of age, and therefore, as already pointed out, the mere circumstance of the existence of an antecedent debt would not be sufficient to bind him. But it must be proved that he was a consenting party to that transaction. His consent might have been express or implied. If he stood by, and thereby allowed the creditor with whom his father was dealing to believe that he was a consenting party, the transaction would be binding upon him. This question was raised in the following issue "whether or not the bond, the [754] decree, and the auction-sale were executed, passed, and held with the knowledge of the plaintiff; if so, would that operate as an estoppel against the plaintiff?" If all these proceedings were held with the knowledge of the plaintiff, it seems to us that it would be a fair inference from that circumstance that the plaintiff was a consenting party to the original transaction. The circumstance that, under the purchase in the year 1866, the defendants obtained possession of the whole family property, and remained in possession of it for about twelve years, has also a material bearing upon this question. As it is a question of fact, we cannot, in this second appeal, deal with it. We must, therefore, remit the record to the lower Court in order that it may, with reference to the observations made above and the evidence upon the record, come to a finding upon it.

We reserve at present our opinion upon the other questions raised in this appeal, and the appeal will be finally disposed of as soon as the record and the finding of the lower Court come up.

We reserve the question of the costs of this hearing.

## NOTES.

**[I. THE HEAD NOTE—**

The headnote, does not, as it ought to have done, indicate that the member of the joint family disputing the alienation, was *a son*, and that the mortgagor was *the father*. The ruling in this case is with reference to the extent to which *adult* sons are bound by the father's alienation.

**II. FATHER'S ALIENATION HOW FAR BINDING ON THE ADULT SONS—**

Certain expressions both in this case and in 6 Cal 135 lend colour to the contention that their consent would be necessary, either express or implied, from (circumstances). But Mr. Justice Mitter himself, explained in (1882) 9 Cal 495 the effect of these cases, and added, "it is difficult to understand upon what ground the distinction between the case of an adult and a minor son can be supported."

See *Simbhunath Pandey's case*, (1887) 14 Cal. 572 P.C.

See also 12 Cal. at 399; (1887) 11 Bom. 605; 4 Bom. L. R. 587.

**III. PRESENCE OF SONS ETC. AT THE TRANSACTION HOW FAR OPERATES AS AN ESTOPPEL—**

Mitter J. observed at 6 Cal. 754 that the presence might give rise to the inference that the son was a consenting party. See also (1881) 8 Cal. 517. But see *Simbhunath Panday's case*, (1887) 14 Cal. 574 where the Privy Council remarked, "Whatever part any of the sons may have taken in *negotiating* between Luchmun and Bichuk, there is no evidence whatever of their proposing to mortgage their own interests. The sons *may have assented* to what was done, but the question is, what was done."

**IV. "RIGHT TITLE AND INTEREST"**

Upon the use of the words "*my proprietary share*" in this case, and Mr. Justice Mitter's inference therefrom, see (1887) 14 Cal. 572 at 579. The words used in this case were the subject of comment by Mahmood J. in (1892) 14 All. 179.]

[7 Cal. 754]

*The 1st February, 1881.*

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Annoda Persad Roy.....Plaintiff

versus

Dwarkanath Gangopadhya and another.....Defendants.\*

*Principal and Agent—Duty of Agent to account—Procedure on taking accounts in Mofussil—Pleading in suit for account—Access to books and papers—Civil Procedure Code (Act X of 1877) ss. 394, 395.*

In a suit for an account against an agent, the plaintiff stated that the defendant had not submitted proper accounts of his agency, and prayed that the defendant might be ordered to produce certain papers, and that, on failure to submit the accounts, he might be decreed to pay the plaintiff Rs. 1,200 by way of damages. The plaintiff also alleged that, in consequence of the defendant's negligence and mismanagement, the plaintiff believed that he had sustained a loss of Rs. 5,000, and prayed for a decree for this sum.

[755] *Held*, that no decree could be made for the sums mentioned, or any other sum, until an account had been taken and the amount due from the defendant ascertained.

*Per FIELD, J.*—It is the duty of an agent to render proper accounts to his employer irrespective of any contract to that effect. And he does not discharge that duty by merely delivering to his employer a set of written accounts without attending to explain them, and produce the vouchers by which the items of disbursements are supported.

Method to be followed on taking accounts in the mofussil stated.

If the taking of accounts by the Judge would occasion a waste of public time, he should resort to the provisions of ss. 394† and 395‡ of the Civil Procedure Code; and furnish the commissioner with such part of the proceedings and such detailed instructions as may appear necessary.

In order to enable an agent to prepare accounts to be furnished to his principal, he should be allowed to have reasonable access, at proper times and in the presence of responsible persons, to such books and papers in the principal's possession as may be necessary for the preparation of the accounts.

Baboo Annoda Pershad Banerjee and Baboo Hem Chunder Banerjee for the Appellant.

\* Appeal from Original Decree, No. 333 of 1879, against the decree of A. J. R. Bainbridge, Esq., Judge of Moorshedabad, dated the 13th October 1879.

†[Sec. 394 :—In any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person, as it thinks fit, directing him to make such examination or adjustment.]

‡[Sec. 395 :—The Court shall furnish the Commissioner with such part of the proceedings and such detailed instructions as appear necessary ;

and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination.

Proceedings of Commissioner receivable in evidence; power to make further inquiry. The proceedings of the Commissioner shall be received in evidence in the suit, unless the Court has reason to be dissatisfied with them, in which case the Court shall direct such further inquiry as is requisite.]

Baboo Rashbehary Ghose, Baboo Hurry Mohun Chuckerbutty and Baboo Kuruna Sindhu Mookerjee for the Respondents.

THE facts of this case sufficiently appear from the **Judgment** of the Court (MCDONELL and FIELD, JJ.), which was delivered by

**Field, J.**—We think that the decree of the District Judge in this case cannot be sustained. It is quite possible that the plaintiff has not properly conceived, or correctly stated in his plaint, the exact remedy to which he is entitled; but we think, having regard to the whole of the circumstances of the case, and the inexact practice prevalent in the mofussil in this class of cases, that the plaintiff ought not to be denied any remedy whatever. In his plaint he states (and on this point there is no dispute) that the defendant was in his employment from September 1875 to May 1879. He states, further, that the defendant has not submitted to him proper accounts of his agency; and in the 9th para. he asks that a decree be passed to the effect that the defendant No. 1 do submit the *nikas* papers called for agreeably to the provi-[756]sions of the kabuliati executed by him. The plaint then goes on to ask that, on failure to submit the said accounts, the defendant may be decreed to pay him Rs. 1,200 by way of damages. It is further alleged that, in consequence of the defendant's negligence and mismanagement, he (the plaintiff) believes that he has sustained a loss of Rs. 5,000, and he asks that a decree may be passed in his favour for this sum, or in respect of such sum as will represent the loss which may be found by the Court to have been sustained by him.

Now some of these prayers have been wrongly conceived. There can be no decree for Rs. 1,200 or Rs. 5,000, or any other sum, until, upon taking the accounts, it has been ascertained that the plaintiff is entitled to receive a sum of money from the defendant, and until it has been further ascertained what the amount is to which the plaintiff is so entitled. That it is the duty of the defendant to render proper accounts to his employer, and this irrespective of the stipulations contained in the kabuliati, there can be no doubt. Mr. Story, in para. 203 of his work on Agency, says that "it is the duty of an agent, where the business in which he is employed admits of it or requires it, to keep regular accounts of all his transactions on behalf of his principal, not only of his payments and disbursements, but also of his receipts, and to render such accounts to his principal at all reasonable times without any suppression, concealment, or overcharge." See also Story's Equity Jurisprudence, §§ 462, 468. We may add that an agent does not discharge the duty of accounting, by merely delivering to his employer a set of written accounts, without attending to explain them, and produce the vouchers by which the items of disbursements are supported.

In the written statement, which was filed by the defendant in this case, he alleged (para. 12) that the *nikas* papers required by the plaintiff had been prepared and submitted to him; and in other parts of the same written statement, he further alleged that certain other accounts had been required from him within such a time, and in such a form, as rendered it impossible for him to comply with this requisition of his employer.

We think that, having regard to these allegations, the proper [757] points for enquiry in this case were: *first*, did the defendant render to the plaintiff such reasonable and proper accounts of his agency as the plaintiff was entitled to require from him? and *secondly*, did the defendant further explain these accounts and support them by the production of proper vouchers? We may observe that the defendant does not allege that his accounts have been settled, or that the plaintiff has expressly or by acquies-

cence, accepted the accounts submitted by him. If sufficient accounts have been rendered, but not explained and supported in the manner above pointed out, the defendant must be called upon to explain and support them. If sufficient accounts have been rendered, explained, and supported, or, in the latter case, as soon as the accounts rendered have been explained and supported, it will then lie upon the plaintiff to point out the entries in those accounts which he alleges to be erroneous; or, in respect of transactions not shown in the accounts to state what monies have been received and not credited. The Judge must then proceed to deal with the questions thus raised between the parties, treating each item separately.

If, on the other hand, no sufficient accounts have been rendered by the defendant, the proper course then for the Court is that pointed out in a judgment of PHEAR, J., in the case of *Syed Shah Maiahmad, alias Boolaki Ali v. Mussamat Bibee Nusibun* (24 W. R., 70). PHEAR, J., there says:—"The proper and convenient mode of doing so is to fix a day before which the defendant should file a written statement of his account, exhibiting therein all the items of receipt for which he is accountable on one side and all items of disbursements on the other; and to fix another day before which the plaintiff should file any objections which he may have to make to these accounts when filed; and finally, the Judge ought to appoint a third day upon which an inquiry into the truth and correctness of the statements of account filed by the defendant should be made; and on that enquiry he will take all such evidence, in the way of books and vouchers, and so on, as the defendant is entitled to produce, as well as the testimony of necessary witnesses, and also all evidence on the part of the plaintiff tending to invalidate the accounts or [758] to surcharge them; and eventually, upon the termination of the enquiry, the Judge should satisfy himself as to the amount which is due upon the account as established by the evidence of both parties, and frame his decree accordingly. He ought not to give a decree for alternative damages founded upon any antecedently estimated amount, which must, apart from the evidence, be simply a matter of conjecture or of claim. He should give no decree other than an order on the defendant to file his accounts, before the accounts have been taken, and then confine his decree to such amount as he may find to be due upon the proper taking of the accounts against the defendant. If the defendant prove contumacious with regard to filing his statement of accounts, the Judge may proceed with the taking of the accounts against him on the footing of evidence furnished by the plaintiff, and in so doing he may make all reasonable presumptions against the defendant." See also the directions to be found at page 12 of the Memorandum of Practice prefixed to the edition of the Circular Orders published in 1876. There may be cases (and it is possible that this present case may be one) in which the taking of any account in the manner above pointed out may occasion so great a waste of public time of the Judge, that resort may well be had to the provisions of the Code of Civil Procedure contained in s. 394. If it be found advisable to have recourse to these provisions, the Judge should then follow the directions contained in s. 395, and furnish the commissioner with such part of the proceedings and such detailed instructions as appear necessary. We think that if these directions be carried out, there will be no greater difficulty in taking accounts in the mofussil than is experienced on the Original Side of this Court, or in any other Court in which accounts have to be taken and settled between parties as disputatious as the parties in the present case.

We think it desirable to add that, in order to enable the defendant to prepare such accounts as the plaintiff is entitled to receive from him, the



defendant ought to have reasonable access, at proper times and in the presence of responsible persons, to such books and papers in the plaintiff's sherista as may be necessary for the preparation of the accounts.

[759] The case will be remanded to the District Judge in order that he may proceed in accordance with the above directions. All costs in the case will follow the ultimate result.

*Case remanded.*

#### NOTES.

##### [I. AGENT: DUTY OF, TO ACCOUNT—

An agent is bound to render proper accounts to his principal on demand :—(1819) Jac. and W. 185.

He must also be ready to explain them :—(1881) 6 Cal. 754 ; (1881) 7 Cal. 627.

He is answerable only to his principal and not to other persons :—(1907) 30 Mad. 243.

##### II LIMITATION—

Suit against an agent for account is governed by Art 89 of sch. II of the Limitation Act :—(1905) 32 Cal. 719=1 C. L. J. 232.

See also Sec. 213 of the Contract Act and commentaries in Pollock and Mulla's Contract Act, p. 577, 3rd edition.]

[6 Cal. 759]

*The 15th February, 1881.*

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Nobin Chunder Sircar and another.....Defendants

*versus*

Gour Chunder Shaha and another.....Plaintiffs.\*

*Assessment of rent—Enhancement—Decree for rent at enhanced rate—  
Beng. Act VIII of 1869.*

On the 25th of January 1864, the plaintiffs obtained a decree against the defendants for assessment of enhanced rent. Shortly afterwards, the defendants executed a kabuliat, at a reduced rate, for eleven years, ending the 31st Assin 1282 (16th October 1875). After the term had expired, the plaintiffs sought to recover rent from the defendants at the rate settled by the decree of 1864.

*Held*, that the decree had been superseded by the subsequent arrangement, and that the plaintiffs could not recover rent at an enhanced rate, except under the provisions of Beng. Act VIII of 1869.

IN this case it appeared that, in 1863, Messrs. Hill & Co. brought a suit against the defendants for assessment of rent, and obtained a decree on the 25th of January 1864, by which the jama was fixed at Rs. 139-3-7. Shortly afterwards, on the 1st of Kartick 1271 (16th October 1864), the defendants executed a kabuliat in respect of the lands covered by the decree, by which they agreed to pay a rent of Rs. 26-6 per annum and to grow indigo for Messrs. Hill & Co., and that in case the defendants should make default in the payment of the rent or in the growing of the indigo, then the whole jama fixed by the decree of the 25th January 1864 should become due and payable by the defendants. The kabuliat was for a term of eleven years, which expired on the 31st Assin 1282 (16th October 1875).

[760] In the month of Pous 1282 (December 1875, January 1876), the plaintiffs, who are the assignees of Messrs. Hill & Co., served a notice on the defendants to the effect that, in future, the rent should be that fixed in the decree of the 25th January 1864.

The main contention of the defendants was, that the arrangement under the kabuliat superseded the decree; and also that the right under the decree had become extinct, as no rent had been realized under it for upwards of twelve years. The Court of first instance, citing *Doorga Churn Chatterjee v. Doyamoyee Dossia* (20 W.R., 243), held, that the enhancement decree had not become ineffectual, but had merely remained in abeyance, and decided in favour of the plaintiffs. This decision was upheld on appeal. The defendants then appealed to the High Court.

Baboo Bhowany Churn Dutt for the Appellants.

Baboo Mohiny Mohun Roy for the Respondents.

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\*Appeal from Appellate Decree, No. 2289 of 1879, against the decree of Baboo Krishna Chunder Chatterjee, Officiating Subordinate Judge of Nuddea, dated the 27th June 1879, affirming the decree of Baboo Shushee Bhusan Banerjee, Munsif of Chooadanga, dated the 31st January 1878.

The Judgment of the Court (McDONELL and FIELD, JJ.) was delivered by

**McDonell, J.** (who, after stating the facts, continued).—Now it appears to us that the plaintiffs are not entitled to succeed in this suit. It may be well to point out in the first instance that the case of the plaintiffs is, not that the defendants, holding over after the expiry of the term of the kabuliāt, are bound by the conditions of the kabuliāt, and are, therefore, liable to pay rent according to the terms of that instrument, nor is it contended that the defendants have refused to grow indigo, and are, therefore, liable, under the penalty-clause, to pay the rent fixed by the decree. As a matter of fact, the plaintiffs do not seek to enforce the conditions of the kabuliāt in any way. Their contention is that, on the expiry of the term of the kabuliāt, the enhancement decree of 1864 revived, and has full effect.

In the first place, it is to be observed that this decree does not contain any direction as to the time for which it is to have effect. Those who are conversant with the history of the law of enhancement of rent in this Presidency, are well aware that [761] there has been some discussion and difference of opinion as to the length of time for which the Courts have authority to fix enhanced rent.

Then, in the next place, the parties did not, when executing the kabuliāt, make any stipulation to the effect that, upon the expiry of the term of the kabuliāt, the enhancement decree should survive and have effect. It would no doubt have been competent to the parties to have provided in this manner for what was to take place on the expiry of the term of the kabuliāt, but they did not do so; they did not provide for the contingency by their own contract, and we have, therefore, to see how the position of the parties is affected by the law of landlord and tenant.

It appears to us, that the arrangement embodied in the kabuliāt had the effect of superseding the enhancement decree; and that, upon the expiry of the term of the kabuliāt, if the plaintiffs seek to enhance the rent, they must do so by having recourse to the procedure laid down by Beng Act VIII of 1869.

The notice served by the plaintiffs upon the defendants is, admittedly, not such a notice of enhancement as is required by the provisions of this Act. It is merely a notice calling upon them to pay the rent decreed in 1864. Then, having regard to the provisions of s. 5 of the Act, in cases of dispute between the parties, the rent previously paid by the ryot is to be deemed fair and equitable, unless the contrary be shown by either party in a suit under the Act. Now the rent previously paid in this case is the rent payable under the kabuliāt; and we think, that if the plaintiffs seek to recover a higher rent than that so previously paid, they must proceed under the enhancement provisions of Beng. Act VIII of 1869.

The appeal will, therefore, be decreed with costs of both Courts.

*Appeal allowed.*

[762] APPELLATE CRIMINAL.

The 22nd February, 1881.

PRESENT :

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE MACLEAN.

In the matter of the Petition of Mayadeb Gossami.\*

The Empress

versus

Mayadeb Gossami.

*False evidence in Judicial Proceeding—Deposition of the accused when admissible as evidence—Civil Procedure Code (Act X of 1877), ss. 178, 182, 183, and 647—Evidence Act (I of 1872), s. 91.*

Failure to comply with the provisions of ss. 182† and 183‡ of Act X of 1877 (Civil Procedure Code) in a judicial proceeding, is an informality which renders the deposition of an accused inadmissible in evidence on a charge of giving false evidence based on such deposition; and under s. 91§ of Act I of 1872 (Indian Evidence Act), no other evidence of such deposition is admissible.

Baboo Baikant Nath Dass for the Appellant.

No one appeared on behalf of the Crown.

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\* Criminal Appeal, No. 66A of 1881, against the order of A. Porteous, Esq., Assistant Commissioner of Kamrup, dated the 27th December 1880.

†[Sec. 182:—In cases in which an appeal is allowed, the evidence of each witness shall be

How evidence shall be taken in appealable cases.

taken down in writing, in the language of the Court, by or in the presence and under the personal direction and superintendence of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and, when completed, shall be read over in the presence of the Judge and of the witness, and also in the presence of the parties or their pleaders, and the Judge shall, if necessary, correct the same and shall sign it.]

‡[Sec. 183:—If the evidence is taken down under Section 182 in a language different from that in which it was given, and the witness does not understand the language in which it is taken down, the evidence as taken down in writing shall be interpreted to him in the language in which it was given.]

When witness may require his deposition to be interpreted.

§[Sec. 91:—When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Evidence of terms of written contract.

Exception 1.—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2.—Wills under the Indian Succession Act may be proved by the Probate.

Explanation 1.—This section applies equally to cases in which the contracts, grants or disposition of property referred to are contained in one document, and to cases in which they are contained in more documents than one.

Explanation 2.—Where there are more originals than one, one original only need be proved.

Explanation 3.—The statement in any document whatever of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.]

THE facts of this appeal sufficiently appear in the **Judgment** of the Court (CUNNINGHAM and MACLEAN, JJ.) which was delivered by

**Cunningham, J.**—The prisoner in this case applied for a certificate under Act XL of 1858 in respect of the estate of two infants, and in support of his application he gave a sworn deposition on the 4th October last before the District Judge.

His deposition was made in Assamese, and was translated by the Sheristadar of the Court, and the Judge recorded it in English. He did not sign it, nor was it read over to the witness or translated. The requirements of ss. 182 and 183 of the Civil Procedure Code were, therefore, not complied with. This is clear from the deposition of the Sheristadar before the Deputy Commissioner.

[763] At the conclusion of the proceedings in his Court, the Judge considered that the prisoner had given false evidence, and he directed that he should be prosecuted. This has resulted in his conviction, and as this Court was of opinion, on the facts brought to its notice, that the appeal ought not to be tried by the Judge before whom the false evidence was given, the appeal has been called up to this Court.

It is contended for the defence, that the informalities which took place in recording the accused's deposition render the record of his evidence inadmissible; and that, under s. 91 of the Evidence Act, no other evidence of his deposition is admissible.

We consider this contention sound. By s. 647<sup>†</sup> of the Civil Procedure Code, the procedure prescribed by the Code is to be followed, as far as it can be made applicable, in all proceedings, in any Court, other than suits and appeals. By s. 178<sup>‡</sup> a party to a suit required to give evidence is governed by the rules as to witnesses. Sections 182 and 183; therefore applied to the accused's deposition, and those sections not having been complied with, the record is inadmissible.

The conviction must, therefore, be quashed, and the prisoner released.

The record of the proceedings before the District Judge does not show that the Sheristadar was sworn or affirmed as required by Act X, 1873, s. 5 (b). The Judge's attention should be drawn to this, and a copy of this judgment furnished to him from this Court.

*Conviction quashed.*

#### NOTES.

[See for the reiteration of the same principle (1886) 9 Mad. 224; (1890) 17 Cal. 862; (1898) 23 Bom. 221.]

Miscellaneous proceedings.

The High Court may  
Admission of affidavits  
as evidence.

Rules as to witnesses to  
apply to parties summoned.

\* [Sec. 647:—The procedure herein prescribed shall be followed, as far as it can be made applicable, in all proceedings in any Court of Civil jurisdiction other than suits and appeals, from time to time make rules to provide for the admission, in such proceedings, of affidavits as evidence of the matters to which such affidavits respectively relate; and such rules, on being published in the Local Official Gazette, shall have the force of law.]

† [Sec. 178:—Whenever any party to a suit is required to give evidence or to produce a document, the rules as to witnesses contained in this Code shall apply to him so far as they are applicable.]

## [764] PRIVY COUNCIL.

*The 9th, 10th and 11th July, and 19th November, 1880.*

PRESENT :

SIR J. W. COLVILL, SIR B. PEACOCK, SIR M. E. SMITH, AND SIR R. P.  
COLLIER.

Rani Anand Kunwar and another.....Defendants

*versus*

The Court of Wards, on behalf of Chandra Shokhar, a Minor.....Plaintiff.

*[On appeal from the Court of the Commissioner of Sitapore in Oudh.]*

*Hindu Law—Adoption by widow—Contingent Reversionary Heir—Collusion—Party to suit to contest Adoption.*

Although a suit, to contest an adoption made by a Hindu widow of a son to her deceased husband, may be brought by a contingent reversionary heir, yet it is not the law that any one who may have a possibility of succeeding to the estate of inheritance held by the widow for her life is competent to bring such a suit. The right to sue must be limited. As a general rule, the suit must be brought by the presumptive reversionary heir,—that is to say by the person who would succeed to the estate if the widow were to die at the time of the suit. But it may be brought by a more distant heir, if those nearer in the line of succession are in collusion with the widow, or have precluded themselves from interfering. The rule laid down in *Bhikaji Apaji v. Jagannath Vithal* (10 Bom. H. C. Rep., A. C. J., 351) approved. Reference made to *Koor Goolab Sing v. Rao Kun Singh* (14 Moore's I. A., 187).

If the nearest heir had refused, without sufficient cause, to institute proceedings, or if he had precluded himself by his own act or conduct from suing, or had colluded with the widow, or had concurred in the act alleged to be wrongful, the next presumable heir would be, in respect of his interest, competent to sue. In such a case, upon a plaint stating the circumstances under which the more distant heir claimed to sue, a Court would exercise a judicial discretion in determining whether he was or was not competent, in that respect, to sue; and whether it was requisite or not, that any nearer heir should be made a party to the suit.

In a suit to have an alleged adoption set aside, the plaintiff, a minor through his guardian, claimed to sue, on the strength of being the adopted son of the husband of a daughter of a brother of the father of the deceased under whose authority the adoption was alleged to have been made by the widow, the defendant. The Judicial Committee, without deciding that, as an adopted son, this minor had the same rights as a naturally born son, and without deciding that he would have been entitled, in default of nearer relations, to succeed to the estate of inheritance, after the death of the widow, pointed out, that he [765] could only have succeeded as a distant bandhu, and that he had not a vested

but at most a contingent interest. And held, that there being, in fact, heirs nearer in the line of succession than this minor, the grounds of his competence to sue in respect of his interest, assuming that interest to exist, should have been made out in the manner above indicated.

APPEAL from a decree of the Court of the Commissioner of the Sitapore Division of Oudh (15th June 1877), affirming a decree of the Deputy Commissioner of the District of Bara Banki (28th August 1870).

The question raised in this appeal was, whether the respondent Chandra Shekhar, a minor suing by his guardian, was in such a position as heir, that he could claim the setting aside of an adoption, alleged to have been made by the first appellant, the Rani Anand Kunwar, as widow of Sunkershahai, deceased, of the second appellant, Radakishen.

The disputed adoption was said to have been made in 1851, under the written authority of Shunkershahai, who had died in 1841. After his death, the first appellant became [and after a suit was declared—see *Widow of Shunkershahai v. Rajah Kashipershad* (L. R., 4 Ind. App., 198)] entitled to the rights of an under-proprietor in certain villages, forming part of the taluqua of Sessendi, for a widow's estate.

The minor Chandra Shekhar, was the adopted son of the last taluqdar of Sessendi, Raja Kashipershad, whose wife, Mussamut Ummed Koer, was Shunkershahai's paternal uncle's daughter. On the death of Kashipershad, the minor's estate had come under the Court of Wards, of which the Superintendent, suing on behalf of the minor, had obtained a decree in the Court of the Deputy Commissioner of Bara Banki, to the effect that neither the adoption of Radakishen, nor the authority to make it, had been proved.

This decree was confirmed on appeal by the Court of the Commissioner of Lucknow; who however held, that the minor plaintiff, not being related to Shunkershahai in any degree that could be understood to come within the table of succession in the Mitakshara, had not a reversionary interest sufficient to enable him to maintain this suit. But that as taluqdar of Sessendi, the minor could maintain the suit, because (said the Commissioner) [766] "a taluqdar had a reversionary interest in every under-proprietary tenure in his estate."

The facts of the case are stated in their Lordships' judgment.

Mr. J. F. Leith, Q. C., and Mr. P. V. Doyne appeared for the Appellants.

Mr. T. H. Cowie, Q. C., and Mr. J. D. Mayne for the Respondent.

An objection was taken on behalf of the respondent, having reference to the effect given to the concurrent findings of a Court of first instance and an Appellate Court on matters of fact. This was disallowed in regard to the nature of the questions raised; see reference to the usual course made in the judgments in *Pauliem Valoo Chetty v. Pauliem Sooryah Chetty* (I. L. R., 1 Mad. 285; S. C., L. R., 4 Ind. App., 114), and in *Gosharn Tota Ram v. Raja Rickmunee Bullub* (13 Moore's I. A., 82).

It was then argued for the appellants,—first, that the interest of the minor Chundra Shekhar, in the estate held by the widow, was too remote to afford a legal basis for his suing through his guardian to contest the alleged adoption. In fact, other heirs were entitled, in priority to him to interests in the estate

of inheritance contingent upon their surviving the widow. The lower Appellate Court had rightly held that this minor had no such reversionary interest, as a bandhu, as would support this suit; but had erred in holding that as taluqdar of Sessendi he had a sufficient interest for this purpose. *Secondly*, the minor, as the adopted son of Raja Kashipershad, was not entitled to succeed through the Rajah's wife, his adoptive mother Ummed Koer, to her collateral relation Shunkersahai. He was not so entitled, because there was authority for holding that adopted sons did not succeed *ex parte materna* to collaterals. On this point were cited Macnaghten's Hindu Law, ch. 6, page 78 of 3rd edition; *Gunga Mya v. Kishen Kishore* (3 Sel. Rep., 128, N. S. 170) *Morun Moe Debeah v. Bejoy Kishto* (W. R., Sp. No., 1864, p. 121), *Chinna Ramakirstna Aiyar v. Minatchi* (7 Mad. H. C. Rep., 245), Table of Succession, Vivada Chintamani translated by Prosono Kumar Tagore.

[767] For the respondent it was argued that the minor's interest in the estate of inheritance was sufficient to support this suit for its protection against the act of the widow. Where the immediate heir was not in a position to sue, a more remote heir was allowed to contest the acts of the widow in *Bal Gobind Ram v. Hirusranee* (2 W. R., Civ. Rul., 255), in which case the judgment referred to the suit of a distant heir permitted in *Chunder Koomar Hazaree v. Dwarkanath Purdhan* and others (S. D. A. 1859, p. 1623). Where nearer heirs had concurred in the acts of the widow, the more distant were held entitled to sue: see *Koor Goolab Sing v. Rao Kurun Sing* (14 Moore's I. A., 187). In the present case nearer heirs might have precluded themselves from suing, and had not interfered. So that, on the principles explained by Sir LAWRENCE PEEL in *Oojulmoney Dossee v. Sagormoney Dossee* (1 Tay. and Bell, 370), and *Hurrydoss Dutt v. Rungunmoney Dossee* (2 Tay. and Bell, 279), with regard to the nature of the estate taken by the widow, the minor in this instance could come in for the protection of the inheritance. Reference was also made to *Blukari Apari v. Jagannath Vithal* (10 Bom. H. C., Rep., A. C. J., 351).

On the second part of the argument, *viz.*, whether the adopted son could succeed *ex parte materna*, and was or was not in the position of a distant bandhu in the family of his adoptive mother, it was pointed out that the course of decision in the Indian Courts had changed since the year 1821, when *Gunga Mya's* case (3 Sel. Rep., 128; N. S., 170) was decided.

In 1859, the ruling was, that the adopted son succeeded in his adoptive mother's family, see *Teencowree Chatterjee v. Dinonath Banerjee* (3 W. R., 49); and more recently this had been held in the North-Western Provinces--*Sham Kuar v. Gaya Din* (I. L. R., 1 All., 255). This adopted son would be in the position of a distant bandhu; and the Mitakshara list of bandhus, as decided in *Girdhari Lal Roy v. The Government of Bengal* (1 B. L. R., 44) was illustrative, not exhaustive.

[768] The principles referred in the judgment of MITTER, J., in *Guru Gobind Shaha Mandal v. Anandlal Ghose Mazumdar* (5 B. L. R., 15) were applicable.

Reference was made to Menu's Institutes, ch. ix, para. 183; Dattaka Mimansa, ch. ii, para. 69, ch. vi, paras. 50 and 52; Dattaka Chandrika, ch. i, paras. 23, 76, ch. iii, paras. 16, 17; Mitakshara, ch. i, s. 2, paras. 30 and 31; Sutherland's Synopsis, 668 Macnaghten's Hindu Law, Vol. I, ch. vi, Vol. II, 88; Stokes's Hindu Law Books, 420; and Mayne's Hindu Law and Usage, para. 149.



In reply it was insisted that the nearer heirs had not been shown to be precluded from suing. It was also argued, that the existence of the adopted son's right to succeed *ex parte materna* would not accord with the general principle that the wife, on marriage, left her own gotra and entered that of her husband. The verses in the Dattaka Mimansa and Chandrika, cited on this point, were vague.

Their Lordships' Judgment having been (November 19th) reserved, was delivered by

**Sir R. P. Collier.**—The suit out of which this appeal arises was instituted in the Court of the Deputy Commissioner of Lucknow, in the Province of Oudh, by the respondent, the Superintendent of the Court of Wards, on behalf of Raja Chandra Shekhar, a minor, against Rani Anand Kunwar and Radakishen, the appellants, to set aside an adoption set up by them, by which, as they alleged, the first defendant had adopted the second defendant as the son of her deceased husband, Shunkersahai.

The suit was transferred to the Court of the Deputy Commissioner of Bara Banki in the district of Sitapore.

The minor on whose behalf the suit was instituted is the taluqdar of Sessendi, the taluq having descended to him as the adopted son of Raja Kashipershad, the former taluqdar.

By an order of Her Majesty in Council made in the year 1873, in pursuance of a report of the Judicial Committee in an appeal in which the first defendant was appellant and the [769] aforesaid Raja Kashipershad was respondent, the first defendant was declared to be entitled, as the widow and heiress of the aforesaid Shunkersahai, to a Hindu widow's estate of inheritance, in four of the mouzas, and to a one-third share of the profits of seven others of the mouzas comprised within the said taluq of Sessendi, and to a sub-settlement of the said four mouzas (*see* the case of the *Widow of Shunkersahai v. Rajah Kashipershad* (L. R., 4 Ind. App., 198).

The plaint in the present suit, which was filed on the 8th July 1875, stated, that the suit was brought to set aside the so-called adoption of the second defendant, and also to set aside a decree given under s. 15<sup>1</sup>, Act VIII of 1859, declaratory of the so-called adoption, obtained by the defendants by fraud and collusion. It alleged, that the said Raja Chandra Shekhar was taluqdar of Sessendi; that, at the time of the said decree, the defendant No. 1 was a sub-proprietor of the said taluq, and liable to him for the Government revenue demand plus a certain percentage; and that the effect of the so-called adoption and decree, so long as they were not set aside, was to put the so-called adopted son of the first defendant in her place as sub-proprietor, and thus to thrust upon the taluqdar, in a method contrary to law, an obnoxious sub-proprietor.

The plaint further stated, that the said Raja Chandra Shekhar was entitled, in reversion, to the sub-proprietary estate so held by the defendant No. 1, and that the effect of the so-called adoption and of the decree declaratory of it, was illegally to injure and postpone that reversion; that the said Raja

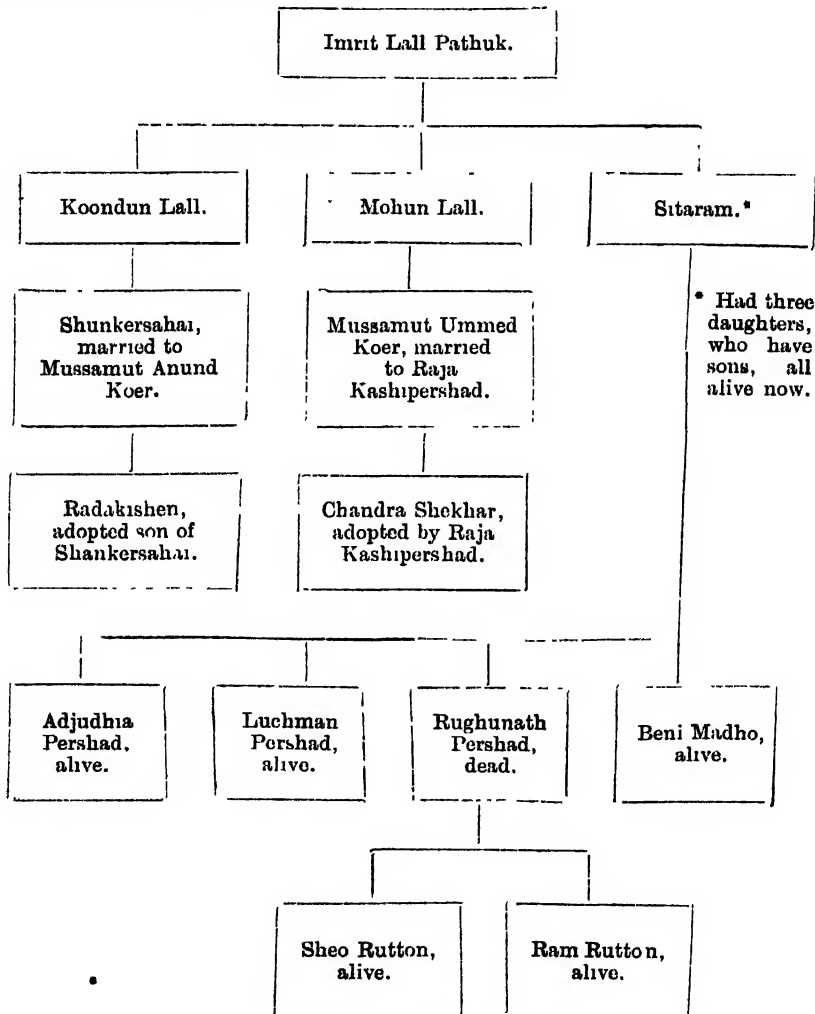
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\* [Sec. 15.—No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Civil Courts to make binding declarations of right, without granting consequential relief.]

Declaratory suit.

Chandra Shekhar was further entitled, immediately in reversion, to the sub-proprietary estate so held by the defendant No. 1 as aforesaid, by right of purchase under a deed of sale bearing date 7th day of November 1862, and that the effect of the so-called adoption and of the decree declaratory of it, was illegally to injure and postpone that reversion.

The first defendant filed a written statement, in which she set up the adoption as having been made in 1851 in pursuance of the verbal and written authority of her deceased husband. She also set out a genealogical tree of the family, which both [770] parties admitted to be correct so far as it goes, and of which the following is a copy :—



She further stated, that the plaintiff had no *locus standi*, nor had the Superintendent of the Court of Wards any right to institute the suit.

Further, she alleged that the plaintiff had no right to sue, because he was only her husband's uncle's daughter's son, and during the lifetime of her husband's male cousins (the sons of Sitaram Pathak) and their sons (to wit,

Sheo Rutton and Ram Rutton), and the possibility of an adoption of a son being made by any of them, the plaintiff could not, by any means, be considered the nearest reversioner to her or to her husband.

[771] The Deputy Commissioner held, that the plaintiff was not the immediate reversioner, either by right of his being the taluqdar or by inheritance; but that he was a remote reversionary heir, and was kept out of his rights by virtue of the alleged adoption and declaratory decree, and that he had thereby sustained sufficient injury to entitle him to maintain the suit. Accordingly, he made a decree that the alleged adoption and the decree declaratory of it be set aside so far as the plaintiff was concerned.

Upon appeal the Commissioner affirmed the decree of the Deputy Commissioner, but on a different ground. He agreed with the Deputy Commissioner that the plaintiff had not proved the alleged deed of purchase of the 7th November 1862, upon which he relied; he held that the plaintiff was not a reversionary heir of Shunkersahai, but considered that, as taluqdar, he had a reversionary interest in the sub-proprietary estate, which entitled him to maintain the suit.

Their Lordships are of opinion that the first ground upon which reliance was placed on behalf of the plaintiff, and upon which the Commissioner decided in his favour,—*viz.*, that as taluqdar he had a right to have the alleged adoption and declaratory decree set aside as against him,—is wholly untenable. Indeed, the learned counsel for the respondent was obliged to abandon it. The last of the three grounds upon which the plaintiff relied in his plaint,—*viz.*, that he was entitled, by purchase, to the immediate reversion in the said sub-proprietary estate,—fails in fact, inasmuch as both the lower Courts concurred in finding that the alleged deed of sale of the 7th November 1862 was not proved.

The only remaining question then is—Is the minor a reversionary heir of Raja Kashipershad; and if so, is he entitled to maintain the suit?

It appears from the genealogical table above set out, and it is not disputed, that the minor is the adopted son of Raja Kashipershad, who was the husband of Ummad Koer, the daughter of Mohun Lall, who was a brother of Koondun Lall, the father of Shunkersahai. It is unnecessary to determine whether he could, under any circumstances, succeed by inheritance to the property of Shunkersahai; and their Lordships [772] abstain from expressing any opinion upon that point. Admitting, however, for the sake of argument, and only for the sake of argument, that, as an adopted son, he had the same rights as a naturally-born son, and that, as a naturally-born son of Ummad Koer, he would have been entitled, in default of nearer relations, to succeed by inheritance to the property of Shunkersahai, it could only have been in the character of a distant bandhu. It is clear that a son of a daughter of a father's brother is much farther removed in the order of succession than a son of a father's brother, or a son of such a son. In any view of the case, the minor had not a vested, but at most a contingent, interest in the property of Shunkersahai during the lifetime of his widow; see *Hurrydoss Dutt v. Rungunmoney Dossee* (2 Tay. and Bell, 279).

The question then arises, is the contingent reversionary interest which the minor has, if he has any, sufficient to enable him to maintain the action which is brought to impeach the adoption of the second defendant?

Their Lordships are of opinion that although a suit of this nature may be brought by a contingent reversionary heir, yet that, as a general rule, it must be brought by the presumptive reversionary heir,—that is to say, by the person who would succeed if the widow were to die at that moment. They are

also of opinion that such a suit may be brought by a more distant reversioner if those nearer in succession are in collusion with the widow, or have precluded themselves from interfering. They consider that the rule laid down in *Bhikaji Apaji v. Jagannath Vithal* (10 Bom. H. C. Rep., A. C. J., 351) is correct. It cannot be the law that any one who may have a possibility of succeeding on the death of the widow can maintain a suit of the present nature, for, if so, the right to sue would belong to every one in the line of succession, however remote. The right to sue must, in their Lordships' opinion, be limited. If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would [773] be entitled to sue; see *Koor Goolab Sing v. Rao Kurun Sing* (14 Moore's I. A., 176). In such a case, upon a plaint stating the circumstances under which the more distant reversionary heir claims to sue, the Court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue, and would probably require the nearer reversioner to be made a party to the suit.

In the present case, the Superintendent of the Court of Wards claims in the plaint a right to sue on behalf of the minor as a reversionary heir, without alleging that there are no others nearer in the line of succession, or that those who are nearer have precluded themselves from suing.

In the course of the argument before their Lordships, it was contended that Adjudhia Pershad and Luchaman Pershad, two of the sons, and Sheo Rutton and Ram Rutton, the two grandsons of Sitaram, had precluded themselves from suing to set aside the adoption and declaratory decree mentioned in the plaint; but no such allegation was made in the plaint, nor does the point appear to have been taken in the Courts below.

No issue was raised, nor was there any finding of either of the lower Courts, in support of that view of the case. The point is not even expressly alluded to in the respondent's case or reasons. Their Lordships cannot, at this stage of the case, give any effect to the contention.

Even if it were allowed to prevail, it would not apply to Beni Modho, who was stated to be alive, but not to have been heard of for some time. It does not appear, that he had been unheard of for a length of time sufficient to warrant a presumption of his death. Moreover, there was no allegation of his death, and no issue whether he was alive or dead, nor any evidence of an attempt to ascertain the fact. It must, therefore, be taken that there may be a son of a brother of Shunkersahai's father in existence who is not precluded from suing. Consequently, the minor, who is merely the son of a daughter of a brother of the father, is not, under the rule applicable to such actions as the present, entitled to maintain the present suit.

It must further be remarked that it appears from the genealogical table that Sitaram had three daughters who have sons living. They would be as near in succession to Shunkersahai as the minor plaintiff would have been, even if he had been a naturally born son.

It must also be borne in mind that even if Adjudhia Pershad, Luchman Pershad, Sheo Rutton, and Ram Rutton have precluded themselves from suing to set aside the adoption, the minor plaintiff could not, even if he were a naturally born son, and the adoption of the second defendant should be set aside, succeed to the property of Shunkersahai, if either of the sons or grandsons of Sitaram should survive the first defendant. The minor, admitting him to be

a bandhu, has merely a very remote possibility of ever succeeding to the property of Shunkersahai. Their Lordships will, therefore, humbly advise Her Majesty to reverse the decisions of both the lower Courts, and to dismiss the suit, with costs, in both the lower Courts. The appellants' costs of this appeal must be paid out of the estate of the minor Chandra Shekhar.

Solicitor for the Appellants : Mr. T. L. Wilson.

Solicitor for the Respondent : Mr. H. Treasura.

### NOTES.

#### [I. GROUNDS ON WHICH DECLARATORY SUITS BY REVERSIONERS PERMITTED—

A suit by a reversioner to set aside an adoption or the binding character of an alienation has been declared to be maintainable on the ground of *perpetuation of testimony*, although he may not be the person entitled to the succession on the falling in of the life-estate —

*Kathama Natchiar v. Dorasinga Tevar* (1875) 2 I A. 169=15 B.L.R. 83.

There are other considerations also when a reversioner is allowed to intervene in probate proceedings, see (1906) 3 C L J. 224; (1909) 10 C I. J. 263, (1882) 8 Cal., 570. (1906) 30 Mad., 195=17 M.L.J. 374. In (1913) 20 I.C. 342 it has been pointed out by Mookerjee J. (who decided the above two cases) that a person who claims outside and independently of the will or claims adversely to the testator and disputes his right to deal with the property, can in no sense be deemed to claim an interest in the estate of the deceased within the meaning of sec 69 of the Probate and Administration Act, 1881.

And the following observation in (1904) 8 C.W.N. 465 P.C.=26 All., 238 should be noted, in the case of wills of limited owners —“The execution of a will by a limited owner such as a Hindu widow, as a general rule, affords no sufficient reason for granting a declaratory decree. See also (1891) 19 Cal., 236 at 239; (1905) 28 Mad., 560, (1911) 8 A L J. 454; (1912) 17 I.C. 586.

#### II. PRESUMPTIVE REVERSIONERS PERMITTED TO SUE—

Their Lordships are of opinion that although a suit of this nature may be brought by a contingent reversionary heir, yet that, as a general rule, it must be brought by the presumptive reversionary heir, that is to say, by the person who would succeed if the widow were to die at that moment. 7 Cal., at 772.

Following this definition, the following persons were held to be presumptive reversioners :—

(a) a person, who by virtue Bom V of 1886 sec. 2, is preferred to the daughter, (1894) 19 Bom. 614.

(b) A person coming next after the life-tenant under the will.—(1904) 27 All. 406=2 A.L.J. 84. For the purpose of the rule as to which reversioners can sue, it has been held that the immediate reversioners entitled to life estates only may be left out of account, and the next set of reversioners entitled to absolute estates may sue without having to implead or account for the absence of, the intermediate holders of life-estates —(1904) 32 Cal 62; (1892) 15 Mad. 422; (1884) 6 All. 431; (1889) 13 Mad 195, (1911) 10 M L.T. 95; (1909) 5 I C. 164; (1909) 33 Mad. 410. A different view was taken in certain early Allahabad cases (1893) 15 All. 132, (1884) 6 All. 428; but the later Allahabad cases are in conformity with the above view.—(1908) A.W.N. 207, 34 All. 207.

#### III. REMOTE REVERSIONERS ARE ALSO ENTITLED TO SUE UNDER CERTAIN CIRCUMSTANCES—

Their Lordships are also of opinion that such a suit may be brought by a more distant reversioner if those nearer in succession are in collusion with the widow, or have precluded themselves from interfering. It cannot be the law that any one who may have a possibility of succeeding on the death of the widow can maintain a suit of the present nature, for, if so, the right to sue would belong to every one in the line of succession however remote. The right to sue must in their Lordships' opinion be limited:—6 Cal. 772. The existence of intervening reversioners entitled to life-estates, it has been noted above, is no bar to the right of reversioners entitled to the full estate coming next after them.

The question who has the right to sue is not affected by events subsequent to the institution of the suit; thus, the suit is not affected by the birth of nearer reversioner 5 O. O. 360; and conversely, the fact of one's becoming the nearest reversioner subsequently does not affect it—8 O. C. 81; a nearer reversioner cannot be brought in later :—(1913) M. W. N. 383.

## **I. L. R. 6 Cal. 774 RANI ANAND &c. v. THE COURT OF WARDS [1880]**

There is no distinction between a suit by a presumptive reversioner and a suit by a remote reversioner when permitted to sue:—(1906) 29 Mad 390.

### **IV. PLEADINGS.**

In such a case, upon a plaint stating the circumstances under which the more distant reversionary heir claims to sue, the Court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue, and would probably require the nearer reversioner to be made a party to the suit:—6 Cal.—at 772, 773

The plaint should disclose who the nearer reversioners are and what entitles the remoter ones to sue; otherwise the suit is liable to be thrown out. (1882) 11 C.L.R., 198; (1906) 29 Mad., 390; 14 M.L.J., 209; (1913) 19 I.C., 814; 11 A.L.J., 382; (1887) 9 All., 441; 4 All., 16.

### **V. CONDITIONS UNDER WHICH REMOTE REVERSIONERS ARE PERMITTED TO SUE—**

If the nearest reversionary heir refuses without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow or concurred in the act alleged to be wrongful, the next presumable heir would be entitled to sue.—6 Cal., at 772.

This extract from the text may be illustrated from decided cases.

- (a) refusal without sufficient cause to institute proceedings;—(1887) 9 All., 441; (1904) 32 Cal., 62; withdrawal of suit;—(1894) 18 Mad., 53 at 58
- (b) precluded himself by his own act or conduct from suing;—bar by limitation — (1904) 32 Cal., 62; 28 Mad., 57=14 M.L.J. 209, (1887) 9 All., 441, (1881) 4 All., 16; waiver—10 B.H.C. 351, of reversionary rights (1870) 2 N.W.P. 31, see also (1869) 3 B.L.R.O.C. 70.
- (c) Consenting to the alienation.—(1910) 32 All., 176; (1894) 18 Mad., 53 at 58; 28 Mad., 57; one's own concurrence does not act as an estoppel:—(1894) 18 Mad., 53 at 58.

### **VI. HOW FAR ONE REVERSIONER REPRESENTS ANOTHER—WHETHER THERE IS PRIVACY AS BETWEEN THEM—**

There is no privity of estate between one reversioner and another as such, and therefore, an act or omission by one reversioner cannot bind another reversioner who does not claim through him:—(1904) 28 Mad., 57=14 M.L.J. 209; (1900) 22 All., 382; (1904) 27 Mad., 588.

This principle is the foundation for the following rules:—

- (a) Father does not represent the son: so when the father is precluded from suing, say, by limitation, son may sue, when owing to minority, his right is not barred:—(1904) 28 Mad., 57=14 M.L.J., 209 following 22 All., 93 and dissenting from 14 Bom. 512; 18 M.L.J., 275=3 M.L.T., 319 is to the contrary, but see (1912) M.W.N., 912.
- (b). A suit brought by one reversioner does not, on his death, survive to another:—8 O.C. 124; 12 M.L.T., 664; (1912) 23 M.L.J., 719=(1912) M.W.N., 897 which was a suit to set aside an adoption, though in such suits (as noted below) a special distinction has been drawn by the Madras High Court, with reference to the representative character of the suit; There is a Nagpur decision to the contrary:—6 N.L.R., 118.
- (c). There is no *res judicata* binding subsequent reversioner by decree in a suit by one of them:—(1900) 22 All., 382; (1904) 27 Mad. 588 But the Madras High Court has in (1906) 29 Mad., 390 drawn a distinction between a suit by reversioner to set aside an *alienation* and a suit to set aside an *adoption*. It holds the decree in the latter case *res judicata*. "Though in suits relating to alienations by a qualified owner the dicta of the Privy Council preclude our holding that the presumptive reversioner represents remote reversioners, yet in suits to set aside an adoption, the presumptive reversioner ought on principle to be held to represent the remote reversioner, provided the matter is decided after a fair trial."
- (d). There has been a question as to whether the act of the widow gives rise to but a single cause of action or a separate cause of action for each reversioner:—The former view was maintained in (1906) 29 Mad., 390 at 408 but the Madras High Court in (1913) 20 I.C., 625 has adopted the latter view.]

[6 Cal. 774]

APPELLATE CRIMINAL.

*The 10th March, 1881.*

PRESENT :

MR. JUSTICE PONTIFEX AND MR. JUSTICE FIELD.

In the matter of the petition of Asgur Hossein and others.

The Empress

*versus*

Asgur Hossein and others\*

*"Incapable of giving evidence"—Evidence (Act I of 1872 s. 33)—Duty, of Committing Magistrate—Witnesses—Examination on oath—Statements of witnesses.*

The incapacity to give evidence mentioned in s. 33 of the Evidence Act need not be a permanent incapacity.

*In re Pyari Lall* (4 C. L. R., 504) dissented from.

[775] The Magistrate, to whom a complaint was made, examined certain persons on oath in the absence of the accused, merely for the purpose of ascertaining whether there was any, and what case, against the prisoners, and he did not take down in writing the statements of the persons so examined. *Held*, that the Magistrate was wrong in examining the witnesses on oath in the absence of the accused, or for the purpose of finding out whether there was a case; but that, having done so, he was not bound to take down their statements in writing.

IN this case one Asgur Hossein, a Police head constable, and four chowkidars, were charged with voluntarily causing hurt to two men, named respectively Dooli and Darshan. The committing Magistrate made an enquiry, not in the presence of the accused, in the course of which he examined certain persons, some of whom were afterwards called as witnesses. No note of these examinations was made by the committing Magistrate, though the persons examined were examined on oath. At the trial it was proved that one of the complainants, Darshan, was ill, and confined to his house, and the Judge, under s. 33 of the Evidence Act, allowed in evidence the deposition which Darshan had made before the committing Magistrate. The prisoners, having been found guilty by the Sessions Judge sitting with assessors, appealed to the High Court.

Mr. *M. M. Ghose* for the appellants.—The prisoners have been prejudiced in their defence by the conduct of the Deputy Magistrate, who refused to give them copies of the depositions on which the committal was based. Again, the deposition of the complainant Darshan should not have been admitted in evidence, as there was no proof that he was "incapable of giving evidence" within the meaning of s. 33 of the Evidence Act—see *In the matter of Pyari Lall* (4 C. L. R., 504).

The Judgment of the Court (PONTIFEX and FIELD, JJ.) was delivered by

**Pontifex, J.**—(The learned Judge, having gone through the evidence, confirmed the finding of the Sessions Judge. His Lordship then continued.)

[776] The deposition before the Deputy Magistrate of one of the complainants (Darshan) was admitted by the Sessions Judge under s. 33 of the Evidence Act, it being stated by certain of the witnesses that he was ill

\* Criminal Appeal, No. 67 of 1881, against the order of H. L. Oliphant, Esq., Judicial Commissioner of Chota Nagpore, dated the 15th December 1880.

and confined to his house. We are of opinion that the evidence as to his illness was not sufficient to bring the case within s. 33 of the Evidence Act. The Sessions Judge ought to have required more precise evidence as to the nature of the illness and the incapacity of the witness to attend. A case has been cited to us, that of *Pyari Lall* petitioner (4 C. L. R., 504), in which it was held that the incapacity to give evidence mentioned in s. 33 must be a permanent incapacity. In our opinion, that is not a necessary construction. We are inclined to think, on the construction of the entire section, and from reference also to s. 32 which precedes it, that something short of permanent incapacity might satisfy the words of the section "incapable of giving evidence." It is not, however, necessary to decide that question in this case, or we might have to send the case before a Full Bench. It is sufficient in this case, without reading the deposition of Darshan, to support the conviction.

There was a preliminary objection which was taken, *viz.*, that the committing Magistrate had made a kind of preliminary enquiry, in which he examined certain persons, some of whom were afterwards called as witnesses; that the appellant before us applied for the depositions given by these persons; and that though they were so examined, in answer to his application no depositions were forthcoming. This Court called for an explanation on this point. The Deputy Magistrate explains that this preliminary enquiry was not an enquiry conducted in the presence of the accused, that the enquiry he made of these particular persons was for the purpose of finding out whether there was any and what case; and that he did not take down their statements in writing, though he did examine them after swearing them. We think it was inefficacious and improper to swear these witnesses on an occasion and for the purpose as stated, but having sworn them, we are of opinion that, under the circumstances, he was not bound to take down their statements in writing. As the Deputy Magistrate was only the committing officer, and as he did not try the case, we think that the accused has no cause of complaint in this respect.

The conviction will be confirmed.

*Conviction confirmed.*

#### NOTES.

#### [INCAPACITY TO GIVE EVIDENCE THROUGH ILLNESS -

The following extracts from L'hipson on Evidence (3rd Edn. p. 434) will be found useful. —

The degree of illness is for the Judge to determine. 3 Q. B. D. 426, not only inability to travel but ability to give evidence must be considered. 7 Cox 265; 8 Cox. 453, 12 Cox. 622.

The ailment need not be permanent, but where it is temporary the Judge may in his discretion postpone the trial for the recovery of the witness. R v. Tait 2 F. & F. 553; R v. Wilson, 12 Cox. 622.

The following held to be *sufficient*. — Danger to life by travel (R. v. Day 6 Cox 55) or by remaining R. v. Wicker 18 jur. 252; inability to depose though paralysis (R. v. Cockburn 7 Cox 265); tendency to softening of the brain and illness and nervousness when under examination and cross-examination such as to nullify the evidence (R v. Wilson, 8 Cox 453); as to pregnancy, previous injury from journey, R v. Croucher (2 F. & F. 285), expectation of confinement, R v. Stephenson, 31 L. J. M. C. 147, R. v. Wellings 3 Q. B. D. 426, recent confinement, R v. Marsella, 17 T. L. R. 164; R v. Wilton 1 F. & F. 309.

The following held to be *insufficient*. — bowel complaint on morning of trial and inability to travel. — R v. Harris, 4 Cox 440, R v. Bull, 12 Cox 31; old age and nervousness so as to make it dangerous, R v. Farrell 12 Cox 605; R v. Thompson 13 Cox 181.

In R v. Wilson 12 Cox 622 the trial was postponed, as the evidence was material.]



[6 Cal. 777]

## APPELLATE CIVIL.

*The 9th February, 1881.*

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Kanai Lall Khan and another.....Defendants

*versus*

Sashi Bhuson Biswas and others..... Plaintiffs.\*

*Representative—Revivor of suit—Substitution—Issue—Mortgage decree—Hindu Widow—  
Party to suit—Res judicata—Code of Civil Procedure (Act X of 1877), ss. 13, 244*

Where the plaintiff in a suit prays that a person may be substituted on the record as the heir of a defendant who has died, the Judge should raise an issue as to whether the person sought to be substituted is the heir of the deceased defendant.

In 1872, *A* brought a suit on a mortgage against the mortgagor, a Hindu widow, who died pending the suit. *A* then applied that the suit should be revived against *B* as the representative of the defendant. *B* denied that he was such representative, but the Judge refused to go into the question, made *B* a party, and gave *A* a decree for the sale of the mortgaged property, *B* subsequently brought a suit to have it declared, *inter alia*, that the mortgage and decree only covered the widow's life interest.

*Held*, that the suit was not barred either as *res judicata*, or under the provisions of s. 244 of the Code of Civil Procedure.

PREVIOUSLY to the year 1863, Digambar Mondol, who was possessed of several immoveable properties in the 24-Parganas, among which was a two-anna share of taluq Huda Rashkhali, died, leaving his widow Romoni his sole heiress under the Hindu Law. On the 6th October 1863 Romoni borrowed [778] certain moneys from Aushotosh Dhur and Muttyloll Dhur, and to secure the repayment of this loan she mortgaged the two-anna share of taluq Huda Rashkhali. The mortgagees afterwards brought a suit on their mortgage, which they foreclosed on the 14th of March 1870, and, in execution of a subsequent decree, obtained possession of the property in the early part of the year 1872. On the 27th of May 1870, more than three months after the foreclosure decree, Romoni again mortgaged the two-anna share of taluq Huda Rashkhali, this time to one Ramdhone Khan. On the 17th of May 1872, Ramdhone Khan instituted a suit on his mortgage, and pending this suit, Romoni died on the 15th of June 1873. On the 10th of July 1873, the present plaintiffs Sashi Bhuson, Giendro Bhuson, and Monendro Bhuson Biswas (who at the death of Romoni were the next heirs in reversion of Digambar Mondol) were, at the instance of Ramdhone Khan, made parties by their father, and guardian, as representatives of Romoni. On the 5th of August 1873, a decree was passed in favour of Ramdhone Khan, which declared the mortgaged property liable to satisfy the decree, and directed that, should the decree not be satisfied out of the sale of the property, then that the same should be realized from the estate left by the deceased debtor Romoni Dasi. In the early part of 1877, the present plaintiffs instituted a suit against Muttyloll Dhur and Aushotosh Dhur, claiming possession of the property, on the ground, that Romoni mortgaged without

\* Appeal from Original Decree, No. 302 of 1879, against the decree of Baboo Brojendro Coomar Seal, First Subordinate Judge of the 24-Parganas, dated the 21st July 1879.

necessity, and therefore the foreclosure proceedings passed only the interest of Romoni. On the 4th of September 1877, the plaintiffs obtained a decree, and shortly afterwards obtained possession.

On the 18th July 1878, Ramdhone Khan applied for execution of the decree of August 1873 by sale of the mortgaged property. On the 27th of July 1878, the plaintiffs filed a petition of objections, which were overruled, and this decision was affirmed on appeal, and the sale of the property ordered, subject to the claims of the reversioners.

On the 20th January 1879, the plaintiffs, under the provisions of s. 283 of the Code of Civil Procedure, filed the present suit against the heirs of Ramdhone Khan, claiming that Romoni borrowed the money from Ramdhone Khan for her own use, and [779] not for purposes which would constitute the mortgage binding on the reversioners; and that their rights were not liable to be sold under the decree of August 1873. They further contended, that no interest whatever passed under the mortgage, which has been executed subsequently to the foreclosure decree of Aushotosh Dhur and Muttyloll Dhur. The lower Court gave a decree in favour of the plaintiffs, from which the defendants appealed.

Baboo *Rash Behary Ghose* and Baboo *Saroda Churn Mitter* for the Appellants.—This claim is *res judicata*, the present plaintiffs were parties to the suit in which the decree of August 1863 was passed, and it was then they should have raised their contention. At any rate, the questions which they raise are questions between the parties to the previous suit and relating to the execution of the decree, and by s. 244 of the Code of Civil Procedure no separate suit will lie. *Chowdhry Wahed Ali v. Mussamut Jumae* (11 B. L. R., 149, s.c., 18 W. R., 185) and *Ameeroonnissa Khatoon v. Meer Mahomed Hossein Chowdhry* (20 W. R., 280).

Baboo *Sreenath Doss* and Baboo *Kali Prosonno Dutl* for the Respondents.

The **Judgment** of the Court (McDONELL, and FIELD, JJ.) was delivered by

**McDonell, J.**—The facts of this case are briefly as follows: One Romoni Dasi, the widow of Digambar Mondol, borrowed Rs 2,000 from the ancestor of the defendants in the present case upon the mortgage of a certain property. This money was not paid, and the mortgagee brought a suit against Romoni Dasi on the 17th May 1872, to enforce the mortgage lien against the mortgaged property. While that suit was pending, Romoni Dasi died; and on the 10th July 1873, the mortgagee applied to have the plaintiffs in the present suit substituted as defendants in the place of Romoni Dasi. In that petition the mortgagee stated, that the present plaintiffs, Sashi Bhuson Biswas and others, were the heirs of Romoni Dasi. These persons were at that time minors, and Bhoopal Chunder Biswas was their father [780] and guardian. Notice was served upon Bhoopal Chunder Biswas, and he, Bhoopal, came in and filed a petition on behalf of the minors.

In that petition it was distinctly asserted that the minors were not the heirs of Romoni Dasi; that they were sister's sons of Romoni Dasi's husband, Digambar Mondol, and as such, were the true heirs of Digambar Mondol, and were in no respect heirs of the widow Romoni Dasi, or of her stridhan. It is further alleged in that petition, that the debt incurred by Romoni Dasi was a personal debt incurred for her own benefit, and that it was not incurred for any legal necessity which would have the effect of making such debt chargeable upon her husband's estate.

The Subordinate Judge before whom the case was pending recorded the following order: "The heirs of the husband of Romoni Dasi have raised a new

plea in the case, *viz.*, that the property secured in the bond could not be made liable for her personal debts. This plea is foreign to this suit. This could not have been raised by the deceased defendant, and they, coming in as her representatives, cannot be allowed to raise it. The property was described in the bond as belonging to the debtor herself, and not to her husband; and the question as to whether that statement is correct or not, cannot be legitimately tried in this suit. I leave these heirs to settle that question by a different suit, if they are really in earnest." Now there is undoubtedly an error in the part of this order, which says that the present plaintiffs came in as the representatives of Romoni Dasi. They did not "come in," if by that was meant coming in of their own accord. They were *brought* in by the mortgagee; and so far from coming in as heirs and representatives of Romoni Dasi, they, through their guardian, contended that they were not the heirs of Romoni Dasi, but the rightful heirs of Digambar Mondol. Before making these minors parties to the suit in the character of heirs of Romoni Dasi, it would have been proper for the Subordinate Judge to raise an issue and come to a judicial finding as to whether they were or were not the right heirs of Romoni Dasi.

We think it clear that no such issue was raised, and that no [781] such question was substantially decided between the parties. In the decree, the minors are not mentioned as heirs of Romoni Dasi, and the decree was passed against the mortgaged property with the further direction that any balance not realized therefrom should be realized from the other properties of the deceased judgment-debtor Romoni Dasi. There was no direction that such unrealized balance should be recovered from any assets belonging to the estate of Romoni Dasi in the hands of, and undisposed of by, the minors, who are the present plaintiffs. Then it is clear that the words which we have above quoted—"I leave these heirs to settle that question by a different suit, if they are really in earnest,"—distinctly excluded from the adjudication in that suit the question whether the minors could be made liable as the right heirs of Digambar Mondol.

It was first contended before us by the learned pleaders for the appellants, that the present suit is barred by *res judicata*. We think it impossible to say, that a question not only not decided in the previous suit, but in express language excluded from the decision therein, can be treated as a *res judicata*, so as to estop the plaintiffs in the present case.

After the decree had been passed in the suit brought by the mortgagee, execution was taken out, and the property, which was the subject of the mortgage bond, was attached in execution. The present plaintiffs appeared before the Subordinate Judge, and raised an objection to the attachment of the property. The objection thus raised again in the execution-proceedings was substantially the same question which they had asked to have decided in the proceedings before decree, and which the Subordinate Judge had in express language refused to adjudicate. It is not to be wondered at, therefore, that the then Subordinate Judge refused to deal with this question in the execution stage. His order refusing to deal with it was appealed; and the order of the Appellate Court was, that the property should be sold, but at the same time that notice should be given that it was claimed by the reversioners,—that is, the plaintiffs in the present case,—as their own property.

The pleader for the appellants has addressed a long argument to us, contending that the question which the plaintiffs now ask [782] to have decided was a question which ought to have been decided between them and the present defendants in the execution-proceedings; that it was in fact a

question falling within clause (c) of s. 244 of the present Code of Civil Procedure,—that is, a question between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge, or satisfaction of the decree. He has relied in support of this contention upon the case of *Chowdhry Wahed Ali v. Mussamut Jumae* (18 W. R., 185; s.c., 11 B. L. R., F.B., 149), decided by their Lordships of the Judicial Committee on the 14th June 1872, and the subsequent case of *Ameeroonissa Khatoon v. Meer Mahomed Mozuffur Hossein Chowdhry* (20 W. R., 280). We think, however, that the present case is one to be decided upon its own merits, and that its special circumstances take it out of the general rule which may be supposed to have been established by the cases just quoted. In the Privy Council case their Lordships say that they cannot concur in the *general proposition* that a party sued in a representative character is not a party to the suit within the meaning of cl. 11 of Act XXIII of 1861. They then refer to the 203rd section of the old Code of Civil Procedure, and they proceed to say:—"It is obvious, therefore, that a party in a representative character is so distinctly a party to the suit, that, under certain conditions, his own private property may be attached and sold. It is true that to fix him with this liability, it must be shown that he has received property of the deceased, of which he has failed to prove a proper disposition. But these things are all cognizable and proper to be ascertained in the suit in which the decree is made, during the progress of the execution-proceedings founded upon such decree. It does not seem to their Lordships to follow that, because all the provisions relating to execution cannot be applied to a defendant sued in a representative character, such a defendant cannot be regarded as a party to the suit within the meaning of such of them as may be applicable to this case." We entirely agree with what was said in the case of *Ameeroonissa Khatoon v. Meer Mahomed Mozuffur Hossein Chowdhry* (20 W. R., 280), that the above [783] remarks of their Lordships of the Judicial Committee are not to be treated as *obiter dicta* merely, but that they amount to an authoritative decision which this Court ought to follow. But it appears to us that these remarks do not go the length of establishing the proposition contended for before us,—viz., that a party sued in a representative character is a party within the meaning of s. 11 of Act XXIII of 1861 (s. 244 of the present Code) for all purposes, and irrespective of the nature of the representative character in which such person, is a party. The High Court had laid down a general proposition.\* The Privy Council intimated that they could not concur in that general proposition,—in fact, that the proposition was too widely put to be generally true, and they pointed out an instance in which the proposition so generally put could not be maintained. They do not, however, go the length of saying that the converse of this general proposition is true, and that a person, who is a party to a suit in any character, is a party in every other character which he may fill, and this irrespective of the question whether there are in the Code provisions as to execution, which apply to this case. We may apply another test. The questions mentioned in clause (c) of s. 244 are questions arising between the parties to the suit in which the decree was passed and relating to the execution, discharge, or satisfaction of the decree. Now, when a decree obtained against a particular person is sought to be executed against the heirs or representatives of that person, who have received a portion of his property, and are liable to the extent of the undis-

\* See the original judgment of the High Court, 2 B. L. R., F. B., 84-88 and the remarks of the Privy Council, above partly quoted, 11 B. L. R., 155.

posed of assets in their hands, there can be no doubt that the decree is still the same decree; and this is in no way altered by the alteration in the person against whom it is sought to be executed. But in the present case it may be said, that the decree passed against Romoni Dasi, and the property of Romoni Dasi and the heirs of Romoni Dasi, is different from a decree passed against the property of Digambar Mondol and the right heirs of Digambar Mondol. We do not, however, desire to base our decision upon this ground merely.

[784] It appears to us that what was directed to be sold, was the right, title, and interest of Romoni Dasi; and looking, at the order of the District Judge, dated 24th December 1879, and the sale notification, we think it clear, that whatever interest the present plaintiffs might have in the property as reversioners, i.e., as the right heirs of Digambar Mondol, was expressly excluded from the sale. The first paragraph of the conditions of sale runs thus: "Beyond what right, title or interest the judgment-debtor has in the said properties, the rights of any other party or the properties connected therewith, shall not be sold." Now if we turn to the decree at p. 41, we find a direction, that the balance be realized from the properties of the deceased judgment-debtors, Romoni Dasi. It is, therefore, clear that Romoni Dasi, and Romoni Dasi alone, was treated as the judgment-debtor, and that what was sold was the interest of Romoni Dasi, and that the interests of the reversioners, the right heirs of Digambar Mondol, were distinctly and expressly excluded from the sale.

It may be, as argued before us, that the prayer for a perpetual injunction which the plaintiffs have inserted in their plaint cannot be granted in this form; but we think that this is not very material. What the plaintiffs subsequently ask is, to have it declared that the interest of Romoni Dasi in this property is nothing. When once that is found and declared, there will be no occasion for a perpetual injunction restraining the defendants from selling that which is worth nothing.

We have then to consider, whether there is enough on the record to enable us to say that the interest of Romoni Dasi in the attached property amounts to nothing. We think that this question falls within a principle acted upon in many cases—namely, that where parties allow a suit to be conducted in the lower Court as if a certain fact was admitted, they cannot afterwards in appeal question this fact and recede from their tacit admission. No question was raised in the written statement before the Subordinate Judge as to Romoni Dasi having any other interest in the property than the life-interest which she had as heir of her husband Digambar Mondol. No express issue on this question was raised by the Subordinate [785] Judge, nor was he asked to raise such an issue, and the point has not been taken in the grounds of appeal to this Court.

Then in the mortgage deed it is stated, that the property was let in ijara to Radha Mohun Mondol for a term of eight years, and we find at page 11 the ijara pottah executed by Romoni Dasi in favour of this Radha Mohun Mondol, in which it is stated, that the right of Romoni Dasi in the property was derived from the fact of her being the heiress of Digambar Mondol.

We do not say that the recitals in these two instruments would be sufficient evidence upon which to decide this question, if it really fell to be decided upon evidence; we merely advert to these recitals taken in connection with the conduct of the defendants in the Court below, as sufficient to satisfy our

minds that no question as to Romoni Dasi having any other interest in the property than that of a Hindoo widow was ever seriously raised or disputed between the parties in the lower Court.

For these reasons, it appears to us that the decree of the lower Court must be affirmed, and this appeal dismissed with costs.

With respect to the form of the decree, we think it more appropriate to draw it up as a decree declaring that the mortgage debt was incurred by Romoni Dasi personally; that it is not binding upon any property of her husband Digambar Mondol in which she enjoyed a life-estate; and that Romoni Dasi had no interest beyond this life-estate in the property which forms the subject of this suit, and which the mortgagee has endeavoured to bring to sale after her death in execution of his decree.

*Appeal dismissed.*

#### **NOTES.**

#### **[REPRESENTATIVE—DECISION IN EXECUTION—HOW FAR BINDING—**

*See* (1888) 16 Cal. 1; (1889) 17 Cal. 57; (1898) 23 Mad. 195 **F.B.**

*See contra* (1885) 7 All. 547; (1889) 12 All. 73, 313 ]

[786] *The 19th January, 1881.*

PRESENT :

MR. JUSTICE MORRIS AND MR. JUSTICE PRINSEP.

Baba Mohamed.....Decree-holder

*versus*

Webb.....Judgment-debtor.\*

*Execution of decree—Satisfaction, plea of, in Bar—Civil Procedure Code  
(Act X of 1877), ss. 244 and 258.*

Where a decree-holder, declared to be entitled to possession of certain land, subsequent to decree executed a patta in favour of his judgment-debtor, who was then in possession, and afterwards took out execution under his decree—

*Held*—on an objection by the judgment-debtor that, under these circumstances, he was not entitled to possession—that satisfaction of the decree not having been entered up, such objection could not be dealt with under s. 244 of the Civil Procedure Code.

*Held also*, that s. 258† of the Civil Procedure Code deals with the adjustment of any decree, and not merely with the adjustment of a money-decree.

IN this case the appellant, Baba Mohamed, on the 18th March 1876, obtained a decree, which was affirmed on appeal on the 16th August 1876, against the respondent C. R. Webb, for possession of certain land, but had not, up to September 1879, attempted to execute it. In that month, however, he applied for execution; and on the 20th November, the respondent was dispossessed, having in the meantime failed to come in and show cause why the decree should not be executed against him, though notice had been served upon him to do so if he chose. Subsequently, he came forward and objected to being dispossessed, on the ground that, in January 1877, the appellant had agreed with him that he (the judgment-debtor) should remain in possession of the land, the subject of the decree, as tenant, and in pursuance of such arrangement the appellant had granted him a patta. He further stated, that the appellant had refused to register the patta, but that, on appeal from the order of the District Registrar, registration had been directed; but that it had never been actually carried out owing to the patta having [787] been destroyed in a fire which had occurred in the Julpigori Government offices. It further appeared, that though no satisfaction of the decree had been entered up, the judgment-debtor had remained in possession of the land. The Munsif, by an order dated the 27th January 1880, considering that the objection could not be dealt with under ss. 244 and 258 of the Civil Procedure Code, declined to entertain it; and in dismissing the petition, left

\* Appeal from order, No. 189 of 1880, against the order of J. R. Hallett, Esq., Officiating Judge of Rungpore, dated the 25th March 1880, reversing the order of Baboo Premchand Paul Munsif of Julpigori, dated the 27th January 1880.

† [Sec. 258 :—If the money is paid out of Court or the decree is otherwise adjusted

to the satisfaction of the decree-holder he shall certify the payment of money out of Court to decree-holder. payment or adjustment to the Court whose duty it is to execute the decree; and no satisfaction of a decree in part or in whole by such payment or adjustment shall be recognized by such Court unless the payment or adjustment be certified as aforesaid. Where the decree-holder fails to certify as aforesaid, the judgment-debtor may apply to such Court for an order directing the decree-holder to certify as aforesaid, and the Court, after hearing the decree-holder, may make such order, and if the decree-holder disobeys the same, may refuse further to execute the decree.]

the judgment-debtor to establish his right to possession by a regular suit. From this order the latter appealed, on the ground that the execution of the patta showed, that the decree-holder had taken amicable possession, and that the decree had been thereby satisfied, and that the Munsif, should not have refused to deal with the objection on its merits. The Officiating District Judge of Rungpore reversed the order and remanded the case to the Munsif to deal with the objection on its merits under s. 244. From this order the decree-holder appealed to the High Court.

*Baboo Hurry Mohun Chuckerbutty* for the Appellant.

*Baboo Girija Sunker Mozoomdar* for the Respondent.

The **Judgment** of the Court (MORRIS and PRINSEP, JJ.) was delivered by

**Morris, J.**—The question before us relates to an alleged adjustment of a decree, which was obtained on the 18th March 1876, and affirmed on appeal on the 16th August of the same year.

The decree-holder was declared by the decree entitled to partition of a specified share, and to be put in possession of the same. He took out execution in September 1879 (whereby this case comes under the provisions of Act X of 1877 as originally framed), and he was put in possession under the decree on the 20th November 1879. Thereupon the judgment-debtor objected, that, in January 1877, the decree-holder had obtained satisfaction of the decree, and that this was evidence by a lease of the land covered by the partition-decree, which the decree-holder had given to him on that date.

[788] The first Court declined to take this lease into consideration, or to interfere with the possession that had been given to the decree-holder.

The Judge on appeal decided that, whether s. 288 of the Civil Procedure Code applied or not, this was a matter which the Munsif should have enquired into under s. 244 ; and he accordingly remanded the case to him to do this. It is against this order that the present appeal is preferred.

It seems to us that the Munsif was right in refusing to consider the matter of the lease in connection with the execution of the decree. If the decree had been adjusted in the manner alleged by the respondent, then, under s. 258, such adjustment ought to have been certified to the Court. Not having been so certified, it cannot now be recognized by the Court charged with the execution of the decree. It is urged on behalf of the judgment-debtor that s. 258 has reference only to money-decrees, and that this is apparent from its position in chap. xix of the Code in connection with the particular sections relating to money-decrees alone. But a consideration of the terms of the section leads us to a different conclusion. That section corresponds in all material respects, and carries with it the same meaning as s. 206\* of the former Procedure Code (Act VIII of 1859), which manifestly deals with the adjustment of *any* decree. Again we cannot agree with the Judge that the case can be decided under the

Payment of moneys under decrees, etc.

Adjustment of decree to be made through the Court.

\*[Sec. 206 :—All moneys payable under a decree shall be paid into the Court, whose duty it is to execute the decree, unless such Court or the Court which passed the decree shall otherwise of a decree in part or in whole shall be recognized by the Court unless such adjustment be made through the Court or be certified to the Court by the person in whose favour the decree has been made or to whom it has been transferred.]



provisions of s. 244, whether s. 258 is applicable or not, for this would enable a Court in execution to deal with any question relating to the execution of a decree under s. 244, although the particular question then before it might be specially provided for by another section of the Code.

We, therefore, reverse the decision of the lower Appellate Court, and restore that of the first Court with costs.

*Appeal allowed.*

#### NOTES.

##### [STATUTORY MODIFICATION—

Under Or. 21, R. 2 of Act V of 1908 (C. P. C ) it has been made very clear that it refers not only to money-decrees but to all decrees, viz., decrees for the enforcement of a mortgage, etc. The old law under s. 206 of Act VIII of 1859 and s. 258 of Act X of 1877 restored.

*See* (1905) 28 Mad. 473. The case in (1898) 22 Mad. 182 will be no longer law under the present code.]

## [789] APPELLATE CRIMINAL.

*The 7th March, 1881.*

PRESENT :

MR. JUSTICE PONTIFEX AND MR. JUSTICE FIELD.

In the matter of the petition of Behala Bibi.\*

The Empress

versus

Behala Bibi.

[=6 C. L. R. 207]

*Penal Code (Act XLV of 1860), s. 201—False information.*

A woman who, with her infant child, eloped from her husband's house, was afterwards arrested on a charge of murdering the child, which was missing. She made three different statements : (1) that she had left it with her husband ; (2) that she had been enticed away by one R, who had taken the child from her ; (3) that one H, had drowned the child. The Sessions Judge believed the last statement, and convicted her under s. 201† of the Penal Code.

*Held*, that the conviction was wrong, and must be set aside.

Section 201 of the Penal Code does not apply to a case where the person, who is the probable or possible offender, makes statements exculpating himself by inculpating another.

THE facts of this case are set forth in the Judgment of Mr. Justice PONTIFEX.

No one appeared for the Appellant or Respondent.

**Pontifex, J.**—We think that the conviction in this case cannot be sustained.

The facts are as follows :—Behala, the appellaat, with her infant, was sleeping in the same room with her husband. Her husband, on awaking about dawn, found her and her child missing. After some search, she was found at a relation's house, but without the child. As to what had become of the child she then, and subsequently, made contradictory statements. She said at one time that she had left it in the room with her husband. At another time she said that she had been enticed away by one Rakhal ; that the child had cried,

\* Criminal Appeal, No. 86 of 1881, against the order of F. W. V. Peterson, Esq., Sessions Judge of Jessore, dated the 14th January 1881.

†[Sec. 201 :—Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that

Causing disappearance of evidence of an offence committed, or giving false information touching it to screen the offender.

to seven years,\* and shall also be liable to fine ; and if the offence is punishable with trans-

If a capital offence.

liable to fine ; and if the offence is punishable with imprisonment for any term not extending

If punishable with transportation.

If punishable with less than ten years imprisonment.

portation for a term which may extend to three years, and shall also be punishable with imprisonment for a term which may extend to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of the imprisonment provided for the offence, or with fine or with both.]

and Rakhal had said "let me go and leave it with its father;" that he then took the child away and quickly returned, upon which she and Rakhal went away together.

[790] Before the Magistrate she said that one Herasatula had enticed her away, and that he had thrown the child into the river.

The Sessions Judge has believed the last story, and has convicted the woman under s. 201 of the Penal Code of giving false information respecting the murder of Ujjala, her infant, with the intention of screening the murderer from legal punishment, *i.e.*, with the intention of screening Herasatula. The information said to be false is that contained in her statement as to Rakhal. Now there is no evidence to show that the story about Herasatula is more true than that about Rakhal, and there is no good reason why the Judge should adopt one story rather than the other.

As to what the woman stated about Rakhal, the evidence is very meagre as to the exact language and the exact occasion upon which this language was used; and the statement as given by the Police Officer Bereshur is certainly not information respecting the *murder of Ujjala*, for she said merely that Rakhal had taken the child away after expressing an intention of leaving it with its father.

The unfortunate woman appears to have disappeared by night from her husband's side and there is much reason to suppose that she took her infant with her. She was found some time after without her infant, which was of too tender an age to take care of itself. Under these circumstances, grave suspicion attached to the woman. When she was arrested, she made contradictory statements as to what she had done with the child. Her manifest object in making these statements was to exculpate herself. We think s. 201 of the Penal Code was not intended to apply to such a case—a case, that is, in which the person, who is the possible or probable offender, makes statements exculpating himself by inculpating another.

That Herasatula murdered the child, and that Bahala knowing this gave information respecting the murder, with the intention of screening Herasatula from punishment, rest upon no evidence. We reverse the conviction and direct the release of the appellant Behala.

*Conviction set aside.*

#### NOTES.

##### [PENAL CODE, S. 201—

Sec. 201 applies only to the person who screens the principal offender and not to the principal or actual offender himself :—

*See* (1895) 22 Cal. 638 ; (1886) 8 All. 252. But see Rat. Un Cr. 799.]

**[791] APPELLATE CIVIL.**

*The 17th February, 1881.*

**PRESENT :**

**MR. JUSTICE PONTIFEX AND MR. JUSTICE McDONELL.**

**Taruck Chunder Mookerjee .... Defendant**

*versus*

**Panchu Mohini Debya.....Plaintiff.\***

*Suit for rent—Splitting claims—Code of Civil Procedure (Act X of 1877), s. 43.*

At the close of the Bengalee year 1283, which was on the 11th of April 1877, the defendant owed to the plaintiff, his landlord, the rents of his holding for the years 1281, 1282, and 1283. The plaintiff, in the month of April 1878, before the close of the year 1284, instituted a suit for the rent for 1281 only, and obtained a decree. On the 10th of April 1879, he instituted another suit for recovery of the rents for the years 1282, 1283, and 1284. *Held*, that the claim for the years 1282 and 1283 was barred under s. 43† of the Code of Civil Procedure.

The cases of *Raja Sutto Churn Ghosal v. Obhoy Nund Doss* (2 W. R., Act X Rul., 31), *Bam Soondur Sein v. Krishno Chunder Goopto* (17 W. R., 380), and *Kristo Kinkur Puramanick v. Ram Dhun Chettangia* (24 W. R., 326) are overruled by s. 43 of Act X of 1877.

THE facts of this case are set forth in the above headnote and in the judgment of Mr. Justice PONTIFEX. The plaintiff obtained a decree in the Court of first instance, and this decree was affirmed on appeal. The defendant then appealed to the High Court.

**Baboo Gurudas Banerjee** and **Baboo Nogendra Nath Roy** for the Appellant.

**Baboo Amarendronath Chatterjee** for the Respondent.

**Baboo Gurudas Banerjee** for the appellant.—The lower Courts are wrong in holding that the claims for 1282 and [792] 1283 are not barred under s. 43 of the Code of Civil Procedure. At the time the previous suit was instituted in April 1878, the plaintiff's title to the rents of 1282 and 1283 had accrued. The claim for the rent of 1281 arose out of the same cause of action as the claim for the rents of 1282 and 1283—namely, the non-payment of rent due under the defendant's lease; and as the claim under the later years was not insisted on them, it cannot be put forward now. The lower Courts' judgment cannot be supported, except on the ground, that each year's rent

\* Appeal from Appellate Decree, No. 2111 of 1879, against the decree of Alexander T. Maclean, Esq., Judge of the 24-Parganas, dated the 12th of August 1879, affirming the decree of Baboo Romesh Chunder Lahiri, First Munsif of Basirhat, dated the 26th of May 1879.

† [Sec. 43 :—Every suit shall include the whole of the claim

Suit to include the whole claim.

arising out of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

Relinquishment of part of claim.

If a plaintiff omits to sue for, or intentionally relinquish any portion of his claim, he shall not afterwards sue for the portion so omitted or relinquished.

Omission to sue for one of several remedies.

A person entitled to more than one remedy in respect of the same claim may sue for all or any of his remedies, but if he omits (except with the leave of the Court obtained before the first hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.]

constituted a separate cause of action ; but that is clearly not the case, since the passing of the illustration to s. 43 of Act X of 1877, whatever it may have been before that Act came into force.

Baboo Amarendronath Chatterjee for the respondent contended, that the present case was concluded by *Raja Sutto Churn Ghosal v. Obhoy Nund Doss* (2 W. R., Act X Rul., 31), *Ram Soondur Sein v. Krishno Chunder Goopto* (17 W. R., 380) and *Kristo Kinkur Puzmanic v. Ram Dhun Chettangra* (24 W. R., 326).

The **Judgment** of the Court (PONTIFEX and McDONELL, JJ.) was delivered by

**Pontifex, J.**—In April 1878, rent being due from the defendant to the plaintiff for the years 1281, 1282, and 1283, the plaintiff instituted a suit for the rent of 1281, for which she obtained a decree.

Although that suit was instituted after Act X of 1877 came into force, the plaintiff did not include in her suit the rents for 1282 and 1283, which were also then due.

In April 1879, the plaintiff instituted the present suit for the rents of 1282, 1283, and 1284. With respect to the rents of 1284, it appears from the judgments of the Courts below that, at the time of the institution of the former suit, the year 1284 had not expired, and therefore the entire rent for that year had not become due. The present suit would, therefore, lie for the rent of 1284.

[793] But objection was taken by the defendant to the suit so far as it related to the rents of 1282 and 1283, on the ground, that they should have been included in the former suit in accordance with the provisions of s. 43 of Act X of 1877.

Now it was decided in *Raja Sutto Churn Ghosal v. Obhoy Nund Doss* (2 W. R., Act X Rul., 31), that a separate suit would lie for the rents of each year, and that decision became the foundation of two other decisions by this Court—in *Ram Soonder Sein v. Krishno Chunder Gupto* (17 W. R., 380) and *Kristo Kinkur Poramanick v. Ram Dhun Chettangra* (24 W. R., 326).

Speaking for myself, I do not consider that the reasons given in the decision of *Raja Sutto Churn Ghosal v. Obhoy Nund Doss* (2 W. R., Act X Rul., 31) are satisfactory ; and I should have been reluctant to be bound by it. But s. 43 of Act X of 1877, with the illustration thereto, is a direct legislative reversal of that decision. Now, so far as the Court is concerned, that decision, with the two other cases founded on it, had established a procedure which, until Act X of 1877 came into operation, would have been a sufficient authority for the course pursued by the plaintiff in her suit No. 467 of 1878. But a different procedure having been ordained by s. 43 of Act X of 1877, which came into force on the 1st of October 1877, the authority of the three cases referred to has, in my opinion, been swept away.

It is true the illustration to s. 43 represents only the exact state of circumstances which existed in the case of *Raja Sutto Churn Ghosal v. Obhoy Nund Doss* (2 W. R., Act X Rul., 31), and it would have been clear if the illustration had been general and not confined to the peculiar circumstances of that case. But it was certainly intended to reverse the decision of *Raja Sutto Churn Ghosal v. Obhoy Nund Doss* (2 W. R., Act X Rul., 31), and with it the entire foundation of the decisions in the two other cases likewise fails. In my opinion, there can be no reason to distinguish between a suit omitting to claim

an earlier rent and a suit omitting to claim a later rent which is due at the date of its institution. The illustration certainly treats a claim to all arrears of rent as a single cause of action.

**[794]** I am unable, therefore, to agree with the interpretation which the learned Judge in the Court below has placed on s. 43 of Act X of 1877, and I am of opinion that the plaintiff was bound by that section to claim in her suit of 1878 the rents of the years 1282 and 1283, and that, having failed to do so, her present suit does not lie for these rents. The decrees of the Courts below will, therefore, be reversed so far as relates to the rents of 1282 and 1283, and will be affirmed so far as relates to the rent of 1284.

This being a case of a defaulting lessor, we think there should be no costs either in this or in the lower Courts.

*Decree varied.*

**NOTES.**

The same principle was adopted for similar cases in (1882) 9 Cal. 143. (1885) 12 Cal. 50, 1895) 21 Bom. 267. (1908) 36 Cal. 115=2 C L J 9]

[6 Cal. 794]

## ORIGINAL CIVIL.

*The 1st, 2nd, 7th, 8th, and 28th February 1881.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE PONTIFEX.

Sarkies.....Plaintiff

*versus*

Prosonomoyee Dossee and others.....Defendants.

*Dower—Introduction of English Law—Freehold estates of inheritance—Armenian widow—English Law how far applicable in Calcutta—Succession Act (X of 1865), s. 4—Estoppel—Admission by conduct—21 Geo. III, c. 70, s. 17—Dower Act XXIX of 1839.*

The widow of an Armenian, married before the Dower Act (XXIX of 1839), is entitled to dower out of lands which her husband held during the marriage for an estate of inheritance, as against a Hindu purchaser for value from the husband during his life, the English law of dower having been recognized in this country amongst Europeans and Armenians as a branch of the law of inheritance.

*Per* GARTH, C. J.—Estates which have been held by British subjects under the name of freehold estates of inheritance, are, in all essential respects, the same estates which have been held in England under the same name.

The case of *The Mayor of Lyons v. The East India Co.* (1 Moore's I. A. 175) does not mean to decide that the Courts of this country are justified in adopting just so much of the law of inheritance, or of dower, or of any other law, as they consider equitable, and rejecting the rest. It only points out that there are certain portions of the English Statute law which from their very nature were [795] only passed for reasons connected with England, and which would not be applicable in India or any Colony of the British Crown,—*e.g.*, the Mortmain Acts, the law of Aliens, and the like.

The provisions of s. 4\* of the Succession Act are prospective, and leave rights unaffected which had already been acquired before the Act passed.

*Per* PONTIFEX, J.—The true construction of s. 17 of 21 Geo. III, c. 70, must confine the words "their inheritance and succession" to questions relating to inheritance and succession by the defendants.

The deed of conveyance of land in Calcutta recited that the vendor was "seised of, or otherwise well entitled" to, the property intended to be sold "for an estate of inheritance in fee-simple," and it purported to convey such an estate. In a suit for dower by the vendor's widow against the heirs of the purchaser.

*Held*, that although, as between the plaintiff and the defendants, there was no estoppel which could prevent the defendants from proving that the estate sold was other than an estate in fee-simple, yet, as the purchaser bought the property as and for an estate of inheritance and paid for it as such, the recital was *prima facie* evidence against the purchaser and persons claiming through him; that the estate conveyed was what it purported to be, it being an admission by conduct of parties which amounted to evidence against them.

Interest and powers not acquired nor lost by marriage.

\*[Sec. 4 :—No person shall, by marriage, acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried.]

APPEAL from a decision of WILSON, J.

This was a suit by the widow of an Armenian, married before the Dower Act (XXIX of 1839) came into force, for dower out of lands in Calcutta, which had been conveyed by her husband to a Hindu purchaser for value, and which lands has descended to the defendants. The conveyance to the defendants' ancestor was in the English form. It recited that the vendor was "seised of, or otherwise well entitled" to, the property intended to be sold "for an estate of inheritance in fee-simple," and it purported to convey such an estate to the purchaser.

The defendants contended, that although dower would attach to lands in Calcutta as against the heir of the husband, yet it would not attach as against a purchaser for valuable consideration from the husband.

Mr. Bonnerjee and Mr. Agnew for the Plaintiff.

Mr. Phillips and Mr. J. G. Apar for the Defendants.

**Wilson, J.**—The main question in this case is a pure question of law,—namely, whether, by the law in force in Calcutta, the widow of an Armenian, married before the Dower Act (XXIX of 1839), is entitled to dower out of lands which [796] her husband held during the marriage for an estate of inheritance, as against a Hindu purchaser for value from the husband during his life.

There is, so far as I can find, no express authority upon the question. It must, therefore, be dealt with upon consideration of principle.

The plaintiff's claim is founded upon two propositions,—*1st*, that, by the law of England, a widow would, under like circumstances, be entitled to dower; *2nd*, that the law of England governs the present case.

The first of these propositions is no doubt correct. The question is as to the second. It is often said that the law administered by this Court is,—except in certain matters affecting Hindus and Mahomedans, and except so far as statutory provisions have modified it,—the Common Law of England as it existed in 1726. But this statement, though, no doubt, in general sufficiently accurate, is not absolutely correct. The true principles to be followed by this Court, when called upon to apply a rule of English law not previously applied, are clearly laid down by the Judicial Committee in *The Mayor of Lyons v. East India Co.* (1 Moore's I. A., 175).

The questions to be answered in each case are stated at page 272 :—"Has the English law (upon the point in question) been introduced?" "If that law has never been introduced, has there been such an introduction of the English law generally, that those parts which have been introduced draw along with them the law in question?"

The rule of English law which the plaintiff in this case seeks to apply has, certainly, not been introduced into Calcutta by any express declaration; nor so far as I can learn, has it ever been sanctioned by any judicial decision. I cannot find any trace of it throughout the whole period during which the Supreme Courts and the High Courts have existed in the Presidency-towns.

Has then any branch of English law been so generally introduced as by reasonable implication to carry this law with it? I think not.

[797] There is authority for saying that the English law of inheritance to real estate was introduced : *Gardiner v. Fell* (1 Moore's I. A., 299) and *Freeman v. Fairlie* (1 Moore's I. A., 305). The rule that the heir-at-law takes subject to the widow's right to dower, may well be regarded as a rule of the law of inheritance. And, accordingly, in some of the cases cited at the bar, the Supreme



Court assigned dower to the widow as against the heir-at-law. But the rule that a wife's right to dower attaches by marriage, and follows the land in the hands of a purchaser, is a peculiar and characteristic doctrine of the feudal law, and can only, it seems to me, prevail in Calcutta, if it can be affirmed that the English law of real property was introduced into Calcutta in its entirety. But this proposition is expressly negatived by the Privy Council in the case to which I have referred. On this ground I am of opinion that the plaintiff's claim fails. It is, therefore, unnecessary to consider any of the other questions which have been discussed.

From this decision the plaintiff appealed.

Mr. *Evans* and Mr. *Agnew* for the Appellant.

Mr. *Phillips* and Mr. *J. G. Apcar* for the Respondents.

Mr. *Evans*.—There is only one right of dower—the old common law right—applicable. In Calcutta it has always been the practice for the wife to join to bar her dower. Lands in Calcutta have always been conveyed with regular investigation of title. They are held as freeholds of inheritance, and dower is assignable out of them. [PONTIFEX, J.—It would take away from the mutuality of contract between husband and wife to hold that the widow is not entitled to dower as against a purchaser from the husband. The husband is entitled to an estate by the courtesy in his wife's lands.] The Dower Act (XXIX of 1839) recites, that it is expedient to extend the amendments in the English law of dower to the territories of the East India Company in cases which, but for the passing of the Act, would be governed by the English law of dower as it existed previously; and s. 4 of that Act provides that no widow shall be [798] entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will. This shows that the Legislature considered that the English law of dower applied. Armenians have no law of their own and are governed by the English law; and an Armenian widow has been held to be entitled to dower—*Emin v. Emin* (1 Morley, 300; Morton by Montriou, 242). In the case referred to by the learned Judge in the Court below—*The Mayor of Lyons v. The East India Co.* (1 Moore's I. A., 276)—Lord Brougham says, that alien widows have had dower assigned to them. The law of dower is not of feudal origin. Its origin is uncertain—Petersdorff's Abridgment, Tit. Dower; but it was in existence before the conquest, and was in fact abridged by the feudal law. It attaches in England to lands of gavelkind and borough English tenure. The question is, whether the law of dower was introduced into this country, and if so, what law was it? English, or what other? The only law of dower we know is the English law, and its existence has been repeatedly recognized in these Courts. The only law applicable to British subjects other than Hindus and Mahomedans is the English law: *Emin v. Emin* (1 Morley, 300; Morton by Montriou, 242), *Stephen v. Hume* (Fulton, 224), *Musleah v. Musleah* (Fulton 420); 1 Boulnois, 234, *Joseph v. Ronald* (Morton by Montriou, 111); *In the matter of Cachek* (1 Morley, 375); Morley's Introd., pp. 187, 298). There is no case which expressly decides that dower will attach as against a purchaser; but in *Dela Cruz v. Goorachand Seal* (Clarke's Addl. Rules and Orders 335) the Court considered that it would. [GARTH, C. J.—If we are to apply the law of dower at all, why should we stop at a particular point and refuse to apply it in its entirety? PONTIFEX, J.—Was the husband seised?] The conveyance recites that he is seised and possessed of the property as and for an estate of inheritance in fee-simple. The learned Judge admits that dower attaches as against the heir, but refuses to

extend the law on the authority of *The Mayor of Lyons v. The East India Co.* (1 Moore's I. A., 276). But that case is based on *The Attorney-General [799] v. Stewart* (2 Mer., 160) which shows that laws having only a local effect, and applicable only to England, such as the Mortmain Acts, are not to be considered as introduced into a Colony. Dower does not come under this class of cases. The reasons given in *The Attorney-General v. Stewart* (2 Mer., 160) were followed in *The Advocate-General of Bengal v. Ranee Surnomoyee* (9 Moore's I. A., 425). That lands in Calcutta are freehold of inheritance appears from *Gardner v. Fell* (1 Moore's I. A., 299) and *Freeman v. Fairlie* (1 Moore's I. A., 305).

[He was stopped by the Court.]

Mr. Phillips.—There is no evidence that this is an estate of inheritance in fee-simple. The recital in the deed is not evidence against my client. It is merely the vendor's statement of his own title. There would be great inconvenience in extending the right of dower as against a purchaser from the husband. The natives of this country are not familiar with English law, and a Hindu purchaser would never think of enquiring whether such a right existed. There is no such estate existing in this country as an estate of fee-simple in inheritance, and dower can only attach on such an estate. It was necessary to introduce a law of inheritance, and the English law was followed, and dower has been assigned as against an heir-at-law. But dower was only partially introduced; it cannot be assigned as against any one but the heir. This is an artificial conveyance, and the wife was not asked to join. That shows that the purchaser was not aware of her existence. The letter of the Court of Directors in 1792, Tagore Law Lectures, 1874, p. 283, shows that the English law relating to land had not then been introduced. None of the cases go so far as to say that dower is assignable against a purchaser. They do say that it is assignable as against the heir, and so far they are binding; but the law should not be extended; the inconvenience and injustice of doing so would be very great. [GARTH, C. J.—There is no more injustice in enforcing that charge than any other. A purchaser must look to his title [800] and see what incumbrances there are on the property. PONTIFEX, J.—If a Hindu governed by the Mitakshara law comes to Calcutta, and buys land here, and a Hindu governed by the Dayabhaga buys from him, he would buy subject to the rights of the vendor's sons, and could not contend that he was ignorant of the Mitakshara law.] The only case in which it is expressly decided that a widow is entitled to dower is *Emin v. Emin* (1 Morley, 300; Morton by Montriou, 242), and that case goes too far, for it shows that dower would attach to lands in the mofussil. In none of the other cases is there any express decision to that effect, *Doedem and Savage v. Bancharam Tagore* (Morton by Montriou, 105), *Joseph v. Ronald* (Morton by Montriou, 111), *Jebb v. Lefevre* (Morton by Montriou, 152). The utmost reached in *Freeman v. Fairlie* (1 Moore's I. A. 305) is, that an equitable fee exists, and that is not an estate out of which dower can be assigned. It is an incident of real estates in this country that they are assets in the hands of executors for the payment of debts. That shows that they are not technically estates of inheritance. [PONTIFEX, J.—In England real estate may be assets in the hands of executors for the payment of debts: *Robinson v. Lowater* (17 Beav., 592; 5 D. M. G., 272).] There must be a legal estate of inheritance in fee-simple in order that dower may attach. No case decides that such an estate exists in India. That point was not decided in *Freeman v. Fairlie* (1 Moore's I. A., 305); the only question there was, whether a will attested by two witnesses passed land: it was enough to consider where the estate was to go, whether to the legal personal representatives or to the heir. The

fact that was customary to levy fines to bar dower<sup>800</sup> does not prove that fee-simple estates existed, but merely that it was thought advisable to take precautions to prevent the widow from claiming. The right to dower was swept away by the Succession Act. Section 4 provides that no person shall by marriage acquire any interest in the property of the person whom he or she marries; and ss. 25-28 provide for the widow in case of intestacy. [GARTH, C. J.—Dower has the effect of a settlement on the [801] marriage; it is a charge which the husband cannot alienate without the consent of the wife.]—It cannot have been intended that a widow should get her dower and also the provision under the Act. He also referred to s. 17 of 21 Geo. III, p. 70.

Mr. Agnew in reply referred to *Nekram Jemadar v. Iswan Prasad Pachuri* (5 B. L. R., 643) and *Jagudamba Das v. Irob* (5 B. L. R., 639).

**Garth, C.J.**—The plaintiff is the widow of an Armenian gentleman, to whom she was married in the year 1837, and she claims, in this suit, to have her dower assigned to her out of certain lands in Calcutta, which belonged to her husband at the time of the marriage, but were afterwards sold by him to one Bungshoe Dhur Dutt and Nobin Chunder Dutt by an indenture dated the 9th of May 1866.

The defendants' title is derived from the purchasers under that deed; and their contention, stated broadly, is, that the English law of dower is not applicable to a case of this kind.

The learned Judge in the Court below appears to have considered, that although lands held by Armenian subjects in Calcutta are subject generally to the English law of inheritance, and although the law of dower might have formed a portion of that law, yet, as there is no direct authority for the position that a widow in this country can enforce her right to dower as against a purchaser from her husband, he was not bound to extend the law of dower to such a case, and he therefore dismissed the plaintiff's suit.

Now, it being once established, that the law of dower has always been recognized as a part of the law of inheritance in this country, that Armenians are subject to that law, and that the property in question was held by the plaintiff's husband for an estate to which the law of dower would attach, I confess I should feel great difficulty in placing any arbitrary limit upon that law, and in denying the plaintiff, as against a purchaser from her husband, the rights to which she is admittedly entitled as against his heir.

Mr. Phillips, who argued the case on behalf of the respon-<sup>[802]</sup>dents, seemed rather sensible, as I thought, of this difficulty, and he, therefore, preferred to take the holder course of contending, not only that the law of dower has never been recognized here in the same way as it has been in England, but that estates held here by Europeans, although they might in one sense be estates of inheritance, were not estates of that particular character to which the right of dower could legally attach. And he has also relied on two or three other points, which I shall proceed to deal with in their proper place.

The case has been argued at some length, and our attention has been called to a great many authorities; but I am bound to say, that from first to last I have never entertained the slightest doubt, either that the law of dower has been recognized in this country, amongst Europeans and Armenians, as a branch of the law of inheritance, or that estates which have been held by British subjects under the name of freehold estates of inheritance are in all essential respects the same estates which have been held in England under the same name.

Indeed, I should be extremely sorry to think that at this day any doubt could reasonably be thrown upon either of these propositions. For a long series of years estates of inheritance have been enjoyed and dealt with by British subjects here in the same way as they have been in England. They have been bought and sold as such. They have been transferred from hand to hand by modes of conveyance which are only applicable to English tenures, and meaningless as applied to any other tenures. They have been considered and treated as such by the Supreme Court since its first establishment; and they have been made the subject of real actions, which we all know constituted a machinery quite inappropriate to any other than English tenures. And lastly, they have over and over again been recognized and dealt with as such by the Indian Legislature.

In fact, if Mr. Phillips' argument is well founded, it seems to me, that not only proprietors of land themselves, but also the legal profession, and the Courts of law, and the Legislature, have all for years past been labouring under a very serious mistake.

[803] So long ago as the year 1815, we have the direct authority of the Supreme Court in the case of *Emin v. Emin* (Morton by Montrieu, p. 242) deciding—*1st*, that the English law of dower was at that time recognized, and enforced here as it was in England; and *2ndly*, that Armenian subjects of the British Crown resident in Calcutta were amenable to that law.

In that case a bill was filed by the widow of an Armenian against the heir-at-law (being the eldest of two sons of her deceased husband), praying to have her dower assigned. Her husband was also an Armenian; and the lands out of which the dower was claimed, and of which the husband was alleged to have been seised for an estate of inheritance in fee-simple, were, for the most part, within the town of Calcutta, though a small portion of them were situate in a neighbouring mouza.

A decree was made in favour of the plaintiff by Sir Edward Hyde East and Sir W. Burroughs, that the dower should be assigned by a commissioner in the usual way; and a final decree was subsequently made confirming the commissioner's report, by a Court which consisted of Sir Edward Hyde East, Sir Francis Macanaghten, and Sir Anthony Buller.

From that time to the present, as far as we know, the correctness of this decision has never been questioned, and we have the further evidence that the law of dower was fully recognized, from the fact that a large number of fines have been produced before us from amongst the records of the Supreme Court, which have been levied from time to time for the express purpose of barring dower.

Then we have the Dower Amendment Act of 1839, passed by the Legislature of this country, corresponding in most of its provisions with the Dower Amendment Act in England, the 3 and 4 Wm. II, c. 105.

If the contention of the defendants were right, there could have been no such thing in this country as the law of dower, because there were no estate to which that law could legally attach. But the preamble of this Act distinctly affirms the existence of that law in India, and the necessity for amending it as it had been amended in England.

[804] The various sections of the Act treat of the doctrine of "seisin," of "rights of entry," and of "equitable," as distinguished from "legal estates of inheritance," in language which would have no meaning, unless the English law of inheritance prevailed in this country.

It seems to me, therefore, that even if we entertained any doubt upon the subject, which I certainly do not, it would not be possible for us at the present day to ignore the existence of a law thus distinctly affirmed, both by the Supreme Court and the Legislature. As a matter of principle, there would seem to be at least as much reason, why amongst British subjects in India a provision should be made by law for a wife's maintenance as in England. And if this principle is conceded, it is difficult to see why a wife should have less power of enforcing her rights against a purchaser from her husband than she had in England.

It then being once established that the law of dower has prevailed in this country, we have no right, as it seems to me, to contest or modify that law according to our own notions of justice: we must administer it in its integrity; and we have no more right to deprive the plaintiff of the benefit of it by holding (contrary to its well-known rules) that her husband could deprive her of her dower, by aliening his lands to a stranger, then we should have to hold, that a tenant for life or in tail might sell the inheritance absolutely, to the prejudice of the reversioner or remainderman.

Besides, it seems to me, that s. 4 of the Dower Amendment Act is itself an authority, that, before the Act, a husband could not alien or devise his lands so as to deprive his wife of her dower. That section purports to *deprive a wife of her right to dower in lands, which may have been aliened or devised by her husband in his lifetime*, which means, if it means anything, that in the view of the Legislature, a wife, before the Act, *had a right to dower in such lands*. The section would not only be superfluous, but misleading, unless the wife had such a right.

The learned Judge in the Court below has alluded to the judgment of the Privy Council in the case of *The Mayor of Lyons v. The East India Co.* (1 Moore's I A, 175), as affording an authority, [805] that the English law of inheritance was not introduced here in its entirety, but only so much of it as was applicable to the state of things in India. But that case, as I read it, does not mean to decide that the Courts of this country are justified in adopting just so much of the law of inheritance or of dower, or of any other law, as they consider equitable, and rejecting the rest. It only points out, that there are certain portions of our English Statute law, which from their very nature were only passed for reasons connected with England, and which would not be applicable to India, or any other Colony of the British Crown, as for instance, the Mortmain Acts, the law of Aliens, and the like.

That part of the law of dower, which we are called upon to administer in this case, is obviously quite as necessary to the due enforcement of the wife's rights in India as it would have been in England.

Then it was suggested, rather than argued, by the defendants' counsel, that although as against a European or any other purchaser (except a Hindu or Mahomedan), the wife might enforce her rights, s. 17 of 21 Geo. III, c. 70, prevents her from enforcing them as against a Hindu purchaser.

That section enacts as follows:—

"Provided always, and be it enacted, that the Supreme Court of Judicature at Fort William in Bengal shall have full power and authority to hear and determine, in such manner as is provided for that purpose in the said Charter or Letters Patent, all and all manner of actions and suits against all and singular the inhabitants of the said city of Calcutta, provided that their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party shall be determined, in the case of

Mahomedans, by the laws and usages of Mahomedans, and in the case of Gentoo, by the laws and usages of Gentoo: and where only one of the parties shall be a Mahomedan or Gentoo, by the laws and usages of the defendant."

It is suggested that as against the defendants here, who are Hindus, the Hindu law of inheritance ought to prevail; and that as the Hindus recognise no rule of dower, the plaintiff [806] cannot enforce that law as against the present defendants. This point, however, was not seriously pressed upon us. It may not be very easy to define what the concluding words of the section really mean; but whatever their proper construction may be, it is clear that they do not mean this, that where a Hindu purchases land from a European, in which the vendor has only a limited interest, the Hindu purchaser is to be in any better position as regards his purchase than a European purchaser would be. If the plaintiff's husband had no power to defeat her right by selling his land to a European, it is clear to me that he had no power to do so by selling to a Hindu or Mohomedan.

Then it was also contended, that assuming the plaintiff to have had an inchoate right to dower at the time when the Indian Succession Act (X of 1865) passed, she was deprived of her right by virtue of that Act. It was argued that s. 27, which provides what property of the husband the wife shall be entitled to in the event of his dying intestate, impliedly, though not expressly, deprived her of any other provision to which she was entitled at the time of the passing of that Act. But I think we cannot put any such construction on s. 27. If the plaintiff had an inchoate right to dower at the time of the passing of the Act, nothing short of express words could deprive her of that right.

Indeed, s. 4 seems to exclude the notion of a wife, who was entitled to dower when the Act passed, being deprived of it by s. 27. It enacts that "No person *shall by marriage acquire any interest* in the property of the person whom he or she marries." That is evidently a prospective provision; and it is intended, as it seems to me, to leave rights unaffected which had already been acquired before the Act passed.

The only remaining point argued by Mr. Phillips was one of a somewhat technical nature. It is not noticed in the judgment of the lower Court, and was evidently considered of no weight; and if I thought there was anything in it, I should certainly have been disposed to allow the plaintiff to call additional evidence.

It is said that there was no sufficient proof in the Court below [807] that the husband's estate in the property in question was an estate in fee-simple.

Mr. Phillips called no evidence on this point, nor offered to call any; nor did he pretend to say that the estate which his client's ancestors had bought from the plaintiff's husband was other than an absolute estate, which is known here by the name of a fee-simple. His bare contention was, that the plaintiff was bound to prove that the estate sold was an estate of inheritance, and that she had failed in that proof.

The conveyance, however, under which the defendants claim, and which was put in by the plaintiff, contains a recital that the vendor "*is seised of, or otherwise well entitled to, the property intended to be sold for an estate of inheritance in fee-simple,*" and it purports to convey that estate to the purchasers.

Although, therefore, as between the plaintiff (who was no party to the deed) and the defendants, there was no estoppel, which would prevent the defen-

dants from proving that the estate sold was other than an estate in fee-simple, yet as the purchasers bought the property as and for an estate of inheritance, and paid for it as such, I consider that is clearly *prima facie* evidence against them and the defendants as claiming under them, that the estate was what it purported to be.

It is one of those admissions by conduct of parties which amounts to evidence against them. If a written contract was made between buyer and seller with regard to the purchase of a horse, that contract (quite apart from any question of estoppel) would be *prima facie* evidence as against both buyer and seller that the thing sold was a horse. It would of course be perfectly competent for either of them to show that the thing sold was *not a horse* but *prima facie* their contract and their conduct would be evidence the other way.

I am of opinion, therefore, that as against the land in the possession of the defendants, the plaintiff is entitled to have her dower assigned, and that the usual decree should be made, appointing a commissioner for that purpose.

I think also that the plaintiff ought to have her costs in this Court and in the Court below on scale 2.

[308] **Pontifex, J.**—I also am of the same opinion. The very learned argument of Mr. *Phillips* might have had some weight in a bygone age dusty with the lore of Fearn and Preston. But it seems to me, for the reasons stated by my Lord, to be now of purely antiquarian interest; and even if it could have had any successful issue before the Courts, and the Legislature had, as Mr. *Phillips* argues, been misled by a false analogy, it is now propounded unfortunately about a century too late.

I will add one word with respect to s. 17 of 21 Geo. III, c. 70. It seems to me, though the language is a little confusing, that the true construction of section must confine the words "their inheritance and successson" to questions relating to inheritance and succession by the defendants. The present is a question of the plaintiff's succession, and therefore not determinable by the laws and usages of the Gentoos.

**Garth, C.J.**—A question has been raised between the parties upon this judgment, from what time the defendants are bound to account to the plaintiff for the profits of the property. We find that, in the case of *Emin v. Emin* (1 Morley, 300; Morton by Montriou, 242), an account of the profits was ordered from the death of the plaintiff's husband, and probably in a suit for dower against the heir or devisee of the husband, that would be the ordinary rule. But in the present case, it does not appear that the defendants had any notice, until the suit was brought, that the plaintiff claimed her dower out of the property in question. She might reasonably have supposed that she had no such claim; and we think that it would be unjust, under such circumstances, to order an account against them prior to the date of suit.

The decree, therefore, will direct an account of the profits to be taken in the usual way from that date.

Attorney for the Appellant: Mr. H. C. Chick.

Attorneys for the Respondents: Messrs. Dhur and Dhur.

## NOTES.

**[ARMENIANS: HOW FAR ENGLISH LAW APPLICABLE IN INDIA.]**

A term of years was held to be personalty in India in case of Armenians as it is under the English Law (1896) 24 Cal. 216.

Statute of Frauds (29 Charles II, C. 3) except so far as it has been repealed was held applicable to Parsis in India :—(1881) 6 Bom. 368.

See our Notes to 1 M.I.A. 175 in the Indian Reports Vol. I. p. 80.]

**[809] *The 4th April, 1881.***

PRESENT :

MR. JUSTICE WILSON.

Steel and others

*versus*

Robarts.

*Application on behalf of Arbitrators—Reference—Costs of Reference.*

There is nothing in the Civil Procedure Code which authorizes arbitrators to apply to the Court for confirmation of an order passed by them making payment of their fees a condition precedent to the hearing of a reference.

MESSRS. BARROW and DIGNAM, who were the arbitrators appointed in the above-mentioned suit to arbitrate between Mr. Steel and Mr. Robarts in certain matters which were known as the Ravelie, Burlah, Panicherra and Stainforth references, applied to the Court on motion, notice of which was duly served on the defendant's attorney, for confirmation of an order passed by them on the 21st March 1881.

It appeared that the arbitrators had given their award in the Ravelie reference in favour of the plaintiff, and that they had also made an award in the Burlah reference and that the arbitrators' fees for attendance and preparing the latter award amounted to Rs. 8, 349, which sum had not been paid; and that on the 30th September 1880, they gave notice to Messrs. Sanderson and Co., the plaintiffs' attorneys, that the award was ready and would be filed on payment of the arbitrators' fees. On the receipt of this intimation, Messrs. Sanderson and Co. wrote to Messrs. Remfry and Co., the defendant's attorneys, expressing



their readiness to pay their clients' share, and suggesting that Messrs. Remfry and Co. should pay the defendant's share, and that the award should then be filed. Messrs. Remfry and Co. replied that it was the plaintiffs' duty to take up the award.

The arbitrators met on the 2nd March 1881, at which meeting both the plaintiffs and defendants were represented, and decided on passing the following order as to the undermentioned reference :

"Panicherra and Stainforth references."

"Ordered, subject to the sanction of the Court being obtained, that, without prejudice to any order or award that may hereafter be made as to how the costs of these references and awards are to be hereafter paid or borne by the parties, the parties do pay [810] the arbitrators' fees of these two references to be fixed by the arbitrators) in equal shares,—that is to say, one-half by Messrs. Sanderson and Co.'s clients, and the other half by Mr. Remfry's clients; and that the arbitrators' fees for every subsequent meeting be paid by the parties in the same proportion before such meeting is opened. In the event of either party not paying the fees hereby directed to be paid, the arbitrators will proceed *ex parte* in the reference or references as to which default shall be made at the instance of the party who shall pay such fees. Messrs. Sanderson and Co. are directed to apply to the Court for the sanction required to the arbitrator's order; and the arbitrators direct that their costs of such application be costs of the reference, whatever may be the result." Mr. Remfry at this meeting protested against such an order, on the grounds that the deed of submission providing for the references contained no provision for prepayment of fees, and that no such condition precedent to the hearing of a reference could be made. The arbitrators, however, replied that cls. 1 and 3 of this agreement empowered the arbitrators to "regulate the proceedings," to which Mr. Remfry replied that such regulation referred only to the mode of proceeding and the reference in which matters were to be taken. The order was ultimately passed as set out above, and the matter came up before the Court on motion, asking for confirmation of the order.

Mr. Allen for the Plaintiffs.

Mr. Bonnerjee for the Defendants.

Wilson, J., decided that, where a matter is before arbitrators, it is out of the hands of the Court; that although the Civil Procedure Code gives power to the Court to interfere in various ways in arbitration matters, it makes no provision for such an application as the present. Such being the case, added to the fact that he considered that no sufficient reason for making the application had been advanced, the motion was dismissed with costs.

*Application dismissed.*

Attorneys for the Applicants : Sanderson and Co.

Attorneys for the opposite party : Remfry and Remfry.

**[511] The 24th March, 1881.**

**PRESENT :**

**MR. JUSTICE BROUGHTON.**

**Juggut Chunder Roy and others.....Plaintiffs**

*versus*

**Roop Chand Shaw and others.....Defendants.**

*Suit on Hathchitta—Partnership—Some Partners denying Debt,  
others admitting Debt—Costs as between Defendants.*

In a suit brought against several partners to recover a sum of money on a hathchitta, some of the partners denied the debt and the partnership, whilst others admitted both the partnership and the liability ; the Court found in favour of the plaintiffs, and gave them a decree for the amount sued for with costs, and ordered the defendants who had disputed the debt and the fact of the partnership, to pay the costs of the other defendants, who had admitted their liability.

JUGGUT CHUNDER ROY, Surut Chunder Roy, and Protab Chunder Roy traders, sued the defendants (Roop Chand Shaw, Sonatun Shaw, and Rakhal Das Shaw (an infant), who were alleged to carry on business as "Nodear Chand, Roop Chand, Sonatun, and Tariney Pershad Shaw,") for a sum of Rs. 2,750, principal and Rs. 319-14-9, as interest up to 14th June 1880, due on a hathchitta, dated 2nd July 1879, signed by the defendants' gomashtha Mohanundo Shaw alleging that they had demanded payment, but that it had been refused.

Roop Chand denied the partnership, and denied the debt, and stated that Mohanundo Shaw had no authority to sign the hathchitta on his behalf. He further stated, that, some years ago, he had inherited, on the death of his father, a certain share in a business which had been carried on by his father in partnership with others, under the name of Chintaram, Nodear Chand Shaw, and that he had remained in the firm till June or July 1877, when he withdrew, and that since that time the business had been carried on, so far as he was concerned, for the purposes of being wound up.

Tairny Pershad Shaw and Chand Mohun Shaw admitted the partnership and the debt, and stated that they had always been ready to liquidate it, but that they had been prevented by their copartners.

**[512] Mr. Kennedy and Mr. T. A. Apcar** for the Plaintiffs.

**Mr. Bonnerjee** for the Defendant Roop Chand and the second Defendant.

**Mr. Dutt** for the third, fourth, and fifth Defendants, contended that, having admitted the debt, he was entitled to his costs.

**Mr. Justice Broughton** found that the defendants were partners, and gave a decree in favour of the plaintiffs against all the defendants, and ordered Roop Chand to pay the costs incurred by Tariney Pershad Shaw and Chand Mohun Shaw, and the costs of Rakhal Doss to be paid out of the partnership assets, after satisfaction of the debt.

**Attorneys for the Plaintiffs :** *Mookerjee and Deb.*

**Attorneys for the Defendants :** *Swinhoe & Co O. G. Gangooly.*

[6 Cal. 513]

The 9th March, 1881.

PRESENT :

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE PRINSEP.

Achul Mahta and Others.....Defendants

versus

Rajun Mahta and Others.....Plaintiffs.\*

*Easement—Limitation, Plea of—Limitation Act (XV of 1877), s. 26—Presumption of a Grant.*

In a suit to establish an easement when limitation is pleaded, the proper issues to frame under s. 26† of Act XV of 1877 (Limitation Act) are :—

(i) Whether the easement in question was peaceably, openly, and as of right, enjoyed by the plaintiff, or those through whom he claims, within two years of the institution of the suit and

(ii) in the event of the above issue being found in the negative, whether there is evidence of enjoyment on the part of the plaintiff, or those through [513] whom he claims, of such a character and duration as to justify the presumption of a grant or other legal origin of the plaintiff's right independent of the provisions of Act XV of 1877, s. 26.†

THIS was a suit brought by the plaintiff Rajun Mahta, in the Court of the Additional Munsif of Contai, to establish his right of way over a footpath through the defendants' premises. He alleged, that he had been using the same for a period of upwards of fifty or sixty years prior to September 1877, and that the defendants had then wrongfully closed it up in execution of a collusive decree obtained in a suit to which he was not a party, although he had previously instituted criminal proceedings against them with reference to the obstruction of the pathway and been successful in getting it reopened. The defendants, amongst other pleas, raised that of limitation, alleging that the

\* Appeal from Appellate Decree, No. 2297 of 1879, against the decree of W. Cornell, Esq., District Judge of Midnapore, dated the 7th July 1879, reversing the decree of Baboo Kalli Nath Dhur, Munsif of Contai, dated the 29th June 1878.

† [Sec. 26.—Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, and as of right, Acquisition of right to without interruption, and for twenty years, and where any way or watercourse, or the use of any water, or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right, without interruption, and for twenty years,

the right to such access and use of light and air, way, watercourse, use of water, or other easement, shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

*Explanation.*—Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.]

plaintiff had not enjoyed the easement within the period of two years before the institution of the suit. The Munsif having dismissed the case in the first instance, the plaintiff appealed to the Judge, who, in giving him a decree, observed, that he found no proof that there was any interruption (which was submitted to for one year) before December 1875, the plaintiff not only having contested the matter in the Criminal Court, but having also prosecuted the defendants, who were punished under s. 188 of the Penal Code in June 1876.

From this decree the defendants appealed to the High Court.

Mr. *H. C. Mendies* for the Appellants.

*Baboo Shooshi Bhoosun Dutt* for the Respondents.

The **Judgment** of the Court (CUNNINGHAM and PRINSEP, JJ.) was delivered by

**Cunningham, J.**—In this case the plaintiff's cause of action is the forcible obstruction in September 1877 of a right of way through the defendants' premises, which the plaintiff alleges that he has peaceably and publicly used for upwards of fifty years. The original Court, finding that no easement was proved, and that any use made of the way by the plaintiff was permissive only, dismissed the suit.

[814] The lower Appellate Court, considering that the right of way two feet wide was proved, reversed the decision of the Munsif, and gave the plaintiff a decree. The objection, however, was taken, and is now urged before us in special appeal, that there was no proof of enjoyment within two years before the suit was brought, and that, accordingly, the right was barred under the 4th para. of s. 26 of the Limitation Act of 1877.

As to this point the Judge observes: "I do not find any proof that there was any interruption (which was submitted to for one year) before December 1875." This remark appears to refer to the explanation given in the section of an "interruption," and leaves indistinct the point whether, there had been an actual enjoyment of the plaintiff, or those under whom or in whose right he claims, within two years of the institution of the suit. We must, therefore, refer the following issues to the lower Appellate Court.

1. Was the right of way in question peaceably, openly, and as of right, used by the plaintiff or those through whom he claims within two years of the institution of the suit? Supposing that it was so enjoyed, and with reference to the alleged antiquity of the right and the observations of their Lordships of the Privy Council in *Makarai Rajroop Koer v. Syed Abdul Hossein* (L. R., 7 I. A., 240), we further direct the following issue:—

2. Is there evidence of enjoyment on the part of the plaintiff, or those through whom he claims, of such a character and duration as to justify the presumption of a grant or other legal origin of the plaintiff's right, independent of the provisions of s. 26 of the Limitation Act of 1877.

#### NOTES.

[See our Notes to I. L. R. 8 Cal. 956 in our Law Reports Reprints.]

*Case remanded.*

[815] SMALL CAUSE COURT REFERENCE.

*The 9th and 28th February, 1881.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE PONTIFEX.

Ramsebuk and others.. ..... Plaintiffs

*versus*

Ramlall Koondoo. .... Defendant.\*

[=8 C. L. R. 457]

*Parties—Adding plaintiffs in actions of contract—Non-joinder—Joinder of plaintiffs after time for bringing suit has expired, Effect of—Co-contractors—Limitation Act (XV of 1877), ss. 20 and 22—“ Prescribed period ”—Procedure—Suit by members of joint Hindu family carrying on trade in partnership.*

Two of the sons out of a joint mitakshara family, consisting of a father and three sons and the widow and sons of a deceased son, and carrying on business in partnership, sued to recover money due on a hathchitta, dated the 11th December 1876, the last payment made and entered by the defendant being on the 20th July 1877. No time was fixed for payment of the money, so that it became payable on the date of the hathchitta.

The suit was instituted on the 19th July 1880, and came on for hearing on the 26th July, when an objection was taken, that all the parties who ought to sue were not on the record. On the application of the original plaintiffs the names of the father and the third son were then added, and the plaintiffs were described as surviving partners of the deceased son. At the time the additional plaintiffs were made parties, the suit was, as regards them, barred by limitation.

*Held*, that the additional plaintiffs were rightly made parties to the suit, notwithstanding that the suit was, as far as they were concerned, barred

In actions of contract it is the right of the defendant, if he takes the objection in proper time, to insist upon all the persons with whom he contracted being joined as plaintiffs, and if, after the objection has been raised, the plaintiff proceeds with the suit without taking steps to add the person or persons whose nonjoinder has been objected to, and the Court finds that the objection is well founded, the suit must be dismissed.

That, inasmuch as the original plaintiffs could only enforce their claim in conjunction

\* Case referred for the opinion of the High Court under s. 7, Act XXVI of 1864, by H. Millet, Esq., and Baboo Koonjo Lal Banerjee, the First and Second Judges of the Calcutta Small Cause Court.

with the added plaintiffs, and the added plaintiffs were barred by s. 22,\* of Act XV of 1877, the claim of the original plaintiffs was also barred.

*Boydonth Bag v. Ghish Chunder Roy* (I. L. R., 3 Cal., 26) dissented from.

[816] That the suit, if all the plaintiffs had originally joined in suing, would not have been barred by s. 20† of Act XV of 1877. The words "prescribed period" in that section mean, not the period prescribed for the payment of the debt, but the prescribed period of limitation.

There is no equity, but often much injustice, in allowing one joint-contractor out of many to sue a defendant, notwithstanding an objection duly made by the latter; and the Court has no right to allow one contractor to recover under such circumstances, though he may no doubt afterwards adjust the sum which he recovers with his co-contractors.

As between the members of a joint family, any one or more may be authorized by the rest to act as their agent or agents in any business transaction; but when a joint family or any members of it carry on a trade in partnership, and contract with the outside public in the course of that trade, they have no greater privileges than any other traders. If they are really partners, they must be bound by the same rules of law for enforcing their contracts in Courts of law as any other partnership.

THE facts of this case fully appear from the referring order, which was as follows :—

"This suit was originally instituted against the defendant on the 19th July 1880. It is based upon a hathchitta dated the 2nd Pous 1283, corresponding with the 11th December 1876, for recovery of Rs. 529-1 as principal and interest. The suit was originally instituted by Ramsebuk and Sewrutton Chand, residing in Calcutta, describing themselves as carrying on business under the firm of Sew Churnlall Luchmondeen. The case came on for hearing before the first Judge, on the 26th July last, when the defendant pleaded misjoinder of parties, though, properly speaking, it ought to have been nonjoinder of parties. Accordingly, on the application of the first two plaintiffs on the record, the names of the other two plaintiffs, Sew Churnlall and Bhogowandeen,

Effect of substituting or adding new plaintiff or defendant.

\*[Sec. 22.—When, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party.]

Proviso where original plaintiff dies.

Provided that, when a plaintiff dies, and the suit is continued by his legal representative, it shall, as regards him, be deemed to have been instituted when it was instituted by the deceased plaintiff :

Proviso where original defendant dies.

Provided also that, when a defendant dies, and the suit is continued against his legal representative, it shall, as regards him, be deemed to have been instituted when it was instituted against the deceased defendant.]

Effect of payment of interest as such.

†[Sec. 20.—When interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorized in this behalf,

or when part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorized in this behalf, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the payment was made

Effect of part-payment of principal.

Provided that, in the case of part-payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making the same.

Effect of receipt of produce of mortgaged land.

Where mortgaged land is in the possession of the mortgagees the receipt of the produce of such land shall be deemed to be a payment for the purpose of this section.]

were added, with the additional description of surviving partners of Luchmondeen, the name and style of the firm Sew Churnlall Luchmondeen being still retained. These parties were added, subject to the objection then taken by the defendant, leave being granted to him to raise the same objection at the hearing. Sew Churnlall is the father of the other plaintiffs, one other son, Luchmondeen, having died some four years ago. At the time the new plaintiffs were added, the suit as regards them was barred by limitation. The First Judge, being of opinion that the suit in this form could not proceed, [817] dismissed it. Against this decision an application for a new trial was filed, and admitted by us. Treating the new trial suit as a fresh one, the defendant put in the following pleas :—Deny plaintiff's right to sue, limitation, and never indebted. No plea was recorded on the ground of nonjoinder of parties. With the defence thus recorded we have tried the suit *de novo*. So far as we could understand the nature of the objection touching the plaintiff's right to sue, it was based on the ground of the names of the two last joined plaintiffs, Sew Churnlall and Bhogowandeen, being added after their right to institute the suit was barred by limitation, and the two other plaintiffs being legally incompetent to maintain the suit, and the names of the heirs of Luchmondeen not being added as plaintiffs. We are of opinion that the persons who have been joined together as plaintiffs are *prima facie* the proper parties to maintain the suit, as they are the persons who are interested in the subject-matter of the suit, and with whom virtually the original contract was made by the defendant. As regards Luchmondeen's heirs, his widow and sons not being made parties to the suit, we do not consider it absolutely necessary that they should be impleaded either as plaintiffs or defendants *firstly*, because even if the widow, under the Mitakshara law which governs the case had a right as well as her sons, they were members of a joint undivided Hindu family living in commensality (where each member acts as an agent for the others), and were fully represented by the surviving partners, who, when there is a change in the partnership, are the proper persons to sue and be sued in respect of all contracts made by or with the firm (Lundley on Partnership, 4th Edition, p. 490). *Secondly*, because, in the absence of a statutory provision, this has been the procedure in such suits recognised by the existing practice of this Court. We have next to consider whether the suit of the two first plaintiffs is also barred. We are satisfied that the law never intended it to be so. The very words of s. 22 of Act XV of 1877 are quite against such a construction. The words of the section are : "the suit shall, as regards him, be deemed to have been instituted when he was so made a party." This is very [818] plain language obviously meaning that it is not intended to affect a plaintiff who has instituted his suit within time. This is the view taken by Mr. Justice MARKBY in *Boydonth Bag v. Grish Chundar Roy* (I. L. R., 3 Cal., 26) of the identical words in s. 22 of Act IX of 1871, which have been re-enacted by s. 22 of the present Limitation Act, though it is true PRINSEP, J., differed from him. Another point has been raised by the defendant's pleader. He argues that as the payments were not made within the prescribed period for payment, this suit is even against all the plaintiffs barred by limitation. The hathchitta on which the suit was brought is for Rs. 460-8, and is dated the 11th December 1876 (2nd Pous 1283). The payments made and entered by the defendant in it were as follows :—

2nd January 1877 (19th Pous 1283).....	.....	.....Rs. 50
11th April 1877 (30th Choitro 1283).....	.....	.....Rs. 40
20th July 1877 (6th Srabun 1283).....	.....	.....Rs. 40
Total .....		.....Rs. 130

"The suit was instituted on the 19th July 1880, only one day within time if the last payment on the 20th July 1877 gives rise to a new period of limitation.

"No time is fixed for the payment of the money, so it becomes due on the date of the *hathchitta*, viz., the 11th December 1876. The argument is, that the words in s. 20 of Act XV of 1877, "before the expiration of the prescribed period" refer, not to the prescribed period of limitation, but to the period prescribed for the payment of the debt. This argument is derived from the fact that, in other sections of the Act the words used are, "before the expiration of the prescribed period for the suit" (s. 19), or "in computing the period of limitation prescribed for any suit, appeal, or application" (s. 12), or some such words; and that accordingly "the prescribed" in s. 20 does not mean the prescribed period of limitation, but the period prescribed for the payment of the debt. In our opinion however, they mean the prescribed period of limitation, although the section does not expressly refer to suits. Reading s. 20 together with s. 4 of the Act, which is the section that prescribed the different periods of limitation for different descriptions of suits, the words "prescribed period" in s. 20 have, we think, reference to s. 4\* and the second schedule of the Act. The words "prescribed period" alone are obviously used for the purpose of conciseness, as it will be found that they are similarly used in illustration (b) of s. 4† of the Act, while there can be little doubt about their meaning in the illustration referred to. We may further remark that Mr. Ninian Thompson has also put a similar construction upon the same words used in s. 20 of Act XIV of 1871 (*vide* page 17 of his supplement to a commentary on Act XIV of 1859). Again, if the argument of the defendant's pleader is a sound one, s. 20 will only apply to debts payable at some date subsequently to the date on which they were contracted, and not to debts payable on demand. Indeed, payments made in respect of a debt to become due, would not be a payment of a debt. If money is borrowed on the 1st January, and it is agreed that it shall be repaid on the 1st February, strictly speaking there is no debt till the 1st February. Then, again, it could not give rise to a new period of limitation, for the limitation would run, not from the date of payment, but from the date the debt became due, such as the 1st February. In other words, if the argument is a good one, the section is wholly infructuous. Such cannot, we think, have been the intention of the Legislature. We have next to decide whether the two plaintiffs who instituted this suit can recover judgment against the defendant for the entire claim. We are of opinion, that either as partners, or as members of a joint undivided Hindu family, they have a right, at least to some portion of the money sued for, though what that proportion is we cannot decide. We see, however, no reason why the two plaintiffs who originally instituted the suit should not succeed in respect of the entire claim. We are of opinion that each member of a joint undivided Hindu family, and every partner of a partnership, is an agent for the

Dismissal of suits, etc., instituted, etc., after period of limitation. •

\*[Sec. 4 :—Subject to the provisions contained in sections five to twenty-five (inclusive), every suit instituted, appeal presented, and application made after the period of limitation prescribed therefor by the second schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence.

*Explanation.*—A suit is instituted in ordinary cases when the plaint is presented to the proper Officer; in the case of a pauper, when his application for leave to sue as a pauper is filed; and in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator.]

†[Sec. 4 (b) :—An appeal presented after the prescribed period is admitted and registered. The appeal shall, nevertheless, be dismissed.]



other members or partners. A firm so constituted in the name under which a suit is originally brought and maintained, represents the whole family. A joint undivided Hindu family is a little commonwealth, in which every member works for the common good. The earnings and the acquisitions of property by each member, wherever made, are the [820] earnings and acquisitions of the whole family, and their interests in all respects are identical; and if the members are individually capable of acquiring property for the use of the whole family, they can certainly sue and be sued individually. The two partners or plaintiffs, at the time they instituted the suit, were alone in Calcutta, and the two others in Lucknow. In one sense, therefore, these two partners can fairly say that they alone carried on the business in Calcutta in the name of the firm, quite irrespective of the two other partners, and in point of fact they actually did so; they, therefore, sought to recover the money in the name of the firm, which included all the partners, in respect of an entire and indivisible contract. The Court has power, under s. 26 of the Civil Procedure Code, extended to this Court, to give judgment for one or more of the plaintiffs who may be entitled to relief, and under s. 32 of the aforesaid Code, we can also strike out the names of any plaintiff who may have been improperly joined. The *hathchitta* given by the defendant to the plaintiff Ramsebuk was joint, and did not specify shares, the money due under it was payable collectively, and not distributively; and as the defendant has no defence on the merits, we are of opinion that, in the interests of justice, there should be a judgment for the two first plaintiffs who instituted the suit, for the whole amount of the claim. Both sides have asked us to refer certain questions to the High Court, and as we think that they are important, we are quite willing that they should be referred to a higher tribunal. The questions referred, which are in nearly the same language as those given to us by the defendant's pleader, are:—

"1. Whether, upon the findings arrived at by the Court, the claim of the plaintiffs is barred, because the names of the two plaintiffs were added to the plaint after the suit as against them was barred?"

"2. Whether the Court, on the application of the first two plaintiffs, had power to add the names of the third and fourth plaintiffs, the defendant having objected that the suit, so far as the third and the fourth plaintiffs were concerned, was barred?"

"3. Whether or not the suit is not altogether barred, having regard to the terms of s. 20 of the Indian Limitation Act of 1877?"

[821] "4. Whether the first and second plaintiffs, having by their own application made the third and fourth plaintiffs parties, can ask the Court to give them (the first and second plaintiffs) a judgment separately from the third and fourth plaintiffs?"

"5. Can the Small Cause Court enter into the equitable rights of the plaintiffs as between themselves? or is not the Small Cause Court a Court of Equity for defendants only in terms of s. 25 of Act IX of 1850, by which legal claims or demands are permitted to be brought into Court with permission to the defendants to plead equitable defences?"

"6. Whether the view taken by the Court of the right of the plaintiff's as joint members of an undivided Hindu family, or as members of a trading partnership *re* their debtor, is correct? Contingent upon the opinion of the High Court our judgment is for the full amount sued for in favour of the two first plaintiffs alone, and the suit is dismissed as against the last two plaintiffs."

• Mr. R. Allen for the plaintiffs.—The suit is not barred with respect to the

original plaintiffs. Section 22 of Act XV of 1877 only provides that the suit should be barred with respect to the party joined. This would not affect the original plaintiffs, as the right still remained in the others, though the remedy was gone: *Boydonth Bag v. Grish Chunder Roy* (I. L. R., 3 Cal., 26), which was decided on similar words in s. 22 of Act IX of 1871. [GARTH, C. J.—Then a plea of nonjoinder would be of no use.] It is practically done away with, it only entails adjournment. [GARTH, C. J.—The defendant may have a right of set-off, which possibly he would not be able to avail himself of, unless all the plaintiffs were joined. PONTIFEX, J.—Must there not be a proper institution of a suit to save plaintiffs from being barred by limitation—just as an incomplete acknowledgment is not sufficient—and can the suit be said to be properly instituted unless all the parties who ought to be plaintiffs are before the Court?] The suit is sufficiently complete to save the bar of limitation; the whole debt is due to each of the plaintiffs, and if one is allowed to recover, there is no injustice done to the [822] defendant. Section 26 of Act X of 1877 provides, that the Court may give judgment for such one or more of the plaintiffs as may be found entitled to relief. This section is made applicable to the Presidency Small Cause Courts. [PONTIFEX, J.—Here the added plaintiffs were only before the Court for the purpose of being dismissed as being barred.] It is submitted they are before the Court in a suit, and the Court could act under s. 26. Then it is submitted, the original plaintiffs can sue as agents for, and on behalf of, the other members of the joint family. [PONTIFEX, J.—If you put their right to sue on the ground of their being a Mitakshara family, you must show that a karta may sue alone without joining the adults.] The original plaintiffs are agents of the other members; they are the only members residing in Calcutta: it is submitted they can sue alone: *Gocool Doss v. Tejram* (Unreported), decided on the 24th January 1879 by Wilson, J. [PONTIFEX, J.—That was only as to surviving partners.] See *Kelsal v. Gopaul Doss* (1 Taylor and Bell, 338). These plaintiffs can bind the others; therefore, they can sue alone. See Lindley on Partnership, 491; *Agacio v. Forbes* (14 Moore's P. C., 160). Under s. 20 of Act XV of 1877, the original plaintiffs are not barred, the words "prescribed period" mean the prescribed period of limitation, not the period fixed for payment of the debt. The contrary has been decided in *Tariney Churn Nundy v. Shaikh Abdur Rohoman* (2 C. L. R., 346); but that construction would make the section useless and unmeaning, as the learned First Judge shows in the reference, and it is submitted that decision is not correct.

Mr. Piffard for the defendant was not called on.

The Opinion of the Court was delivered by

Garth, C. J.—Before answering *seriatim* the questions referred to us, I think it necessary to explain what I consider to be the law with regard to the non-joinder of plaintiffs in actions of contract. This explanation will of itself afford an answer to most of the questions referred. In actions of contract, it is the right of the defendant, if he takes the objection [823] in proper time, to insist upon all the persons with whom he contracted being joined as plaintiffs, and if, after the objection has been raised, the plaintiff proceeds with the suit without taking steps to add the person or persons whose nonjoinder has been objected to, and the Court finds that the objection is well founded, the suit must be dismissed. It is for this reason that the nonjoinder of plaintiffs in an action of contract has always been a plea in bar; and the justice of the rule is manifest. If a defendant is sued by one only of two persons with whom he has contracted, he may have a set-off, or any other defence against the two, of which he could not avail himself as against the one

only ; and, besides this, the defendant ought always to be in a position to recover his costs, if he succeeds, *as against all the parties* with whom he contracted. In the present case the two original plaintiffs yielded at once to the defendant's objection and the Court very properly, upon their application, allowed the two other plaintiffs to be added. But then the 22nd section of the Limitation Act presented a new difficulty to the plaintiffs, and upon this the main question in the case depends. In England, since the passing of the Common Law Procedure Act of 1852, the amendment might have been made, if the Court thought proper, so as to protect the claim of the plaintiffs from limitation, because, after the amendment, the suit would be considered as having been commenced by all the plaintiffs at the time when it was first instituted. If the Court had reason to believe that all the plaintiffs had not been joined for some improper motive, the amendment would be refused ; but if it considered that the nonjoinder was a *bonâ fide* mistake, the amendment would be made, for the express purpose of protecting the plaintiffs' rights, and of preventing the Limitation Act from working injustice. (See *Lakin v. Watson* (2 Cr. & M. 685), *Brown v. Fullerton* (13 M. & W. 556, and cases there cited at p. 556 of the Report). But the policy of the Legislature in this country has been to make the law of limitation much more strict than in England, and to take away, as far as possible, any discretion from the Courts to modify its strictness. The provisions of s. 22 of the Limitation Act seem to have been passed [824] with the avowed object of preventing such amendments being made in such a way as to relieve the plaintiffs from limitation ; and the effect of those provisions in such a case as the present is to render the amendment virtually useless to the original plaintiffs. If those plaintiffs cannot enforce their claim without joining the additional plaintiffs, and the additional plaintiffs are barred from enforcing it by the law of limitation, it is obvious that the suit must fail. The lower Court seems to have supposed that the original plaintiffs ought in equity to succeed, although their co-contractors may be barred. But this would be directly at variance with the rule of law, which requires that all co-contractors should join in such a suit, and it would place it in the power of one or more of several plaintiffs (co-contractors) to render any objection by the defendant on the ground of nonjoinder ineffectual ; because, by bringing their suit at the very last moment, to save limitation, they might always prevent their co-contractors being usefully joined, and so secure the judgment of the Court themselves to the exclusion of their co-contractors. We have been referred in the course of the argument to the case of *Boydonth Bag v. Grish Chunder Roy* (I. L. R. 3 Cal. 26), in which Mr. Justice MARKBY appears to have held, that, under circumstances similar to the present, the two original plaintiffs would be entitled to a decree, though their co-contractors were barred. I confess I cannot understand, nor agree with that decision ; and if Mr. Justice PRINSEP had concurred in that view, I should have thought it right to refer the question to a Full Bench. But as I understand, Mr. Justice PRINSEP decided the appeal upon another ground. Of course, if in this case it had been found in the Court below as a fact, that the contract was made *between the defendant and the two original plaintiffs only*, there would be no difficulty in deciding in their favour, because then the joinder of the two other plaintiffs would only have been a *misjoinder*, which by s. 31\* of the Code of Civil Procedure is never now fatal to

Suit not to fail by reason of misjoinder.

\*[Sec. 31 :—No suit shall be defeated by reason of the misjoinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.]

Nothing in this section shall be deemed to enable plaintiff to join in respect of distinct causes of action.]

a suit (Section 31 of the Civil Procedure Code has, however, not been extended to the Presidency Small Cause Courts—*Rep. note*). That section is a reproduction of s. 19 of the Common Law Procedure [825] Act, 1860, and applies (for good reasons) to cases of *misjoinder* only. There can never be any injustice in allowing *too many plaintiffs* to sue together, or in allowing them to frame their suit either jointly or severally, or in the alternative, because the defendants in such a case can always set up different defences against different plaintiffs, and is in a position to obtain his costs from all or any of them against whom he may succeed. The Court can always dismiss a suit against one or more plaintiffs without difficulty or injustice, and without incurring any of the objections which are applicable to the case of nonjoinder. Thus, for instance, suppose that three persons, *A, B, and C*, sued *D* upon a contract, and *D's* defence was, that he made the contract with *A* and *B* alone, and that as against them he has a set-off. Then, if all the three plaintiffs succeeded in proving their case against the defendant, he would be defeated, because, as against the three, he would have no right of set-off. But if, on the other hand, the defendant proved that he made the contract with *A* and *B* only, the suit would be dismissed as against *C*, and *D* would probably get his costs against him; but as regards *A* and *B* the question of set-off would be tried, and the defendant would succeed or not according as he proved that plea. This is the reason why both by the Common Law Procedure Act of 1860 and the Indian Code of Civil Procedure, misjoinder of plaintiffs can never be fatal to a suit, though nonjoinder of plaintiffs may. Now, as I understand, the lower Court has found in this case, that all the four plaintiffs were partners in the concern, and that the defendants contracted with all jointly, and it is difficult to see how upon the facts the Judges could have come to any other conclusion. The assets of the firm were the joint property of all the partners; the firm was conducted with their joint moneys; and the business appears to have been carried on by the acting partners on behalf of all the four. If I considered that there was any room for doubt as to this point, I should be disposed to send the case back to the Court below to have it reconsidered; but as the original plaintiffs declined to raise that question upon the defendant's objection, I think, that if the case went back, it could only be at the plaintiffs' cost. [825] Having thus explained what I consider the law to be as applicable to the case, I will proceed to answer the question referred to us *seriatim* :—

1. I think that the claim of the original plaintiffs is barred, because they can only enforce their claim in conjunction with the other plaintiffs, and the other plaintiffs are barred by s. 22 of the Limitation Act.

2. It was in the discretion of the Court to add the names of the third and fourth plaintiffs, and I think that, under the circumstances, they were right in so doing.

3. The suit, in my opinion, would have been in time if all the plaintiffs had joined in the first instance. I quite agree with the learned Judges of the Small Cause Court that the word "prescribed period" in s. 20 means, not the period prescribed for the payment of the debt, but the prescribed period of limitation. We were referred to the case of *Tariney Churn Nundy v. Shaikh Abdur Rohoman* 2 (C. L. R., 346), in which a contrary view appears to have been entertained; and if it was necessary for the purpose of this case, we should refer the point to a Full Bench. But having regard to our judgment upon the other point, it is not necessary.

4. For the reasons already given, I think that the first and second plaintiffs are not entitled to the judgment of the Court.

5. There is no equity, in my opinion, but often much injustice, in allowing one joint contractor out of many to sue the defendant, notwithstanding an objection duly made by the latter; and the Court has no right to allow one contractor to recover under such circumstances, though he may no doubt afterwards adjust the sum which he recovers with his co-contractors.

6. As between the members of the joint family, any one or more may, of course, be authorized by the rest to act as their agent or agents in any business transaction; but when a joint family, or any members of it, carry on a trade, in partnership, and contract with the outside public in the course of that trade, they have no greater privileges than any other traders. If they are really partners, they must be bound by the same rules [827] of law for enforcing their contracts in Courts of law as any other partnership. The defendant will have the costs of this reference.

Attorney for the Plaintiffs: Mr. Hart.

Attorney for the Defendant: Mr. E. O. Moses.

#### NOTES.

#### [JOINT CONTRACTORS: NECESSARY PARTIES TO SUIT—

Persons having the same cause of action must sue jointly as;

(1) When all the necessary parties were not joined in a partnership suit it was dismissed:—(1887) 14 Cal. 791.

(2) One only of two or more co-partners cannot sue except in case of assignment by the other or others:—(1892) 14 All. 524.

(3) In a suit against a firm some alone could be sued, allowing the right against the other to become barred:—(1882) 6 Bom. 700.

(4) One alone sued to recover a debt which accrued due to his father, himself and his two brothers as members of a joint family. Held suit not maintainable:—(1888) 7 Bom. 217.

See also (1907) 6 C. L. J. 558; (1899) 29 Cal. 349; (1908) 25 All. 378; 29 All. 311.

#### II. BUT THIS PRINCIPLE NOT APPLICABLE TO ACTIONS ON TORT—

See (1897) 25 Cal. 285, a case of distraint.

#### III. NOR TO CASES OF CO-PARCENERS—

See (1895) 6 M. L. J. 27.

#### IV. LIMITATION AS AGAINST SUBSEQUENTLY ADDED PLAINTIFFS—

When Court does *not* add parties on its own motion limitation runs against them:—(1906) 38 Cal. 613.

But not when Court acts *suo moto*:—(1892) 17 Mad. 12; (1892) 9 M. L. J. 176.

#### V. WHO ARE NECESSARY PARTIES—

Representatives of a deceased partner are *not* necessary parties to a suit on a firm debt:—(1892) 17 Bom. 6.

#### VI. WHEN TO ADD AS PARTY DEFENDANTS—

When some persons entitled to sue refuse to join as plaintiffs, then alone they can be added as party defendants:—(1889) 17 Cal. 160.]

APPELLATE CIVIL.

[6 Cal. 527]

The 11th March, 1881.

PRESENT :

MR. JUSTICE MORRIS AND MR. JUSTICE TOTTENHAM.

Dwarkanath Pal and others.....Defendants

*versus*

Grishchunder Bundopadhya and others.....Plaintiffs.

*Suit to cancel under-tenures—Parties—Act XI of 1859, s. 37.†*

On the 13th January 1871 *A* and *B* purchased an estate sold for arrears of Government revenue. The original proprietors asserted their right to collect the rents of a portion of the property by virtue of holding two shikmi talooks and a howla tenure. This right was affirmed by the High Court in April 1875, *B* had previously sold his interest to *C*. On the 29th May, 1876, *A* created a patni of his eight annas in favour of *D* and *E*, and on the 4th July 1876, *C* purchased all the rights of the original proprietors. On the 18th January 1877, *A* sued under Act XI of 1859, s. 37, to cancel or vary the tenures, making the original proprietors,

\* Appeal from Appellate Decree, No. 1391 of 1879, against the decree of J. C. Geddes, Esq., Judge of Tippera, dated the 29th March 1879, affirming the decrees of Baboo Uma Churn Kastogiri, First Subordinate Judge of that District, dated the 19th February 1878.

†[Sec. 37:—The purchaser of an entire estate in the permanently-settled Districts of Bengal, Behar, and Orissa, sold under this Act for the recovery of arrears due on account of the same shall acquire the estate free from all encumbrances which may have been imposed upon it after the time of settlement and shall be entitled to avoid and annul all under-tenures and forthwith to eject all under-tenants, with the following exceptions:—

*First* :—Istemrree or mokurree tenures which have been held at a fixed rent from the time of the permanent settlement.

*Secondly* .—Tenures existing at the time of settlement, which have not been held at a fixed rent. Provided always that the rents of such tenures shall be liable to enhancement under any law for the time being in force for the enhancement of the rent of such tenures.

*Thirdly* .—Talookdaree and other similar tenures created since the time of settlement, and held immediately of the proprietors of estate; and farms for terms of years so held, when such tenures and farms have been duly registered under the provisions of this Act.

*Fourthly* :—Leases of lands whereon dwelling houses, manufactories, or other permanent buildings have been erected, or whereon gardens, plantations, tanks, wells, canals, places of worship, or burning or burying grounds have been made, or wherein mines have been sunk.

And such a purchaser as is aforesaid shall be entitled to proceed in the manner prescribed by any law for the time being in force for the enhancement of the rent of any land coming within the fourth class of exceptions above made, if he can prove the same to have been

C, and various tenants defendants. C objected that A had no right of suit or cause of action as he had parted with all his rights to D and E; and that as his entire interest in the estate was only eight annas, he could not sue to cancel a part only of the sub-tenures D and E then applied to be added as parties, and were made plaintiffs.

*Held*, that A had no cause of action, as he had previously parted with all his rights as zemindar, to cancel these tenures in favour of D and E, nor could D and E sue, as the were not "purchasers of an entire estate." That A having no cause of action it was not competent to the lower Court to add D and E as plaintiffs, and so introduce a right of action which did not previously exist; and

[525] That, even on the assumption that D and E were properly made plaintiffs, the lower Appellate Court should have taken into consideration certain admissions made by them as to the existence of the undertenure, both before and after the Government sale.

*Sreemunt Ram Dey v. Kookoor Chund* (15 W. R., 481), followed.

Mr. Jackson and Baboo Kashi Kant Sen for the Appellant.

Baboo Srinath Doss and Baboo Bykunt Nath Doss and Munshee Serajul Islam for the Respondents.

THE facts of this case sufficiently appear from the **Judgment** of the Court (MORRIS and TOTTENHAM, JJ.), which was delivered by

**Morris, J.**—This suit was instituted by one Grish Chunder Bundopadhya, one of two auction-purchasers, who, on the 13th January 1871, jointly purchased the estate, Talook Sributso Doss, when it was put up to sale for arrears of Government revenue on the default of the proprietors, Raj Coomar Bose and Dino Nath Bose. After their purchase, the auction-purchasers found themselves unable, in four villages of the property, to realize rent direct from the ryot-cultivators, owing to the opposition of the former proprietors, the Boses who asserted their right to collect the rent in virtue of holding certain intermediate tenures in the shape of two shikmi talooks and one howla tenure. Various suits for rent were instituted against the ryot-cultivators, either by the Boses as plaintiffs, in which the auction-purchasers intervened, or *vice versa* by the auction-purchasers as plaintiffs, in which the Boses intervened. The litigation was carried up to the High Court, and the final result in April 1875 was to establish the existence of these under-tenures and to declare the right of the Boses to collect the rent from the ryot-cultivators. But in February 1875, for about a month and-a-half before this decision, Brijnath Roy, the coparcener of Grish Chunder Bundopadhya, sold his interest in the property to certain

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held at what was originally an unfair rent, and if the same shall not have been held at a fixed rent, equal to the rent of good arable land, for a term exceeding twelve years; but not otherwise.

Provided always, that nothing in this section contained shall be construed to entitle any such purchaser as aforesaid to eject any ryot, having a right of occupancy at fixed rent, or at a rent assessable according to fixed rules under the laws in force, or to enhance the rent of any such ryot otherwise than in the manner prescribed by such laws, or otherwise than the former proprietor, irrespectively of all engagements made since the time of settlement, may have been entitled to do.]

persons, who may be called generally the Pals. Then, on the 29th May 1876, Grish Chunder Bundopadhya created a patni of his eight annas share of the pro-[829] perty in favour of two persons, Kali Coomar Dutt and Nill Komul Dutt; and on the 4th July 1876, one of the Pals, the appellant now before us, purchased, under a deed of sale of that date, all the rights and interests of the Boses in the three intermediate tenures which they set up. The effect of the last purchase was, to throw the estate practically into the hands and under the control of the Pals; and hence, on the 18th January 1877, Grish Chunder Bundopadhya brought the present suit to cancel or avoid these subordinate tenures. He made defendants the Boses, the Pals, and the various tenants whose rents he had failed to recover in the previous rent-suits.

The principal defendant, No. 3, who is the present appellant, at once objected that Grish Chunder Bundopadhya had no right of suit or cause of action, as he had parted with all his rights to the patnidars, Nil Komul and Kali Coomar Dutt, and further that as his entire interest in the estate amounted to an eight-anna share, he could not sue to cancel a part only of these subordinate tenures. He took other objections, which it is not necessary now to mention. But the result of the first objection taken in his written statement was, that the patnidars, Nil Komul and Kali Coomar Dutt, made an application to the Court to be added as parties to the suit, and to this the Court acceded by an order dated April 21st, 1877. The suit was then tried on its merits, and the Subordinate Judge dismissed the claim of Grish Chunder Bundopadhya with costs, but gave a partial decree in favour of the patnidars, dismissing their claim in respect to the two shikmi talooks, but directing the cancellation of the howla tenure. Against this order Grish Chunder Bundopadhya and the patnidars appealed, and a cross-appeal against the decision regarding the howla was preferred by the defendants. The District Judge dismissed the appeal of the defendants, and decreed the claim of the three plaintiffs in full, and it is this order which forms the subject of the present appeal.

Three points are urged before us in this appeal: *First*, that as Grish Chunder Bundopadhya, who instituted the suit, had no cause of action, he having previously parted with all his rights as zemindar, to cancel these tenures in favour of the patnidars, Kali Coomar and Nil Komul Dutt: his suit ought to have been [830] at once dismissed. *Second*, that, when no right of action lay in Grish Chunder Bundopadhya, the Court could not add the patnidars as plaintiffs to the suit, and so introduce a right of action which did not before exist, and *third*, that even on the assumption that the patnidars were properly made co-plaintiffs, the lower Appellate Court should have taken into consideration certain admissions made by them as to the existence of these under-tenures both before and after the Government sale of the property.

We think that, on all these points, the appellant must succeed. On the first point the Judge considers the Subordinate Judge to be in error in holding Grish Chunder Bundopadhya, by his assignment of his rights as zemindar to the patnidars, to have no longer any right to deal with under-tenants of those patnidars; and the reason he gives is this: "The grantor of a patni is bound to warrant his patnidars in the enjoyment of his patni as granted; and the zemindar has a right to see that there are assets available to the patnidar,



wherewith the patnidar may meet his half-yearly liability." But there appears to be some confusion of thought in this argument. There is no question that the patnidars received the property covered by the patni lease in exactly the same state as the zemindar had held it. And if the patnidars could not meet their half-yearly liability,—that is, pay the rent reserved,—the course for the zemindar to pursue was, not to bring suits against under-tenants, which the patnidars alone have the right to bring, but to enforce their liability by bringing the patni to sale under the provisions of the patni law. That the patnidar alone can bring a suit such as the present; and that the zemindar having given away his rights in patni cannot do so, has been expressly declared by a Bench of this Court in the case of *Sreemunt Ram Dey v. Kookoor Chund* (15 W.R., 481). Their Lordships say: "We think there is no doubt whatever that an auction-purchaser can sue within twelve years of the date of his purchase to recover any land that was originally included within the estate sold for arrears of revenue. When he created a patni in favour of the present plaintiff, it is quite clear that he could not sue to annul an under-tenure within that patni, and [831] that no one but the patnidar could do so." From this the second point taken in appeal follows, as a necessary consequence, *viz.*, that when Grish Chunder Bundopadhyas had no right of action against the defendants, he could not mend his case by joining as parties to the suit other persons, the patnidars, who had a right of action against them.

But, independently of these considerations, it seems to us that the plain was bad on the face of it, and ought to have been dismissed. We understand the suit to be one brought by an auction-purchaser to avoid certain under-tenures under the provisions of s. 37, Act XI of 1859. No doubt, the plaintiff alleges that these under-tenures are fictitious, and have been set up in fraud simply to deprive the auction-purchaser of the benefit of his purchase; but clearly this allegation cannot be maintained in the present suit. It was an allegation which ought to have been made, and doubtless was made, in the various suits for rent to which the present plaintiffs and defendants were parties. The effect of these suits was to declare the Boses entitled to collect the rent. Decrees were passed on the basis of the proof adduced by the Boses that, as under-tenure holders, they had previously collected the rent. The only ground, therefore, on which the plaintiff could bring this suit was that stated by him in the latter portion of his plaint, *viz.*, that none of these subordinate tenures were created at the time of the Permanent Settlement and comprised within the talook (Sributso Doss), and that the present talook devolved on him "free from all encumbrances." This being so, we are of opinion, that neither Grish Chunder Bundopadhyas as one of the original auction-purchasers, nor subsequently the patnidars to whom he assigned his rights, could bring this suit, inasmuch as, in the language of s. 37, Act XI of 1859, they were not "purchasers of an entire estate." By their own showing they purchased only an eight-anna share. Before proceeding, therefore, to avoid under-tenures comprised within the estate under the power granted to them by that Act, it was necessary to join the co-purchaser, as co-plaintiff in the action. But admittedly the co-purchaser, who is now, as found by the District Judge, represented by the Pals, [832] of whom the present appellant is one, refuses to do anything of the kind. This section of the Act is of a penal character. It presses hardly upon persons who may have rights of long standing, and was enacted simply for the purpose of protecting the Government revenue. It must, therefore, be construed strictly. But just as the law vests "the proprietor" of an estate with power to measure the lands of such estate, and our Courts have repeatedly held that

no sharer only can be treated as a proprietor to enforce this right, so here we think we must hold that one of two joint auction-purchasers who, without the consent of his co-sharer, brings a suit to avoid under-tenures, within the estate purchased by them, cannot be recognised as an "auction-purchaser of an entire estate" within the meaning of s. 37 of the Act.

On all these grounds, therefore, we reverse the judgment of the Court below, and dismiss the suit of the plaintiff with costs in all Courts.

*Appeal allowed.*

**NOTES.**

[This case was followed in (1896) 24 Cal. 334, where it was held that if an estate was sold in auction, all the purchasers in auction must join to annul or avoid an under-tenure under Sec. 37 of Act. XI of 1857.]

[6 Cal. 833]

CRIMINAL REFERENCE.

*The 9th March, 1881.*

PRESENT :

MR. JUSTICE PONTIFEX AND MR. JUSTICE FIELD.

The Empress

*versus*

Nuddiar Chand Shaw, Accused.\*

[= 3 C. L. R. 152]

*Excise—Sale by wholesale—Sale by servant—Beng. Act VII of 1878, ss. 15, 59 and 60.*

A sale of more than twelve quart bottles, or two gallons of spirituous or fermented liquors of *the same kind*, made at one transaction, is a sale by wholesale.

*Quere.*—Whether a sale of twelve quart bottles of one kind of liquor, and three quart bottles of another kind, at the same time, comes within the prohibition in the explanation clause of s. 15.

The licensed retail vendor himself is the only person liable to conviction under s. 60.

THIS was a reference made to the High Court under s. 296 of the Criminal Procedure Code.

[833] One Nuddiar Chand Shaw, a servant of a licensed retail vendor of imported liquors, sold to an informer, twelve quart bottles of beer and three quart bottles of brandy (the sale of the two sorts of liquors being completed in one transaction). On these facts being proved, the Joint Magistrate of Howrah convicted Nuddiar Chand of an offence under s. 60 of Beng. Act VII of 1878 for having sold excisable imported liquor by wholesale and sentenced him to pay a fine of one hundred rupees.

On the case coming up before the Sessions Court, the Judge was of opinion that the facts proved, did not amount to an offence under s. 60 of the Act, for that the sale of two distinct quantities of different liquors, although in total exceeding two gallons, did not amount to a wholesale sale within the meaning of the Act. He further added, that the transaction was one which was prohibited by s. 15 of the Act and by the conditions of the license held by the convicted person's employer, and as such, would be punishable, under s. 59 of the Act, with a fine of Rs. 50 ; but the offence could not be brought under s. 60. He further was of opinion that the conviction was bad, inasmuch as it had been had upon *the servant of the vendor*, whereas the last clause of s. 59 made the vendor alone responsible. He therefore referred the case for the opinion of the High Court.

No one appeared at the hearing.

\* Criminal Reference, No. 93 of 1881, from the order of J. P. Grant, Esq., Sessions Judge of Hooghly, dated the 28th February 1881.

The Opinion of the Court (PONTIFEX and FIELD, JJ.) was given by

**Pontifex, J.**—The accused has been convicted under s. 60 of "The Bengal Excise Act," VII (B. C.) of 1878. This section enacts that, "every licensed retail vendor who sells by wholesale . . . shall be liable for every such offence to a fine not exceeding two hundred rupees."

The Sessions Judge is of opinion that the conviction is bad: (1) because the sale of twelve bottles of beer and three bottles of brandy at the same time, is not a sale by wholesale; and (2) because the person convicted is not a retail vendor, but the servant of such a vendor.

We think that the Sessions Judge is right in his view of the law as to the second point.

As to the first point, there is more room for doubt. Under [834] s. 15 of "The Bengal Excise Act," the sale of a larger quantity of spirituous or fermented liquors than twelve quart bottles would be a sale by wholesale. If, therefore, more than twelve bottles of beer or of brandy, *i. e.*, of the same kind of liquor, had been sold at one transaction, this would be a sale by wholesale. In this case two kinds of liquor were sold, and the quantity of neither kind exceeded twelve bottles. The case of such a sale is provided for by a clause of the 15th section, which is in fact an explanation, *viz.*, "Under this section a sale of an assortment of spirituous or fermented liquors . . . in greater quantity than is specified above, by a licensed retail vendor, is prohibited." If this provision stood alone without any other provision following or qualifying it, the sale in the present case would probably be within the prohibition. The section then goes on to enact:—"The Board, may, by rule, define what shall be held to be an assortment for the purposes of this section." So far as we have been able to discover, there is no evidence that the Board have made a definition of "an assortment" from which would be excluded such a sale as that in this case—a sale, that is, of twelve bottles of beer and three bottles of brandy. This being so, the sale in question probably comes within the prohibition in the explanation clause above referred to, but for the decision of this case it is not necessary to determine this point, as we think that, upon the second ground, the convictions must be reversed.

We are clear that the licensed retail vendor himself is the ~~only~~ person liable to the penalty provided by s. 60, and that the servant of such vendor is not liable to conviction under this section.

We set aside the conviction of Nuddiar Chand Shaw had under s. 60 of "The Bengal Excise Act," acquit him, and direct that the fine, if realised, be refunded.

*Conviction set aside.*

#### NOTES.

[This case was affirmed by the Full Bench in (1902) 29 Cal. 606 which overruled (1882) 8 Cal. 207. (1890) 17 Cal. 566, which followed this case, is good law under the ruling of the Full Bench, while (1888) 9 Cal. 847; following (1878) 19 W. R. Cr. 34 and 8 Cal. 207 is no longer good law.]

[335] APPELLATE CRIMINAL.

*The 4th March, 1881.*

PRESENT :

MR. JUSTICE PONTIFEX AND MR. JUSTICE FIELD.

In the matter of Gobind Chunder Moitra.....Petitioner  
*versus*  
 Abdool Sayad and others.....Opposite Party.\*

[=3 C. L. R. 247.]

*Criminal Procedure Code (Act X of 1872), ss. 491, 530—Dispute likely to cause breach of the peace—Decision on title by Civil Court—Police report—Incorporation of, by reference.*

On the 20th of March 1879, *A* applied to have certain lands, which he had lately purchased, registered in his name. The order of the Deputy Collector, declaring that *A* had proved possession, and was entitled to registration, was not passed until the 24th December 1879. Prior to *A*'s purchase, *B* and *C* had, on the 6th March 1879, obtained registration of the same property. The proceedings were sent to the Commissioner, who, on the 29th September 1880, declared *A* to be entitled to the land; and in October the registration in the names of *B* and *C* was cancelled, and *A*'s name was finally registered. In July 1880 proceedings under s. 530 of the Criminal Procedure Code were commenced upon the petition of certain ryots, who alleged that other ryots, at the instigation of *A*, were going to do acts which would lead to a breach of the peace. The Deputy Magistrate, the same person who as Deputy Collector had decided the land-registration case in favour of *A*, proceeded under s. 530 to consider the question as to who was in possession, and found that *B* and *C* were in possession.

*Held*, that the Deputy Magistrate could not, in these proceedings, set aside the order which he had made in the registration-case, as that order could only be set aside in a regular suit.

The proceedings recorded by the Deputy Magistrate did not set forth in express language that he was satisfied that a dispute likely to create a breach of the peace existed in respect of the land in question, between *A* on the one side and *B* and *C* on the other; nor did it set forth the grounds upon which he was so satisfied that such dispute existed.

*Held*, that the proceeding was therefore defective.

In the proceedings, the Magistrate referred to a police report, which, however, did not show that a breach of the peace was imminent.

*Held*, that although this report might be taken to be incorporated by reference, yet that it was not sufficient to justify the order.

[336] *Per FIELD, J.*—Unless the parties are able to show that there is such a dispute as is likely to induce a breach of the peace, the Magistrate should hold his hand and not proceed further. When the rights of the parties have been determined by a competent Court, the dispute is at an end, and it is the duty of the Magistracy to maintain the rights of the successful party, and the proper course for the Magistrate to pursue, if the defeated

\* Criminal Motion, No. 37 of 1881, against the order of Baboo Dwarka Nauth Roy, Deputy Magistrate of Pubna, dated the 20th January 1881.

party does any act that may probably occasion a breach of the peace, is to take action under s. 491\* of the Criminal Procedure Code, and require from such person security to keep the peace

In this case a rule had been obtained by one Gobind Chunder Moitra, calling upon one Abdool Sayad and others, to show cause why an order of the Deputy Magistrate of Pubna, made under s. 530 of the Criminal Procedure Code, declaring that Abdool Sayad and others were entitled to retain possession of certain lands until ousted by due course of law, and forbidding all disturbance of possession until such time, should not be set aside.

The facts of the case sufficiently appear from the judgment of PONTIFEX, J. Mr. *H. Bell* and Baboo *Ishur Chunder Chuckerbutty* in support of the rule. Mr. *Lee* and Baboo *Tarucknath Pauht* showed cause.

The following **Judgments**, were delivered :—

**Pontifex, J.**—I think this rule must be made absolute and the order of the Deputy Magistrate must be set aside. In giving my reasons for this decision, it is necessary to advert shortly to some circumstances which preceded the order made by the Deputy Magistrate. The person moving for the rule is one Gobind Chunder Moitra, who alleges that, in March 1879, he purchased the property with respect to which the order which he seeks to set aside was made under s. 530 of the Code of Criminal Procedure, the date of such order being the 20th January 1881.

On the 20th March \*1879, Gobind Chunder applied, under the land Registration Act, to have the land registered in his name. The decision of the Deputy Collector, in which he found that Gobind Chunder had proved possession and [837] was entitled to registration, was not passed until the 24th December 1879.

Now it appears that, prior to this alleged purchase by Gobind Chunder Moitra, Abdool Sayad and Abdool Majid, who now oppose the rule, had obtained registration of the property in their names, under the Land Registration Act, on the 6th March 1879. It was therefore impossible for the Deputy Collector, on the 24th December 1879, to direct that the land should be registered in the name of Gobind Chunder Moitra. It was necessary that, for that purpose, his proceedings should go up to the Commissioner, who, if he confirmed the decision of the Deputy Collector, alone had the power to direct that the registration in the names of Abdool Sayad and Abdool Majid should

\*[Sec. 491.—Whenever a Magistrate of a Division of a District, or a Magistrate of the 1st class, receives information that any person is likely to commit a breach of the peace, or to do any act that may probably occasion a breach of the peace, he may summon such person to attend at a time and place mentioned in the summons, to show cause why he should not be required to enter into a bond to keep the peace, with or without sureties, as such Magistrate thinks fit.

*Explanation.*—I. A summons, calling on a person to show cause why he should not be bound over to keep the peace, may be issued on any report or other information which appears credible and which the Magistrate believes; but the Magistrate cannot bind over a person until he has adjudicated on evidence before him.

*Explanation.*—II. A Magistrate may recall a summons issued under this section if he thinks proper.]

be cancelled in order that registration might be effected in the name of Gobind Chunder Moitra. The proceedings accordingly went before the Commissioner, but it was not until the 29th September 1880 that he passed his final orders, and under those orders, in the month of October 1880, the registrations in the names of Abdool Sayad and Abdool Majid was cancelled, and Gobind Chunder Moitra's name was finally registered. These registration-proceedings, therefore, occupied a period extending from the 18th March 1879 to October 1880. It must, however, have been manifest to Abdool Sayad and Abdool Majid, from the 24th December 1879, when the Deputy Collector decided in favour of Gobind Chunder's possession, that there was every probability that the result of the proceedings would be, that the property would be registered in the name of Gobind Chunder Moitra. As it seems to me, to evade these consequences, and while the reference was pending before the Commissioner in order that his ultimate orders might be obtained, recourse was had to proceedings under s. 530, which were commenced in July 1880.

In the registration-proceedings under the Land Registration Act, the Deputy Collector had decided the question in the presence of both parties. Each party had had an ample opportunity of adducing all the evidence that he thought necessary to prove his case. Each party did adduce evidence, and upon that evidence the Deputy Collector, acting under [838] the Land Registration Act, finally decided that Gobind Chunder Moitra *had proved possession*, and that he was entitled to have his name registered. Now the criminal proceedings in July 1880 were started by certain ryots submitting a petition of complaint, alleging that other of the ryots, at the instigation of Gobind Chunder Moitra, were going to do certain acts which would tend to a breach of the peace. Upon the receipt of that complaint, a police report was called for, and a report was accordingly made by the police. Their report is, that there were two persons who claimed to be landlords; that certain of the ryots took the part of one side, and others of the other side, and that, at a future time, when the crops came to be cut, it was probable that the ryots of one side might cut the crops which had been grown by the other side, and a breach of the peace might ensue; but the police recommended that it would be sufficient if the leading ryots on either side were bound over to keep the peace. Upon that report, the District Magistrate, who possibly had on notice of the registration-proceedings, held a proceeding under s. 530 and referred to the Deputy Magistrate, who was the very same person who as Deputy Collector had decided the land-registration case in favour of Gobind Chunder Moitra, finding that he had proved that he was in possession of this property. The Deputy Magistrate took evidence with respect to the complaint under s. 530. There was nothing in the police report to implicate Gobind Chunder Moitra, in any of the acts out of which it was suspected a breach of the peace might ensue. The police had only implicated the ryots. But notwithstanding, the Deputy Magistrate, in his office of Deputy Collector, had so recently, and after a full investigation, decided that possession was in Gobind Chunder Moitra, he considered that he might altogether disregard his prior proceedings as Deputy Collector, and proceed again under s. 530 to determine who was in actual possession of this land, being the very same question which he had already tried and decided.

Now, in my opinion the fact that these registration-proceedings were pending at the time that the application was made for interference under the Criminal Procedure Code, should [839] have made the Deputy Magistrate extremely

careful not to make any order as to possession under s. 530, unless he was quite satisfied that a *bona fide* dispute existed, and that a breach of the peace was imminent.

The Meahs knowing that the registration-proceedings could, under ordinary circumstances, only properly be set aside by a regular suit, thought they might avoid being obliged to resort to that remedy, if they could set the Criminal Court in motion under s. 530, and hence this alleged quarrel between the ryots and the application to the District Magistrate.

Unfortunately, the Deputy Magistrate, altogether disregarding the former order that he made after a full trial, has now entirely rendered nugatory his order of October 1880. In my opinion the Deputy Magistrate, knowing that the land-registration proceedings only awaited formal completion, ought not to have proceeded under s. 530 to deal with the question of possession—a question which he had himself so recently decided in the presence of both parties.

It would have been quite sufficient, if he thought a breach of the peace was imminent, to bind over the leading ryots on either side as recommended by the police. There was nothing to show from the police report that Gobind Chunder Moitra was implicated in the acts complained of, and it seems to me, in passing the order in respect of possession and in setting aside his own order, the Deputy Magistrate was acting improperly and unfairly to Gobind Chunder Moitra. It was never intended that the provisions of s. 530 should be used for the purpose of avoiding a decision so recently arrived at after a full trial.

The rule will be made absolute, and the order of the Deputy Magistrate set aside.

**Field, J.**—I also am of opinion that this rule must be made absolute, and the order of the Deputy Magistrate set aside. Under s. 530 of the Criminal Procedure Code, a Magistrate, in order to give himself jurisdiction, must first record a proceeding setting forth that he is satisfied that a dispute likely to induce a breach of the peace exists concern-[340]ing land, etc., and this proceeding must state the grounds upon which he is so satisfied. It appears to me that, in the case before us, the proceeding recorded by the District Magistrate is defective in that it does not set forth in express language that he was satisfied that a dispute likely to create a breach of the peace existed in respect of the land in question between Gobind Chunder Moitra on the one side, and the Meahs on the other side; and that it is further defective in that it does not set forth the grounds upon which he was so satisfied that such dispute existed. The Magistrate's proceeding refers to a police report, which may perhaps be taken to be incorporated by reference. I think the proceeding itself ought to contain all the particulars essential to give the Magistrate jurisdiction, and that reference to any other document ought not to be necessary in order to the ascertainment of these essential particulars. But even if the Police report be here taken to be part of the proceeding, the above defects are not removed, as this report shows merely that there was a dispute between two sets of ryots in the village, who had respectively taken the sides of Gobind Chunder Moitra and of the Meahs. Now the ryots are not parties to the present proceedings, the only parties being Gobind Chunder Moitra on the one side, and the Meahs on the other side; and it thus appears that the real "parties concerned in the dispute" were not the parties called upon to attend Court and state their claims to actual possession. There is another ground upon which it appears to me that the order of the Deputy Magistrate in this case should be set aside; and that is, because there was no



such dispute as is contemplated by s. 530. When once a Magistrate has recorded the preliminary proceeding under the section, and has called upon the parties concerned in the dispute to appear before him, the express language of the section does not provide for any further inquiry into the fact of the existence of a dispute likely to induce a breach of the peace. When the parties appear before the Magistrate, the law expressly requires only that the fact of actual possession be inquired into. But it appears to me that the essence and basis of the jurisdiction, which a Magistrate can exercise under s. 530, [841] depends upon there being a dispute likely to create a breach of the peace; and that, when the parties appear before the Magistrate, if they are able to show, or if it otherwise appears to the Magistrate that there is no dispute, or no such dispute as is likely to induce a breach of the peace, the Magistrate should hold his hand and not proceed further.

I take it that the term "dispute" in s. 530 means a reasonable dispute, a *bona fide* dispute, a dispute between parties who have each some semblance of right or supposed right. It has been decided by this Court, in the case of *Rai Mohun Roy v. Wise* (16 W. R., Cr. Rul., 24), that when a decree has been passed by a Civil Court regarding land in dispute, it is the duty of a Magistrate to maintain it; and he has no power again to institute proceedings regarding such land under this section of the Code of Criminal Procedure. The principle of this decision is this, that when the rights of parties have been determined by a competent Court, the dispute is at an end, and it is the duty of the Magistracy to maintain the rights of the successful party. In other words, the defeated party will not be allowed to go to the Criminal Court, and alleging the existence of a dispute, invoke the aid of the Magistrate and the Police to neutralize the effect of the decree of a competent Civil Court. When the rights of the parties have been determined, there is no longer a "dispute" within the meaning of s. 530; and the proper course for a Magistrate to pursue, if the defeated party does any act that may probably occasion a breach of the peace, is to take action under s. 491 of the Code of Criminal Procedure and require from such person security to keep the peace.

In the case of *Rai Mohun Roy v. Wise* (16 W. R., Cr. Rul., 24), the question of title had been definitively determined by the Civil Court; and no case has, so far as I am aware, as yet arisen in which the principle of that decision has been carried further, or extended to cases in which there has been merely a summary adjudication upon the question of possession. I think, however, that the proceedings under the Land Registration Act are proceedings to which the same principle should be extended. [842] Under this Act a revenue officer is directed to hold an inquiry; that inquiry in this particular instance was held in the presence of both parties; and they had an opportunity of producing before the revenue officer evidence to show that they were in possession of the land. After making his inquiry, the revenue officer came to the conclusion that Gobind Chunder Moitra was in possession; his name was registered in the Collector's general register as that of the person in possession of the estate; and the result of this registration is, that the Meahs are not entitled to sue the tenants for rents; for to any such suit it is a sufficient defence that their names are not registered in the Collector's general register.

If, after these formal proceedings before the revenue authorities, it is competent to the Magistrate to take action under s. 530, an order made under this section may absolutely neutralize the effect of the registration proceedings (as has happened in this case), and great confusion and possible injustice may be done. Persons who have had experience in the mofussil are well aware

why an order under s. 530 is so strenuously sought after in many cases. Such an order is important as regards the question of limitation. The person who is declared by the order of the Magistrate to be in possession under s. 530 can successfully set up such possession in answer to a plea of limitation.

The question of burden of proof, no unimportant question in many cases, depends materially upon whether a party occupies the position of a plaintiff or a defendant in a civil suit, and the person who succeeds in getting the Magistrate to declare him to be in possession, obtains no small vantage ground for subsequent litigation, *melior est conditio defendentis*.

Then whether a person who had a good title will be able to procure witnesses to give evidence in his favour, depends in no slight degree upon whether he is in possession or out of possession. Regard being had to these considerations, I think the Magistrate should be most careful in applying the provisions of s. 530, that they should not proceed to act under this section unless they are satisfied that a dispute, a *bona fide* dispute, a reasonable dispute, a dispute in which [843] there is some semblance of right on either side, exists, and that such dispute is likely to induce a breach of the peace. I am satisfied that it was not the intention of the Legislature that the provisions of this section should be applied to any case in which a competent Court, whether in a regular suit or in that sort of proceeding which is in this country known as a summary proceeding, has decided that one person is entitled to, or is in possession of, land.

I may refer to s. 535 of the Code of Criminal Procedure by way of further argument in support of this view. This section enacts, that "nothing in this chapter shall affect the powers of a Collector or a person exercising the power of a Collector or of a Revenue Court." The officer acting under the Land Registration Act is probably a Revenue Court, and if a Magistrate may, under s. 530 of the Code of Criminal Procedure, decide that a person is in possession, whom a revenue officer has under the provisions of the Land Registration Act held not to be in possession, the powers of such revenue officer or Court would be materially affected.

It therefore appears to me that the order of the Deputy Magistrate should be set aside, (1st) because the initiative proceeding of the District Magistrate was defective; (2nd) because the whole of the proceedings were without jurisdiction.

*Rule absolute.*

#### NOTES.

#### [JURISDICTION OF MAGISTRATE IN CASES OF THREATENED BREACH OF THE PEACE—

\* The mere fact that there is a dispute as regards some land does not give jurisdiction to a Magistrate to act under s. 145 of the Criminal Procedure Code. There must be a likelihood of breach of the peace either from the Police Report or from other information:—(1905) 33 Cal. 33=10 C.W.N. 257.

The order of a Magistrate under this section is not illegal on the ground that it does not contain the grounds on which the Magistrate has come to the conclusion that there is a likelihood of the breach of the peace, when the police report contained them:—(1905) 33 Cal. 352 F.B.

See also Rat. Un. Cr. 462; (1881) 7 Cal. 46.]

[6 Cal. 343]

PRIVY COUNCIL.

*The 23rd November, 1880.*

PRESENT :

SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, AND  
SIR R. P. COLLIER.

Kameswar Pershad.....Plaintiff

*versus*

Run Bahadur Singh.....Defendant.

[=8 I. A. 8=8 G. L. R. 361.]

[*On Appeal from the High Court of Judicature at Fort William in Bengal.*]

*Grounds supporting charge on the inheritance by a widow for her debt.*

In transactions such as the alienation by a widow of her estate of inheritance derived from her husband, any creditor, seeking to enforce a charge on such estate is bound, at least, to show the nature of the transaction, [844] and to show that, in advancing his money, he gave credit, on reasonable grounds, to an assertion that the money was wanted for one of the recognised necessities. The principle is, that the lender, although he is not bound to see to the application of the money, and does not lose his rights, if, upon *bona fide* inquiry, he has been deceived as to the existence of the necessity which he had reasonable grounds for supposing to exist, still is under an obligation to do certain things. These are to inquire into the necessity for the loan and to satisfy himself, as well as he can, with reference to the parties with whom he is dealing, that the borrower is acting in the particular instance for the benefit of the estate. This principle laid down in *Hunooman Persaud Panday v. Mussamat Bahooce Munraj Koonweree* (6 Moore's I. A., 393), in regard to the manager for an infant, has been applied also to alienations by a widow of her estate of inheritance, and to transactions in which a father, in derogation of the rights of his son, under the Mitakshara law has made an alienation of ancestral family estate.

APPEAL from a decree of a Divisional Bench of the High Court, Bengal (2nd July 1878), varying the decree of the Subordinate Judge of the District of Gaya (6th December 1876).

The question in the suit giving rise to this appeal was whether the late Rani Asmedh Konwer (who was living when the suit was commenced), widow of the Raja of Tekari, in the Gaya District, had in her lifetime charged her widow's estate with a debt to the plaintiff of Rs. 72,612, rendering the estate, which she had obtained as widow of the Raja, liable to sale in satisfaction thereof.

The Rani had executed in 1872 a bond to the plaintiff for the above amount, and secured it by mortgage of her estate.

The Subordinate Judge found that the bond had been executed for legal necessities, and decreed that the amount should be realized by the sale of the mortgaged property.

The High Court was of opinion that the Rani's signature to the bond had been obtained without giving her the least intimation of the nature of the contents of the instrument, beyond that money was required, and that no legal necessity had been proved. It, therefore, held this appellant to be entitled only to a decree for the principal and interest of the debt, which was a personal one, for which the estate in the hands of the Raja's heir was not liable

[845] The facts are stated in their Lordships' judgment.

Mr. B. V. Doyne and Mr. C. W. Arathoon appeared for the Appellant.

The Respondent did not appear.

The Judgment of their Lordships was delivered by

Sir J. W. Colville.—The only material point to be decided upon this appeal arises in a somewhat peculiar manner. The suit was originally brought by the plaintiff, appellant, who is a mahajun carrying on business in the city of Benares, and also at Gaya, to enforce a bond and mortgage against the late Rani Asmedh Konwar, the instrument being dated the 1st of March 1872. It appearing, however, that the next reversionary heir was in possession of the property alleged to have been mortgaged under an ikrarnamah executed by the Rani putting him in possession, apparently, of the whole of her husband's estate, he was joined as a party defendant in the suit; and it was prayed that a decree might be made for the amount sued for, with costs and interest, and that it might be awarded "by sale of the mortgaged and hypothecated properties, and in case the same do not cover the amount, by the sale of other properties, and from the person of the debtor." The suit, therefore, was framed for the purpose of obtaining, in case of need, an absolute decree for the sale of the property alleged to have been mortgaged, including the reversionary interest of the second defendant therein; and, accordingly, the second issue was settled so as to raise the question how far the reversionary estate was bound by the widow's disposition. It is in these words: "Whether or not was the amount claimed taken for a legal necessity, and whether or not is the amount of debt repayable by the property left by the husband of the widow Mussamut Asmedh Konwar, who contracted the debt."

The Subordinate Judge, who tried the case in the first instance, found wholly in favour of the plaintiff, and gave a decree for the amount sued for, and a further direction that, in case it was not paid, the mortgaged properties should be sold out-and-out. The High Court, upon appeal, so far confirmed [846] the decree of the Subordinate Judge that it left the widow bound to the extent of being a debtor on the bond for the amount stated on the face of the bond to be due, but determined that the deed had not been properly explained to her; that she did not understand, or was not properly informed, that it was a deed mortgaging the property; and, consequently, that all that could be given against her was a decree in the nature of an ordinary money-decree.

The appeal to their Lordships is against the decree of the High Court so far only as it was adverse to the plaintiff. After the decree was pronounced, and before the appeal was presented here, the widow died, and the second defendant, the only respondent upon the record, became the absolute owner of the property in question.

Their Lordships concur with the High Court in thinking that, upon the evidence, there was a total failure of proof as to the proper explanation of this deed to the lady. It is not necessary for them to say whether, that being so, they should have gone so far as to make the money-decree which was made against her. That is not the subject of appeal, and they must assume that so far the decree was properly made. Nor do they think it necessary to express any opinion, whether in point of fact the bond sued upon, upon the face of it, purports to pledge more than the widow's interest. They will assume that it was intended by those who prepared it, to be a pledge of the mouzas and property which she had inherited from her husband. The only question to be decided on this appeal is, whether the transaction created a charge on the

inheritance; whether it made the property in question, when in the hands of the respondent, liable to satisfy the bond-debt for which a decree has been made against the widow.

In order to establish the affirmative of this proposition, it is necessary, in the first place, to show that the widow intended to do that which the law allows her to do in certain specified cases; viz., to make a pledge of her husband's estate. But if the High Court was right in supposing that the document was not properly explained to her, there is a failure of proof that she did really intend to do that. The question whether the pro-[847] party was mortgaged at all depends upon the fact whether she intentionally executed a deed containing such a stipulation; and their Lordships have already intimated that, in their judgment, the High Court, dealing as it did with the evidence of Bishen Sahi and the other evidence in the cause, was right in coming to the conclusion that there was no such proper explanation of the bond as would bind her in respect of that stipulation.

Again, if this were otherwise, there would remain the question whether the plaintiff had satisfied the burden of proof which every plaintiff who seeks to charge the inheritance after the death of a widow, by virtue of a security executed by her, has to sustain. Their Lordships in no degree depart from the principles laid down in the case of *Hunooman Persaud Panday v. Mussamut Babooee Munraj Koonweree* (6 Moore's I. A., 393), which has been so often cited. They have applied those principles in recent cases, not only to the case of a manager for an infant, which was the case, there, but to transactions on all-fours with the present, namely, alienations by a widow, and to transactions in which a father, in derogation of the rights of his son, under the Mitakshara law has made an alienation of ancestral family estate. The principle broadly laid down is, that although the lender is not bound to see to the application of the money, and does not lose his rights if, upon a *bona fide* inquiry, he has been deceived as to the existence of the necessity which he had reasonable grounds for supposing to exist, he still is under an obligation to do certain things. The words of the judgment in that case are:—"Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate; but they think that if he does so inquire and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money." And the judgment ends thus:—"Their [848] Lordships do not think that a *bona fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived."

It appears to their Lordships that, such being the law, any creditor who comes into Court to enforce a right similar to that which is claimed in the present suit is bound at least to show the nature of the transaction, and that in advancing his money he gave credit on reasonable grounds to an assertion that the money was wanted for one of the recognised necessities.

In this case there is hardly any evidence on the part of the plaintiff to show what negotiations took place with him, and what representations induced him to advance the money; still less is there any proof that, having those representations before him, he made the necessary and proper inquiries. The chief witness that has been called, Fakir Chand, says of himself, that although

he is a village wasil-baki-nuvis, and writes certain zemindari books, he has nothing to do with the books relating to the mahajani business. It is true that he speaks to having been present when persons purporting to come from the Rani asked for a loan of money for payment of Government revenue and the like; but one would expect in such a case as this that the gomāshta, who had management of the books, and who was responsible for lending money from the the kooti, would be the person to come forward and show upon the faith of what representations and after what inquiry he advanced the money. There is no evidence at all of that kind.

Then, again, the servants who are called from the defendant's establishment, give evidence which cuts both ways, because, although Dost Mahomed, calling himself one of the dewans of the Rani, professed to have gone to the plaintiff and to have taken money from him, he shows *prima facie* that there was no real necessity for the plaintiff to borrow money under the power which she could exercise only in the case of certain necessities. His evidence goes to show that the lady was in fact in very easy circumstances, and that she had a net revenue of about 1,30,000 rupees. He says:—"The amount of collections used to remain in the custody of the dewan. A certain amount, when required, used to be paid to the Rani. I cannot [849] say off-hand what amount of collection comes to my hands. The expenses of the Rani, whatever they may be, are restricted to charitable and pious purposes and distribution to people, etc. Besides this, she does not spend anything with a lavish hand." So again Mahadeo Lal, who was called on the part of the defendant, puts her income at even a larger amount, and says:—"The balance, exceeding a lac and thirty thousand, used to be a saving to the Rani as profit. This amount used to be lodged in the custody of the dewan. The necessary expenses used to be supplied to the Rani. The money would not be lodged in the cutcherry."

The evidence of those two persons seems to their Lordships to be consistent with this state of things; that the Rani's servants, the dewans, chiefly managed her affairs; that if they had immediate occasion for a sum of money they may have gone to the plaintiff's kooti and got a temporary loan, but it fails to prove a necessity so serious as would justify a pledge of her husband's estate in excess of the ordinary powers of a Hindu widow, or reasonable grounds for the belief of such a necessity.

Then as to the latest transaction there is little or no evidence at all given by the plaintiff as to the settlement of the former accounts or the circumstances under which he advanced the small sum which made up the amount sued for upon the last bond. All that the witnesses state is, that one Baboo Ram Coomar, who is said to be also a dewan of the Rani's, told the munshi to get this bond signed, some speaking to the making of the bond; but as to the part taken by the plaintiff in making the last bond, or as to any inquiries made on that occasion, there is no evidence whatever.

It appears to their Lordships that the High Court was right on both grounds in treating the transaction as not binding upon the estate; and they will, therefore, humbly advise Her Majesty to affirm the decree of that Court and to dismiss this appeal.

*Appeal dismissed.*

Solicitor for the Appellant: Mr. T. L. Wilson.

**NOTES.**

**[I. WIDOW : POWERS OF, IN MANAGING HER HUSBAND'S ESTATE.]**

As regards the management of the estate, she has not less power than the manager of an infant's estate.

(1) A permanent lease granted by her and found to be beneficial to the estate cannot be avoided by a reversioner :—(1906) 33 Cal. 842.

(2) Trade debts incurred by her in carrying on the family trade after her husband's death are binding on the reversioners :—(1901) 26 Bom. 206 F. B.

**II. MINOR : GUARDIAN OF.**

The above principle applied to the case of a minor also .—(1911) 13 I.C. 5.

**III. HINDU LAW : FATHER, MORTGAGE BY,**

When a mortgage is executed by the father who had sons living at the time, it was held by the Full Bench in (1909) 31 All. 176 that even though the mortgage was for valuable consideration as it was not executed to meet any antecedent debt, it was not binding on the sons who were living at the time of the mortgage :—

**IV. ONUS OF PROOF.**

The onus of proving that the debt was incurred by the widow for a necessary purpose binding on the estate is on the alienor, see (19 Cal. 249 ; (1911) 34 All. 126.]





**THE  
INDIAN LAW REPORTS.**

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**CALCUTTA SERIES.**

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**Vol. VII—1881.**



THE INDIAN LAW REPORTS, CALCUTTA SERIES,  
CONTAINING CASES DETERMINED BY THE HIGH  
COURT AT CALCUTTA, AND BY THE JUDICIAL  
COMMITTEE OF THE PRIVY COUNCIL ON APPEAL  
FROM THAT COURT AND FROM ALL OTHER  
COURTS IN BRITISH INDIA NOT SUBJECT TO  
ANY HIGH COURT.

CALCUTTA—Vol. VII—1881.

*July to December.*

ORIGINAL CIVIL.

*The 9th, 10th, 11th February and 4th March, 1881.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE PONTIFEX.

Falle and others

*versus*

MacEwen and others.

*Mutual Benefit Society—Power of majority of subscribers to alter Rules—Pay-  
ment of Pensions in England—Adjustment of payments in accordance with  
Rate of Exchange—Interest of subscriber to Society.*

The U. S. F. P. Fund—a society established, as stated in rule 2 of the Rules of the Society, “to provide for the maintenance of the widows and children of those who shall subscribe to it upon the terms and conditions specified below, or upon such others as may be determined upon by the subscribers or by a majority of them”—had, prior to 1850, passed a rule (33) that “widows, being incumbents on the Fund, shall be paid their pensions at any place they may desire, subject to the usual charges of remittance: the pensions of children being incumbents on the Fund, shall also be so paid and on the same conditions.” The subscriptions were then, and continued to be, paid in rupees, and the pensions were calculated in rupees according to certain tables. On being admitted, a subscriber had to “promise and engage to submit to, and abide by, the rules and by laws of the Institution” (rule 22), and by rule 27 had to pay “a fee equal to ten per cent. on the amount of monthly pension insured.” Rule 60 gave power to alter any existing rule by the duly recorded votes of a majority of the subscribers. In 1850, exchange between India and England being then about par, rule 33 was repealed, and a new rule (41) was substituted for it, which provided that “incumbents on the [2] Fund shall be paid their annuities in India at par, or in Europe at the fixed rate of two shillings in the rupee.” On the 1st July 1876, exchange being adverse on remittances from India to England, a rule was passed, which provided that

"incumbents on the Fund shall be paid their annuities in India in full, and those residing in Europe at the rate of exchange fixed for the official year by the Secretary of State; annuities already due or hereafter becoming due on risks accepted before the 1st July 1876 shall be payable to incumbents residing in Europe at the fixed rate of two shillings to the rupee." Exchange continuing to decline, on the 22nd May 1880, the Society, by the votes of 553 against 505 of the subscribers, passed the following rule—"Annuities already due, or becoming due before the 1st May 1880, on risks accepted before the 1st July 1876, shall be payable to incumbents residing in Europe at the fixed rate of two shillings to the rupee; but all other annuities due, or becoming due, shall be paid, if to incumbents in India, in full, and if to incumbents residing in Europe, in London, at the market rate of exchange."

The plaintiffs were the widow and children of *F.*, a member of the Society, who was admitted as a subscriber for the benefit of his widow in November 1871, for the benefit of his son in September 1873, and for the benefit of his daughter in November 1874. He commenced to pay an increased subscription for the benefit of his son in September 1878. He was not one of the majority who voted in favour of the rule of the 22nd May 1880, though he attended the meeting of subscribers. He died on the 25th June 1880, having, up to that time, duly paid his subscription to the Fund. In a suit in which the plaintiffs, who were residing in England, claimed to be paid their pensions there at the rate of two shillings in the rupee,—

*Held*, that *F.* had no vested interest at the time of the passing of the rule of the 22nd May 1880; that the plaintiffs were, with respect to their pensions, bound by the terms of that rule, which a majority of the subscribers had full powers to pass so as to affect the nominees of all existing subscribers, and therefore the suit should be dismissed.

Rule 41 gave an undue advantage to one class of subscribers, which was *extra vires* and open to correction under rule 60 by a majority of the subscribers. The Society being one for the equal benefit of all subscribers, even if rule 60 did not give power to adjust payments in accordance with the rate of exchange, such a power might be implied for the purpose of continuing the business of the association.

THIS suit was brought against the defendants as the Directors of a Society called the Uncovenanted Service Family Pension Fund, having its head office at 14, Kyd Street, in Calcutta. The plaintiffs were the widow and infant children of John Vernon Falle, a subscriber to the Fund, who died on the 25th June 1880.

[3] The plaint stated that the Uncovenanted Service Family Pension Fund was a voluntary association of Christian members of the Government Uncovenanted Service, for the purpose of providing, upon certain terms, for the maintenance of the widows and children of the subscribers to the funds of the Society. That the said J. V. Falle was, from the year 1871 and until his death, employed in the Government Uncovenanted Service; and on the 11th November 1871, in Calcutta, he applied to be, and was admitted, a member of the Fund for the benefit of the plaintiff S. A. Falle, his wife; on the 18th October 1873, he was further admitted to subscribe to the Fund for the benefit of his son, the plaintiff P. E. Falle, until the age of eighteen years (the benefit being afterwards, on the 28th September 1878, extended until the age of twenty-one years); and on the 14th November 1874, he was admitted to subscribe to the Fund for the benefit of his daughter, the plaintiff, N. E. V. Falle, until her marriage. That, at the date of the admission of J. V. Falle as a member of the Fund, the terms of admission and membership and the benefits secured to the widows and children of members were regulated by the following rules:—

"22. That every application for admission as a subscriber shall be in the Form A.

FORM A.

To the Secretary, Uncovenanted Service Family Pension Fund,  
Calcutta.

SIR,

I request to be admitted a subscriber to the U. S. F. P. Fund for the benefit of my as per statement and affirmation enclosed ; and I hereby promise and engage to submit to, and abide by, the rules and by-laws of the Institution.

I am, Sir,

Yours obediently,

(Applicant's signature.)

(Designation or profession.)

(Address.)

Dated the

18 .

" 25. That a subscriber wishing to increase the recorded provision for his family, or to provide for his wife or any children not already [4] on the Fund, shall in all respects conform to the rules, and comply with the forms prescribed for observance in cases of original application for admission.

" 27. That an admission fee at the following rates be charged on every insurance effected, whether for the first time or in augmentation of any prior risk, viz., for a pension of less than Rs 50 a month, a fee of rupees 5, and for pensions of Rs. 50 a month and upwards, a fee equal to ten per cent., upon the amount of monthly pension insured.

" 32. That the payments for securing annuities be regulated according to the rates laid down in Tables A, B-I, B-II, C ; payments for the present risks to be undisturbed ; that risks which are declared to be not first-class, but which the Directors may nevertheless consider to be reasonably insurable, may be admitted on a payment of an addition not exceeding 50 per cent., upon the rates of subscription laid down in the tables. Risks not considered by the Directors to be reasonably insurable shall be rejected.

" 37. That in every case of admission or of increased provision, the subscription shall be computed from the date on which such entrance or increase shall be effected. All reductions in the recorded provision shall take effect from the first day of the month following that in which the application may be made.

" 38. That an entrance certificate according to Form F, after being duly entered on the record of the Fund, shall be granted to each subscriber on his admission, bearing the date on which the risk was accepted by the Directors.

*Note.*—Applicants will be admitted subject to the sanction of the Comptroller-General under the orders of Government. If the Comptroller-General shall refuse to authorize the admission of any person on the ground of ineligibility, the acceptance will be cancelled, and all payments made will be returned, less the medical-fee and stamp-duty on Form D.



[6] "43. That subscribers residing in Europe may make their payments to the recognized agents of the Fund in London at an exchange of two shillings to the rupee.

"41. That incumbents in the Fund shall be paid their annuities in India at par, or in Europe at the fixed rate of two shillings to the rupee. It shall be imperative, however, on all widows, incumbents on the Fund, to furnish half-yearly a certificate from competent local authority, or from two subscribers to the Fund, existence, and continued widowhood (Form I). A certificate of existence, and where necessary, of spinsterhood also, shall be furnished in the case of incumbents on the children's Fund (Form J).

The plaint then stated that this rule was, on or about the 1st July 1876, altered as follows:—

"50. That incumbents in the Fund shall be paid their annuities in India in full, and incumbents residing in Europe and America may be paid their annuities in London at the rate of exchange fixed for the official year by Her Majesty's Secretary of State for such pensions and allowances as are payable at the India House in London and fluctuate with the rate of exchange. Annuities already due or hereafter becoming due on risks accepted before the 1st July 1876, shall be payable to incumbents residing in Europe at the fixed rate of two shillings to the rupee.

"53. That a valuation of the assets and liabilities of the Fund, both in the widows' and children's branches, shall be made annually by a competent Actuary.

"54. That the surplus capital declared upon the report of the Actuary to exist at the date of such valuation shall form a reserve fund. The interest arising from such reserve fund shall be available for reduction of subscriptions, and such interest accruing annually shall, on the 1st May of each year, be appropriated to the reduction of the subscription for the ensuing year. All subscribers who shall, on or before the 30th April preceding, have completed five years' consecutive payments, shall be entitled to share rateably in the reduction according to the amount of their registered subscriptions.

"55. That whenever the surplus capital or reserve fund so declared shall exceed one-third of the net liabilities, the Directors may, at their discretion, set apart a portion of such reserve fund, not exceeding six per cent. thereof for distribution in further reduction of subscriptions. Such amounts shall be applied in the first instance, so far as may be necessary, to completing the abatement of subscription of all subscribers entitled to share in the interest under rule 54, to 32 per cent., and the balance or remaining portion thereof shall then be applied in reduction of the subscription for the ensuing year of all subscribers who, on or before the 30th April preceding, shall have completed three years' consecutive payments in the following rates:—

Subscribers above 3 years and not exceeding 6 years, 1 share.

"	"	6	"	9	"	2 shares.
"	"	9	"	12	"	3 shares.
"	"	12	"	15	"	4 shares.
"	"	15 years	...	...		5 shares."—

The plaint then further stated that the rules, except as abovementioned, remained unaltered until the 22nd May 1880, when the Society, by the votes of 553 members against 505, purported to pass the following rule:—

"That annuities already due, or becoming due before the 1st May 1880, on risks accepted before the 1st July 1876, shall be payable to incumbents residing in Europe or America at the fixed rate of two shillings to the rupee; but that all other annuities due, or becoming due, shall be paid, if to incumbents in India, in full, and if to incumbents residing in Europe in London, at the market rate of exchange."

The plaintiff submitted that the rule of the 22nd May 1880 was void and inoperative so far as it tended to the detriment of the plaintiffs; that the said J. V. Falle, by virtue of his admission as a member of and subscriber to the Fund, and of his subscriptions (which had always been duly paid), became entitled to the benefit of the Fund according to the rules and regulations at the time he was admitted as such member and subscriber; that those benefits could not be taken away from him or from the plaintiffs, nor the rules and regulations alter to his detriment or to the detriment of the plaintiffs; that the Society or Fund contracted with the said J. V. Falle for valuable consideration to pay to his widow and children on his death, and the defendants as Directors of the Fund were bound to pay to the plaintiff the respective sums subscribed for in the manner provided by the existing rules and regulations at the time he so subscribed; such sums being as follows:

1. On the 11th November 1871, in consideration of a monthly [8] subscription of Rs. 44-8, the Society contracted to pay the plaintiff S. A. Falle, on the death of J. V. Falle, the monthly sum of Rs. 100 in Calcutta, or £10 in sterling in London, at the plaintiff's option.

2. On the 18th October 1873, in consideration of a monthly subscription of Rs. 10-10, the Society contracted to pay the plaintiff P. E. Falle, on the death of J. V. Falle, the monthly sum of Rs. 32 in Calcutta, or £3-4s. in sterling in London, at his option, until the age of eighteen years; and on the 28th September 1878, in consideration of a further monthly subscription of Rs. 2-5, contracted to continue the said payments to the plaintiff P. E. Falle until the age of twenty-one years.

3. On the 14th November 1874, in consideration of a monthly subscription of Rs. 11-5, the Society contracted to pay the plaintiff N. E. V. Falle, on the death of J. V. Falle, the monthly sum of Rs. 32 in Calcutta, or £3-4s. in sterling in London, at her option, until her marriage.

On the death of J. V. Falle, the plaintiffs went to reside in England, and the defendants on being called upon to pay these sums, refused, on the ground that the sums they were bound to pay were those which would be payable under the rule of the 22nd May 1880, passed by the majority of the subscribers, *viz.*, Rs. 100, Rs. 32 and Rs. 32 respectively.

The plaintiff prayed for a declaration that the defendants were bound to pay the sums claimed by the plaintiffs, and that the defendants might be ordered to pay them.

The defendants, in their written statement, stated, that the object of the Fund was stated in rule 2 of the Rules of the Fund, *viz.*, "to provide for the maintenance of the widows and children of those who shall subscribe to it upon the terms and conditions specified below, or such others as may be determined upon by the subscribers, or by a majority of them;" or that, so far as the deceased J. V. Falle was admitted to subscribe to the Fund in respect of the plaintiff P. E. Falle, on the 28th September 1878, the application to become such subscriber, and the admission to be such subscriber, was, under rule 25, a distinct matter from any previous application for admission of the



deceased as a subscriber to the Fund; that the altered rule 50 was in force [9] at the time the deceased applied to be and was admitted as a subscriber to the Fund for the benefit of the plaintiff P. E. Falle; that rule 41 was passed in 1850 in place of, and substitution for, the old rule (33) of the Fund, which was as follows:

"33. That widows, being incumbents on the Fund, shall be paid their pension at any place they may desire, either monthly, quarterly, or half-yearly, subject to the usual charges of remittance. The pensions of children, being incumbents, shall also be so paid, and on the same condition, at the request of their guardians. It shall be imperative, however, on all widows, incumbents on the Fund, to furnish half-yearly a certificate from competent local authority, or from two subscribers to the Fund, of existence, and continued widowhood; a certificate of existence, and where necessary, of spinster-ship also, shall be furnished in the case of incumbents on the children's Fund."

That, at the time of the passing of rule 41, the rate of exchange between England and India was variable, in favour sometimes of silver and sometimes of gold, and the rule was passed to avoid the trouble of paying in England a slightly different sum each month to each incumbent, and as an equitable rate at a time when the value of a rupee and of two shillings was, roughly speaking, equal, varying occasionally in favour of England, and occasionally in favour of India, that the rule which was passed on the 22nd May 1880, by the votes of the majority of the subscribers to the Fund, was so passed under the power conferred upon the subscribers to alter or amend any existing rule of the Fund by rule 60, which was as follows:—

"60. That it shall be competent to any twelve qualified subscribers who may be dissatisfied with any proceeding of the Directors, or who may be desirous of altering or amending any existing rule or practice, or of making any proposition with regard to the Fund, to require the Directors, by a written requisition, to call a special meeting of subscribers, and such meeting shall thereupon be called by the Directors. Notice of the object of such meeting shall be given by the Directors in two of the principal newspapers of Calcutta and the Government *Gazettes* four weeks before the time appointed. It shall be essential to the validity of such meeting that not less than fourteen subscribers other than the requisitionists and Directors shall be present thereat. The meeting shall determine whether the question shall be submitted by [10] circular to the general body of subscribers or not; if the former, the Directors shall circulate it accordingly, and the votes of the majority of the subscribers received within three months from the issue of such circular shall be decisive."

The defendants further stated that the deceased J. V. Falle himself voted in respect of the passing of the rule of the 22nd May 1880; that that rule was passed because it was found that the relative value of gold and silver and the conditions of the members whose families were to be provided for by the Fund had so altered, as that the loss to the Fund by exchange in paying pensions of incumbents in Europe at the rate of two shillings to the rupee rose from the sum of Rs. 4,246, in the year 1871-72 to the sum of Rs. 40,583 in the year 1878-79, and such loss threatened to increase as each new incumbent for many years came on the Fund, and it was found that such loss might seriously injure the stability of the Fund; and because the paying of the said pensions at the said rate of exchange was conferring an undue advantage on one class of subscribers to the Fund at the expense of another class of subscribers, besides disturbing seriously the subscription tables of the Fund,

which were made after due deliberation, and fixed certain proportions between the rates of payment and the pension secured, both being expressed in Indian money, and which tables formed the basis of contract with every subscriber as shown by the entrance certificate, which declares the pension payable to be in Indian money, and even directly alludes (as in the form for children) to the tables in question.

The defendants submitted that the correct meaning of the words of rule 2 was, that the Fund was intended to provide upon the terms and conditions contained in the subsequent rules of the Fund, or in such other rules as might be determined upon by the subscribers or a majority of them, for the maintenance of the widows and children of those who might subscribe to the Fund; that the rule of the 22nd May 1880 was and is a good and valid rule, and such a rule as the subscribers had full power and authority to make and pass; and such rule was and is binding on the deceased and on all who were subscribers to the Fund at the date of the passing of the said rule, or who had [11] become subscribers since the passing of the rule; and that it was one of the rules and conditions of the Fund under which the Fund agreed to provide for the plaintiffs as the widow and children of the deceased. The defendants further submitted that the rule of the 22nd May 1880 was a good and valid rule of the fund at the date of the death of J. V. Falle and at the date when the plaintiffs became entitled to the benefit of the fund, and that the plaintiffs were not entitled to claim payment of the respective pensions due to them otherwise than under the rules of the Fund at the date they became so entitled, and therefore were not entitled to claim to be paid their respective pensions at the rate of two shillings to the rupee, or at any other rate than that provided by the rule of the 22nd May 1880.

Mr. Kennedy and Mr. Phillips for the Plaintiffs.

Mr. Branson and Mr. Evans for the Defendants.

For the plaintiff it was contended, that the terms for payment of the annuities at two shillings in the rupee was a part of the contract entered into between Mr. Falle and the Society at the time he was admitted as a subscriber; and that there was no power to alter the rules as to take away any advantage which he might derive under that contract, which could not be altered by any subsequent agreement of the members amongst themselves. The amount of the annuity or the terms of subscription were not subject to alteration. As long as Mr. Falle continued to pay his subscription, he had a vested interest in what he had contracted to pay for, and the Society had contracted to give his nominees, of which interest he could not be deprived. It was an important object that the interest of the nominees should be certain. The following cases and authorities were referred to:—*In re Norwich and Norfolk Provident Benefit Building Society*, *Smith's case* (L. R., 1 Ch. D., 481), *May's Law of Insurance*, s. 152, p. 587, and cases there cited; *Menier v. Hooper's Telegraph Works* (L. R., 9 Ch. App., 350). *East India [12] Company v. Robertson* (12 Moore's P. C., 400); *Secretary of State for India v. Underwood* (L. R. 4 Eng. and Ir. App., 580, at p. 583) and *Edwards v. Warden* (L. R., 9 Ch. App., 495; *sc* on appeal, 1 App. Cas., 281).

For the defendants it was contended, that there was no contract at all with the plaintiffs; every member who joined was admitted under all the rules of the Society, one of those rules being that a majority of the subscribers had power to alter the rule (see rule 60); that the rule which had been altered was a subsidiary rule, and not a rule of the essence of the Fund. There were particular provisions for any cases of hardship. The plaintiffs had not complet-

ed their title under the old rules ; therefore their case was governed by the new rules. The rules refer to the tables of subscription and annuities (see rule 32), and therefore the calculation of annuities is to be made from the tables. The rule objected to observes a just proportion between the amount each member pays in and what he takes out. *Secretary of State for India v. Underwood* (L.R., 4 Eng. and Ir. App., at pp. 588, 589, 599, and 608) was referred to.

The Judgment of the Court (GARTH, C. J., and PONTIFEX, J.) was delivered by

**Pontifex, J.**—This case, although exceedingly important to the subscribers to and pensioners upon the Uncovenanted Service Family Pension Fund, does not appear to us to be one of much difficulty. The Fund was established many years ago for the purpose of securing a provision for the widows and children of its subscribers. Originally, or at all events prior to 1850, the rule (then being No. 33) as to payments of pensions was as follows:—"That widows being incumbents on the Fund shall be paid their pensions at any place they may desire, either monthly, quarterly, or half-yearly, subject to the usual charges of remittance. The pensions of children being incumbents shall also be so paid, and on the same conditions." The subscriptions were and continue to be paid in rupees, and the pensions are calculated in rupees according to certain tables.

[13] It is clear, of course, that the tables would be untrustworthy and deceptive guides, if the subscriptions were paid in a lower and the pensions in a higher, standard of currency.

In the year 1850, exchange being then somewhere about par, the old rule (33) was repealed by a general meeting, and a new rule (41) was substituted for it. The new rule was as follows:—

"That incumbents on the Fund shall be paid their annuities in India at par, or in Europe at the fixed rate of two shillings to the rupee." This alteration must have been made under rule 60 of the Society, which is as follows — "It shall be competent for any twelve qualified subscribers who may be dissatisfied with any proceeding of the Directors, or who may be desirous of altering or amending any existing rule or practice, or of making any proposition with regard to the Fund," to require the Directors to call a special meeting. "The meeting shall determine whether the question shall be submitted by circular to the general body of subscribers or not; if the former, the Directors shall circulate it accordingly, and the votes of the majority of the subscribers received within three months from the issue of such circular shall be decisive." If rule 41 was passed by the votes of a majority of the subscribers in substitution for the old rule 33, it was of course competent for a majority of the subscribers by their votes duly recorded to alter it.

As Lord WESTBURY puts it in the case of the *Secretary of State for India v. Underwood* (L. R., 4 Eng. and Ir. App., 605) : "If it was competent to them to make that addition" (in this case alteration), "then, by the clear interpretation of the 30th rule, by which that authority was given, there was equal authority to take it away." But the question in this case is, not whether the Society could revoke rule 41 which they passed in 1850, but how far they could revoke it, so as to bind existing subscribers to the Fund.

What they really did was as follows:—When in 1876 adverse exchange began to tell, the following rule, then numbered 50, was on the first of July 1876 passed by the votes of a majority of the subscribers. (*Reads* rule 50 *ante*, p. 6).

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It was thus attempted, though it seems to us with questionable wisdom or fairness, to preserve what I suppose where re-[14]garded, but in my opinion improperly regarded, as the vested interests of those existing subscribers. Exchange, however, continuing to decline, until at one time there was actually a depreciation of 25 per cent. from the valuation of the rupee at two shillings, it was considered that further steps were necessary for the security of the Fund; and on the 22nd of May 1880, the Society, by the votes of 553 members against 505, passed the following rule. (*Reads* rule of 22nd May 1880, *ante*, p. 7.)

The question we have to determine is, whether this new rule is binding on the widows and children of subscribers to the Society before the 1st of July 1876, and who died after the 22nd May 1880? Mr. John Vernon Falle, the husband of the plaintiff Sophia Anne Falle, and father of the infant plaintiffs, commenced subscribing to the Fund on the 11th of November 1871 for the benefit of his widow, on the 18th of September 1873 for the benefit of the plaintiff Phillip Erskine Falle, and on the 14th of November 1874 for the benefit of the plaintiff Nora Eliza Vernon Falle. On the 28th of September 1878, he made a further subscription for an increased benefit to the plaintiff Phillip Erskine Falle but it is not disputed that this last subscription must be governed by the rule passed in 1876. Mr. John Vernon Falle attended the meeting at which the rule of the 22nd May 1880 was passed, but it is admitted that he did not vote with the majority. Mr. John Vernon Falle died on the 25th June 1880, having up till then duly paid his subscriptions to the Fund.

His wife and children, the plaintiffs, are now residing in England, and claim to be paid their pensions in England at the rate of two shillings to the rupee, notwithstanding the existence of the rule passed by the majority of the subscribers on the 22nd May 1880. Their case is, that Mr. Falle contracted on the footing of rule 41 of 1850; that it was out of the power of the Society to vary the terms of that contract either by passing a rule or otherwise, whatever might be the depreciation of exchange. Their argument is, that if exchange had risen, so that the rupee had become of greater value than two shillings, a state of circumstances which existed not so very long ago, though to us it sounds like a fable of the golden age, the loss [15] would have been theirs, and that, therefore, now they are entitled to insist upon the benefit. But this is scarcely an argument, it is rather a begging of the question.

They then argue that it is impossible to say whether Mr. Falle would have become a subscriber to the Fund if he had known that pensions in England were to be calculated at less than two shillings to the rupee. This is, in other words, to argue that Mr. Falle would not have joined the Fund unless an advantage was secured to his nominees which would be unfair to Indian nominees and most of his fellow-subscribers. But as a matter of fact, we do know that Mr. Falle increased his subscription on the 28th of September 1878, although at that time the two-shilling rule had been abrogated so far as respected risks accepted after the 1st of July 1876.

Rule 33, which was in existence prior to 1850, was a rule which dealt with perfect fairness with all classes of pensioners, Indian and foreign; though under it troublesome calculations might become necessary in payment of each English pension. As a matter of convenience, and to save constant trouble of calculation, it was, no doubt, in the Society's power to alter it as they did in 1850, provided they gave no class of pensioners an undue advantage. But that a majority should give an undue advantage to any class would be, in our opinion,

*extra vires*, and open to correction. As Lord HATHERLEY said in the case already cited (p. 588):

"The power of making general rules must surely be one of making rules that operate equally on all subscribers; as for instance, any general change in the rate of percentage or of contribution or the like."

The plaintiffs, however, rely on certain other observations of Lord HATHERLEY in the same case when he says (p. 589): "No rules" (meaning powers to effect changes by the resolution of a majority), "unless the expressions were insuperably the other way, would ever be so construed as to enable a majority, having an interest directly opposed to the vested interest of a minority, to confiscate that interest." But when the rule of 1880 was passed by a majority, Mr. Falle cannot, in our opinion, be said to have had any vested interest in the [16] proper acceptance of the term. Nor could it be said that the majority had an adverse interest to the minority, for it was impossible at the time the rule was passed to predicate whether Mr. Falle or any other member of the minority would be prejudiced or would benefit by it. If Mr. Falle had lived for some years after the passing of the rule, he would probably have benefited by it. As it happens, he died shortly after the rule was passed; but the result of the rule is to place his nominees in the same and no worse position than the nominees of any other existing member of the Association at the time the rule was passed. To quote Lord HATHERLEY again at p. 590 of the case already cited: "Those who have not yet paid in excess might all be held to be in an equal position, regard being had to their chances of life," and further: "I think a rule might well be passed that, saving the rights of all who have contributed in excess of the one-half value of the annuity, no future refund shall be allowed."

It seems to us, therefore, that even Lord HATHERLEY, the dissentient Judge in the case cited, would have agreed that the nominees of all the shareholders in existence at the date of passing the new rule would be bound by it. And it is clear that the other Judges, Lord CHELMSFORD, Lord WESTBURY, and Lord COLONSAY would have been of that opinion.

But apart from authority, common sense would lead us to the same result. This was a Society intended for the equal benefit of all its subscribers, Mr. Falle, in becoming a subscriber, can scarcely be supposed to have intentionally subscribed on a footing unjust and prejudicial to a large number of the other subscribers. Rule 41 of 1850 was itself a rule of adjustment, and its very existence was notice of the necessity of adjusting Indian and English payments for pensions. The existence of tables in which pensions were calculated in rupees, and the reference to them in the rules, was further notice that a pension payable in England was calculated on precisely the same data as a pension payable in India; and ought, therefore, to be of precisely the same value, subject only, for convenience' sake, to some easy and ready rule of adjustment; and so long as exchange had but slight variations under or over par, the two-shilling rule [17] was a roughly convenient one. In a Society of this kind, if pensions are, for the convenience of certain nominees, allowed to be paid out of India, it seems to us absolutely necessary that there should be a continuous power to adjust payments in accordance with the true rate of exchange. The 60th rule seems to us sufficiently wide to confer that power, and the fact that the Society failed for some years to make such adjustment, does not in our opinion disable them from at any time afterwards putting all the subscribers on an equality. Indeed, this being an Indian Society, and the subscriptions being payable in India in rupees, we see no reason to prevent a majority of the subscri-

bers from passing a rule that all pensions should be payable exclusively in India. For the rule allowing pensions to be paid elsewhere is simply a rule of convenience. If the Society could not make adjustments in accordance with the rate of exchange, or refuse to pay pensions out of India, the result might be that the existing subscribers would decline to continue to contribute for what, according to the actuarial calculations upon which the operations of the Society are founded, would be such evidently unfair results. Indeed, according to the strict interpretation of rule 41 of 1850, and as between competing pensioners, it might be difficult to hold that all pensioners entitled before the 1st July 1876, even though they might reside in India, could not demand payment to be made to their agents in England at the rate of two shillings to the rupee. For it is to be observed that rule 41 of 1850 makes no mention of "residence." Rule 33, for which it was substituted, speaks of payment at any place pensioners might desire, and rule 50 of 1876 is the first to use the word "residing," though curiously enough the latter part of the rule omits all reference to incumbents residing in America. This, however, might be so seriously detrimental to existing subscribers as to involve the collapse of the Society, and it would of course have been equally detrimental to Mr. Falle, if he had continued to live.

If, therefore, the terms of rule 60 were not as wide as they are, it seems to us that, for the purpose of continuing the business of this Association, it would be necessary, if pensioners are to be paid out of India, to imply a power to make such adjustments [18] as equal fairness might require. But when we see what was the description of the Society to which each subscriber elected to become a member, *viz.*, the description contained in its second rule stating the object of the Society to be "to provide for the widows and children of those who shall subscribe to it, upon the terms and conditions specified below, or such others as may be determined upon by the subscribers or by a majority of them,"—when we refer to the terms upon which Mr. Falle entered into his so-called contract, namely, his request to be admitted a subscriber, and his engagement "to submit to, and abide by, the rules and bylaws of the Institution,"—when we consider the terms of some of these rules, as for instance, rule 27, which requires the payment by subscribers of "a fee equal to ten per cent. upon the amount of monthly pension insured,"—and particularly when we further consider the terms of its 60th rule, it seems to us beyond all question that a majority of the Society had full power to pass such a rule as was passed on the 22nd of May 1880, so as to effect the nominees of all the existing subscribers, and beyond this, for the purposes of this case, it is not necessary to go.

We are, therefore, of opinion that the plaintiffs are, with respect to their several pensions, bound by the terms of the rule passed on the 22nd of May 1880, and that this suit should be dismissed with a declaration to that effect. This being a representative case, and the defendants not pressing for costs, we think the suit should be dismissed without costs.

*Suit dismissed.*

Attorneys for the Plaintiffs: Messrs. Carruthers and Jennings.

Attorney for the Defendants: Mr. Fink.

#### NOTES.

[Referred to in argument in (1898) 22 Bom. 451 for the position that the majority has no powers under the rule to bind the minority].

[19] The 21st March, 1881.

PRESENT :

MR. JUSTICE WILSON.

S. M. Kadumbinee Dossee

versus

S. M. Koylashkaminee Dossee.

*Execution of decree—Arrest—Purdahnashin lady—Entering Zenana—  
Civil Procedure Code (Act X of 1877), ss. 271,\* 336, 640.†*

It is not necessary that a special order of Court should be made, empowering an officer authorized to arrest a purdahnashin lady to enter the zenana of the house in which she resides. Under s. 336† of the Civil Procedure Code, if the officer is able to enter the house, he may break into any room in the house, including the zenana, in order to effect the arrest.¶

¶ As to arrest of purdahnashin ladies, see *Maharani of Burdwan v. S. M. Barada Sundari Debi*, 1 B. L. R. F. B., 31 : *Raj Chunder Roy v. Shama Soondari Debi*, 1. L. R., 4 Cal., 583.

\*[Sec. 271 :—If the person executing any process under this Code directing or authorising seizure of moveable property, has gained access to a house or other building, he may unfasten and open the door of any room in which he has reason to believe any such property to be.

Seizure of property in house. Provided that if the room be in the actual occupancy of a woman, who, according to the customs of the country, does not appear in public, the person executing the process shall give notice to her that she is at liberty to withdraw; and after allowing a reasonable time for such woman to withdraw, and giving her every reasonable facility for withdrawing, he may enter such room for the purpose of seizing the property, using at the same time every precaution, consistent with these provisions, to prevent its clandestine removal.]

Exemption of certain women from personal appearance. †[Sec. 640 :—Women, who, according to the customs and manners of the country, ought not to be compelled to appear in public, shall be exempt from personal appearance in Court.

But nothing herein contained shall be deemed to exempt such women from arrest in execution of the Civil process.]

‡[Sec. 336 :—A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall, as soon as practicable, be brought before the Court, and his imprisonment may be in the Civil Jail of the district in which the Court ordering the imprisonment is situate, or, when such jail does not afford suitable accommodation, in any other place which the Local Government may appoint for the confinement of persons ordered to be imprisoned by the Courts of such district :

Arrest in houses. Provided that no house shall be entered after sunset and before sunrise for the purpose of making an arrest under this section.

Provided also that when the decree in execution of which a judgment-debtor is arrested is a decree for money and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.

Proviso.

The Local Government may, by notification published in the official Gazette, direct that whenever a judgment-debtor is arrested in execution of a decree for money and brought before



IN this case the plaintiff's suit had been dismissed with costs, and a writ of attachment had been issued against her. Attempts had been made to arrest the plaintiff, who was a purdahnashin lady; but she had always escaped arrest by secreting herself in the zenana of her house. The Sheriff's officer refused to execute the writ in the zenana without a special order from the Court.

A rule was then obtained, calling upon the Sheriff to show cause why he should not execute the writ by entering into the zenana of the plaintiff's house.

Mr. C. C. Dutt in support of the rule.

Mr. Jackson showed cause.—Rule 212 in Mr. Belchambers' book provides "that no Sheriff or officer of the Sheriff, or any other person executing the process of the Court in any civil cause whatsoever, before or after decree, shall enter into the zenana or private apartments allotted to the women of any Hindu or Mussulman, except affidavit be made proving to the satisfaction of a Judge of the Court that the effects seizable by such process are secreted in such zenana or private apartments, or for other special cause which, in the discretion of the Judge, may make it necessary to the due execution of the laws and the attainment of justice, and unless such Judge [20] shall make an order in writing for that purpose." So that there must be a special reason for entering the zenana. [WILSON, J.—The rule seems only to contemplate execution by seizure of property where it is concealed in the zenana. If it were carried out in cases where it is sought to execute the decree by arrest, no female party to a suit could ever be arrested.] The words are distinct, "no Sheriff shall enter." It has always been the custom to obtain an order of the Court.

Wilson, J.—I cannot make an order authorizing the Sheriff to enter the zenana, because that involves entering the house, and I cannot order him to break into the house. The only order that I can make is, that if the Sheriff can enter the house, he may break into the zenana.

Section 640 of the Civil Procedure Code makes it clear, if it were not so otherwise, that purdahnashin women are as much liable to execution of civil process as any other persons. Section 271 relates to the seizure of property in zenanas, and does not apply to this case. Section 336 is that which deals with the case where it is necessary to enter a zenana to effect an arrest. It first states the circumstances under which an officer authorized to make an arrest may enter a house, and then deals with the case of entering any portion of the house. It provides that, "when the officer authorized to make the arrest has duly gained access to any dwelling-house, he may unfasten and open the door of any room in which he has reason to believe the judgment-debtor is to be found." If that stood alone, it would authorize the officer, when he has once entered the house, to enter any room. But the section goes on, "provided that if the room be in the actual occupancy of a woman who is not the judgment-debtor, and who, according to the customs of the country, does not appear in public,

the Court under this section, the Court shall inform him that he may apply under Chapter XX to be declared an insolvent, and that he will be discharged if he has not committed any act of bad faith regarding the subject of his application and if he places all his property in possession of a receiver appointed by the Court.

If after such publication the judgment-debtor express his intention so to apply, and if he furnish sufficient security that he will appear when called upon, and that he will within one month apply under Section 344 to be declared an insolvent, the Court shall release him from arrest. But if he fails so to apply, the Court may either direct the security to be realised or commit him to jail in execution of the decree.



the officer shall give notice to her that she is at liberty to withdraw; and after allowing a reasonable time for her to withdraw, and giving her every facility for withdrawing, he may enter such room for the purpose of making the arrest." The only qualification, therefore, of the general right of a judgment-creditor to arrest his judgment-debtor is, that if the room be in the occupation of a purdahnashin lady not the judgment-debtor [21] the officer making the arrest is to give her time to withdraw. If she is the judgment-debtor, he is bound to go in and arrest her.

Rule No. 212 in Mr. Belchambers' book is, so far as it is inconsistent with, superseded by the Code.

No order is necessary in this case to authorize the Sheriff to enter the zenana. The order I make is, that if and when the Sheriff's officer can enter the house, he is to execute the writ in the zenana. I make the order not because it is necessary, but because the Sheriff thinks that he is bound to have the order of the Court for his protection.

Attorney for the Defendant : Baboo N. G. Newgee.

Attorneys for the Sheriff : Messrs. Roberts and Morgan.

[7 Cal. 21]  
APPELLATE CIVIL.

*The 17th December, 1880.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE PONTIFEX AND  
MR. JUSTICE MORRIS.

In the matter of the Maharajah of Durbhungah and others.\*

*Stamp Act (I of 1879), s. 3, cls. 9, 11, 19—Deed of family arrangement.*

By a deed of family arrangement, one brother conveyed a pargana and the sum of two and-a-half lacs of rupees to a younger brother, on condition that the latter should release certain family property on which he had claims.

*Held*, that the deed was neither a conveyance or a settlement, nor an instrument of partition, within the meaning of Act I of 1879.

THIS was a reference made by the Board of Revenue to the High Court, under s. 46<sup>†</sup> of Act I of 1879, asking for an expression of opinion as to the amount of stamp-duty payable on a certain deed executed by the Maharajah of Durbhungah and his brother on the 20th August 1880. The deed, amongst other matters, recited that the Maharajah had succeeded to, and was in possession of, the Raj and all property, moveable and immoveable, which had been possessed by his father subject to a charge for the maintenance of the junior members of the family; that disputes had arisen between the Maharajah and [22] his younger brother as to the claims of the latter in the said properties; and that the younger brother had, by way of compromise, agreed to waive and relinquish all claims which he had, or might have, on the said Maharajah, in consideration of receiving under the Baboona form of Sunnud, Pargana Bachoor and two and-a-half lacs of rupees. In accordance with these recitals, the Maharajah granted and conveyed to his younger brother such an interest in the above-mentioned properties as was usually conveyed under a Baboona grant, to have and to hold the same as a maintenance or Baboona grant according to the custom of the family, subject to certain conditions, amongst which were, that the name of the Maharajah should stand recorded on the Collectorate roll as the proprietor of the said lands; that he should pay the revenue and other cesses, and the younger brother absolved and released the Maharajah from all claims and demands which he might have as one of the

\* Reference No. 1213 B, by A. Forbes, Esq., Under-Secretary to the Board of Revenue, dated 20th October 1880, under s. 46 of Act I of 1879.

† [Sec. 46.—The Chief Controlling Revenue authority may state any case referred to it

under section forty-five or otherwise coming to its notice and refer such case with its own opinion thereon, if the case arises in the territories for the time being administered by the Governor of Fort St. George in Council or the Governor of Bombay in Council to the High Court of Judicature at Madras or Bombay, as the case may be; if it arises in the North-Western Provinces or Oudh—to the High Court of Judicature for the North-Western Provinces; if it arises in the territories for the time being administered by the Lieutenant-Governor of the Punjab—to the Chief Court of the Punjab; if it arises in the Central Provinces—to the High Court of Judicature at Bombay; and if it arises in any other part of British India—to the High Court of Judicature at Fort William.

Every such case shall be decided by not less than three Judges of the High Court or Chief Court to which it is referred, and in case of difference the opinion of the majority shall prevail.]

sons of the late Maharajah in any property whatsoever belonging to the Raj. The deed was stamped with Rs. 5 as a release, and Rs. 15 as a deed of trust.

The Collector of Durbhungah, to whom the instrument was presented for adjudication under s. 30 of the Stamp Act, was of opinion, that the deed must either be taken as a gift or as a settlement, and held it to be the latter, because it was a gift or disposition of property made for family reasons, and ordered evidence to be taken as to the net annual rental in order that the value of the stamps to be affixed might be ascertained.

The Board of Revenue dissented from the view taken by the Collector, thinking that the document was in the nature of a settlement according to the definition given in cl. 19, s. 3,\* Act I of 1879, and referred the question for the decision of the High Court.

Mr. *Evans* and Mr. *H. Bell* for the Maharajah.

Mr. *Bonnerjee* for the Grantee.

The **Opinion** of the High Court was given by

**Garth, C. J.**—We think that the instrument in question is already sufficiently stamped.

[23] It is neither a “conveyance,” nor a “settlement,” nor an “instrument of partition,” within the meaning of Act I of 1879.

It is in its nature a deed of arrangement, by which a sum of money was paid absolutely, and a maintenance grant made by the Maharajah of Durbhungah to his younger brother, by way of discharge and satisfaction of all claims, by way of maintenance or otherwise, to which the latter was entitled as the son of the late Maharajah.

The instrument would, no doubt, have been a “conveyance” under the Stamp Act of 1869, because it is a deed by which property is conveyed *inter vivos*; but the definition of a conveyance in the Act of 1879 [see s. 3 (9)] excludes all transfers or conveyances, *which are not made by way of sale*, and this transfer, we consider, was clearly not made by way of sale.

Interpretation-clause.      \* [Sec. 3 :—In this Act, unless there is something repugnant in the subject or context,—

Conveyance.      (9) “Conveyance” means any instrument by which property (whether moveable or immoveable) is transferred on sale.

(11) “Instrument of partition” means any instrument whereby co-owners of any property divide or agree to divide such property in severalty, and includes also a final order for effecting a partition passed by any Revenue authority:

“Settlement.”      (19) “Settlement” means any non-testamentary disposition in writing, of moveable or immoveable property, made—

(a) in consideration of marriage,

(b) for the purpose of distributing property of the settler among his family or those for whom he desires to provide, or

(c) for any religious or charitable purpose. It includes an agreement in writing to make such a disposition :]

[7 Cal. 23]

The 14th March 1881.

PRESENT:

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE PRINSEP.

Nilmoney Singh.....Plaintiff

versus

Heera Lall Dass.....Defendant.\*

*Rent suit—Decree obtained ex parte—Admissibility of, as evidence finality of, with regard to its subject-matter—Civil Procedure Code (Act X of 1877), s. 13, expl 4.*

A decree obtained *ex parte* is not final within the meaning of expl 4, s. 13<sup>1</sup> of Act X of 1877.

Such a decree is not conclusive evidence of the amount of rent payable by the same defendant in another suit for subsequent rent of the same property

Where the plaintiff sued the defendant for a year's rent at the same rate which had been decreed to him for a previous year in a suit which he had brought against the same defendant for rent of the same property, and relied upon the former decree, which had been obtained *ex parte*, and which he also alleged had been duly executed, as evidence of the amount of rent due to him by the defendant, but it appeared that the lower Court had found that the alleged execution-proceedings were fraudulent, and that no steps had been taken which gave finality to the decree,—

[24] *Held*, that the decree was not conclusive evidence of the amount of rent due from the defendant or of the questions with which it dealt.

*Birchunder Manickya v. Hurish Chunder Dass* (I. L. R., 3 Cal., 383) distinguished.

THIS was a suit for the recovery of rent due for the year 1280 (corresponding with the years 1873-74), in which the plaintiff claimed Rs. 100-12-3 $\frac{1}{2}$ . The defendant, in his written statement, alleged, that the mouza in respect of which the suit was brought was his ancestral brohmutter property, subject to a quit-rent of Rs. 39-10 per annum, and that he had not paid the rent for 1280, as the plaintiff had demanded it at an enhanced rate.

The plaintiff, in support of his claim, produced a certified copy of a decree obtained *ex parte* in a previous rent-suit on the 20th May 1867, with reference to the same mouza and against the present defendant, for an amount similar to that which he now claimed; and further produced evidence to show that

\* Appeal from Appellate Decree, No. 2272 of 1879, against the decree of R. Towers, Esq., Officiating Judicial Commissioner of Chota Nagpore, dated the 7th June 1879, affirming the decree of Baboo Radha Madhub Bhowse, Deputy Collector of Manbhoom, dated the 23rd January 1879.

† [Sec. 13 :—No Court shall try any suit or issue, in which the matter directly and substantially in issue has been heard and finally decided by a Court of competent jurisdiction, in a former suit between the same parties, or between parties under whom they or any of them claim, litigating the same title.

*Explanation IV.*—A decision is final within the meaning of the section when it is such as the Court making it could not alter (except on review) on the application of either party or reconsider of its own motion. A decision liable to appeal may be final within the meaning of this section until the appeal is made.]

this decree had been executed in due course. The defendant, on the other hand, denied all knowledge of these proceedings, and alleged that they were collusively taken in order to fabricate evidence for the present suit.

The original Court found as a fact, that the alleged execution-proceedings were fraudulent, and the plaintiff having otherwise failed to make out his case, gave a decree only for Rs. 39-10, the amount admitted by the defendant as due.

The lower Appellate Court supported this finding, and following the decision in *Goya Pershad Aubustee v. Tarinee Kant Lahoree Chowdhry* (23 W. R., 149) held, that the *ex parte* decree was not good evidence of the amount of jumma payable by the defendant.

From these two decrees the plaintiff then appealed to the High Court, on the ground that the lower Appellate Court was wrong in holding that the *ex parte* decree was not good evidence of the amount of the jumma, and that it was for the defendant to prove that the decree had been fraudulently obtained against him; and that, he having failed to do so, the lower Courts should have given a decree for the amount claimed.

Baboo *Bhobany Churn Dutt* for the Appellant.

[25] Baboo *Munmohun Dass* for the Respondent.

The **Judgment** of the Court (CUNNINGHAM and PRINSEP, JJ.) was delivered by

**Cunningham, J.**—In this case, in a suit for rent, an endeavour is made to use an *ex parte* decree obtained by the plaintiff as conclusive evidence against the defendant as to the amount of rent.

The defendant denies all knowledge of the decree, and the first Court considered the alleged execution to be fraudulent. The lower Appellate Court considered that the *ex parte* decree "was not good evidence" of the amount of rent; and, in the absence of any other sufficient evidence, it dismissed the plaintiff's claim. We think that this view is correct. The decree being *ex parte* is not "final" within the meaning of expl. 4, s. 13 of the Code of Civil Procedure, so long as it is open to the Court, on the application of the parties, to modify it. As in this case the alleged execution was held to be fraudulent, and no proceedings had been had which gave finality to the decree, we think that the lower Appellate Court was right in holding that, in the absence of any proof of execution, the defendant was not precluded by the existence of the decree from contesting a question with which it dealt.

Our present decision does not conflict with that in *Birchunder Manickya v. Hurrish Chunder Dass* (I.L.R., 3 Cal., 383), inasmuch as the question here is whether the plaintiff had a right to use the *ex parte* decree as conclusive evidence.

The appeal is dismissed with costs.

*Appeal dismissed.*

#### NOTES.

#### [EX PARTE DECISION NOT RES-JUDICATA—

Followed in (1882) 8 Cal. 275 and (1899) 9 M. L. J. 60 where it was held that an *ex parte* decision was not *res judicata* as it was not final within the meaning of explanation to sec 13 of Civil Procedure Code (of 1877 and (1882) cf. s. 11 of the Civil Procedure Code of 1908.]

[26] CRIMINAL REFERENCE.

The 31st March 1881.

PRESENT :

MR. JUSTICE PONTIFEX AND MR. JUSTICE FIELD.

Jhumuk Noniah

versus

Shadashib Roy.

*Distrant—Rent Act (Beng. Act VIII of 1869, ss. 72, 74, 76—Criminal trespass.*

A, the servant of B, was convicted of criminal trespass in going upon the land of C, one of B's tenants, and preventing him from cutting his crops. B was convicted of abetment of criminal trespass. A and B pleaded that they were acting in the exercise of the legal right of distraint.

It appeared that no written demand under s. 72 of the Rent Act (Beng. Act VIII of 1869) for the amount of the arrears, together with an account exhibiting the grounds on which demand had been made, was served on C, and that no written authority under s. 76 had been given by B to A.

*Held*, that it lay upon A and B to show that they had conformed to the provisions of the law, or at least had acted with the *bona fide* intention of distraining the complainant's crops; and that the conviction was right.

*Held* also, that, as under s. 74 standing crops and ungathered products may, notwithstanding distraint, be reaped and gathered by the cultivator, A had no right, even if he was acting *bona fide*, to restrain C from cutting his crops.

THE facts of this case sufficiently appear from the **Judgment** of the Court (PONTIFEX and FIELD, JJ.), which was delivered by

**Pontifex, J.**—In this case Shadashib Roy has been convicted of criminal trespass punishable under s. 147 of the Indian Penal Code, and Sheosahai has been convicted of abetment of criminal trespass punishable under s. 447† read with s. 109. The facts of the case appear to be as follows:—There is a dispute between Sheosahai and his tenants on the subject of rent. On the day of the occurrence, which forms the subject of these criminal proceedings, Shadashib, the servant of Sheosahai, and a number of other persons, went on the field of the complainant, and prevented him from cutting [27] his paddy. Shadashib was sentenced to pay a fine of Rs. 10, and his master, Sheosahai, was sentenced for abetment to pay a fine of Rs. 100. The Sessions Judge of Tirhoot, on the appeal of Sheosahai, set aside his conviction and sentence; and he has now made a reference to this Court in order to have

\* Criminal Reference, No. 47 of 1881 (letter No. 114), from the order of H. W. Gordon, Esq., Officiating Sessions Judge of Tirhoot, dated the 14th March 1881.

†Sec. 447 :—Whoever commits criminal trespass, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees or with both.

the conviction and sentence of Shadashib Roy set aside. The Sessions Judge is of opinion, that the facts of the case as shown by the evidence do not constitute the offence of criminal trespass. We are unable to take this view of the case. It lay upon the accused persons, who set up in their defence that they were acting in the exercise of the legal right of distraint, to show that they had conformed to the provisions of the law, or at least to prove such facts as would raise a reasonable presumption that, even although they had in some respects acted illegally, still what they did was done with the *bona fide* intention of distraining the complainant's crops.

Under s. 72 of the Rent Act, the distrainer is bound to serve the defaulter with a written demand for the amount of the arrears, together with an account exhibiting the grounds on which the demand is made. No attempt was made to show that this was done. Under s. 76 of the same Act, if Sheosahai, instead of going himself to distraint, employed a servant to make the distress, he was bound to give such servant a written authority. No attempt has been made to show that such authority was given. There is upon the record some evidence to show that Sheosahai was only one sharer in the estate upon which the complainant was a ryot. Under the provisions of s. 58 of the Rent Act, a sharer in a joint estate in which a division of the lands has not been made amongst the sharers, is precluded from exercising the powers of distraint otherwise than through a manager authorized to collect the rents of the whole estate on behalf of all the sharers in the same. There is nothing to show that the person who is alleged to have distrained the property of the complainant in this case was the manager acting on behalf of all the sharers. We desire, however, to say that we do not give much weight to this last point in deciding the present case, as the evidence does not clearly show whether the estate in which Sheosahai [28] has an interest falls within the above definition. Then, under s. 74 of the Rent Act, standing crops and other ungathered products may, notwithstanding the distraint, be reaped and gathered by the cultivator. Now the evidence shows that Shadashib Roy and the men with him prevented the complainant from cutting the paddy, and this they clearly had no right to do even if they were acting *bona fide* in the exercise of the power of distraint. It was said by one of the witnesses for the defence, that Sheosahai had called upon the ryots to produce receipts for the rents lodged by them in Court, and that as they failed to do so their crops were distrained. The complainant stated on oath that his receipt had been filed in a case in the Civil Court; and if this were so, this was a good reason for not producing it on demand. At the same time it is to be observed that there was on the record evidence that the rent had been lodged in Court. If it were lodged, a notice would have been given by the Court to Sheosahai under s. 47 of the Rent Act. Sheosahai did not deny having received this notice.

Having regard to all these circumstances, we think that we ought not to interfere with the conviction of Shadashib Roy, more especially as the fine imposed upon him will probably be paid by his employer, and we further think that the conviction of Sheosahai was not properly reversed.

APPELLATE CRIMINAL.

The 29th March, 1881.

PRESENT :

MR. JUSTICE PONTIFEX AND MR. JUSTICE FIELD.

Faiz Ali and others.....Petitioners

versus

Koromdi.....Opposite Party.\*

*Recalling Witnesses, Time for—Right of Accused to recall witnesses for Prosecution—Criminal Procedure Code (Act X of 1872), ss. 217, 218.*

Reading ss. 217† and 218‡ of the Criminal Procedure Code together, it appears that, if an accused person desires to recall and cross-examine the witnesses for the prosecution, the time at which he should express such desire is when the [29] charge is read over to him and he is called upon to make his defence, and although it is in the discretion of the Magistrate to recall the witnesses at a subsequent stage of the case, the accused has no right to insist upon the witnesses being recalled.

IN this case the petitioners were charged with having wrongfully confined one Koromdi. The complainant's witnesses were examined and cross-examined. On the 17th December 1880 the charge was drawn up, and the case was adjourned until the next day. On that day the accused presented a petition, asking for leave to recall and cross-examine the complainant's witnesses. This application was refused, on the ground that it was too late, and the petitioners were convicted and sentenced to fine and imprisonment. An appeal to the Magistrate was dismissed. The petitioners, thereupon, obtained a rule calling upon the complainant to show cause why the conviction should not be quashed, on the ground that the Deputy Magistrate had improperly refused to allow the petitioners to recall and cross-examine the complainant's witnesses.

Baboo Grish Chunder Chowdhry in support of the rule.

Baboo Joy Govind Shome showed cause.

**Pontifex, J.**—This rule was moved for and granted by us on the ground that the Deputy Magistrate had improperly refused to allow the petitioners to recall and cross-examine the witnesses of the complainant after the charge had been framed under s. 217. The same objection was taken in appeal before the Magistrate, and the Magistrate, in his decision, has held that the petitioners

\* Criminal Motion, No. 64 of 1881, against the order of Moulvie Syud Faizoddeen Hossein, Deputy Magistrate of Mymensing, dated the 20th December 1880.

†[Sec. 217:—The charge shall then be read and explained to the accused person, and he shall be asked whether he is guilty or has any defence to make.]

‡[Sec. 218:—If the accused person have any defence to make to the charge, he shall be called upon to enter upon the same, and to produce his witnesses if in attendance, and shall be allowed to recall and cross-examine the witnesses for the prosecution.]

If the accused person puts in any written statement, the Magistrate may file it with the record, but shall not be bound to do so.]



did not exercise their right under s. 218, of recalling the witnesses for the prosecution for cross-examination within proper time, and that therefore they were not now entitled to take any objection on account of the refusal by the Deputy Magistrate to recall such witnesses.

Now, in the petition before us, it is stated that the charge was drawn up on the 17th of December 1880, and that on the same day an application was made to the Deputy Magistrate, asking that the witnesses should be recalled for further cross-examination. It appears, however, that the petition before the [30] Deputy Magistrate asking that the witnesses should be recalled, although dated on the 17th December 1880, could not have been filed before the 18th December 1880, the date on which the stamp was punched and the date on which the endorsed order was made. It appears that, early in December, the witnesses, both for the complainant and for the accused persons, had been examined and cross-examined, and on the 17th December the charge was drawn up, and the Deputy Magistrate made this order,—“To-day having heard the pleaders and mukhtears, the case will stand over until to-morrow.” The ordinary inference would be, that the pleaders and mukhtears having been heard, the case had closed, and only awaited the decision of the Deputy Magistrate. But, however that may be, the only rights that the accused person has, are under s. 218 of the Criminal Procedure Code. Now, under s. 217, the charge is to be read and explained to the accused person, who is to be asked whether he has any defence to make. That was done on the 17th December. Under s. 218, if the accused has any defence to make, he is to be called upon to enter upon the same, and to produce his witnesses, and is to be allowed to recall and cross-examine the witnesses for the prosecution. These two sections coming together, it seems to us that it was intended, that if the accused person desired to recall and cross-examine the witnesses for the prosecution, the time at which he should express such desire was, when the charge was read over to him and he was called upon to make his defence. That was done on the 17th December. The petition to recall these witnesses was not put in until the 18th. Therefore we think, that it was no longer in the power of the accused persons to insist upon their right of recalling these witnesses, although it remained in the discretion of the Deputy Magistrate to recall them if he thought fit. Now, on the 18th December, he made another order directing that the case should come on again on the 20th; and on the 20th, an order was drawn up, but not signed, directing that the witnesses should be produced for re-examination on the 28th. The Deputy Magistrate never signed that order, for, before he was prepared to sign it, one of these witnesses for the prosecution, a policeman, who [31] happened to be in Court, was produced, and it was asked on behalf of the prosecution that, if the accused persons wanted to cross-examine this witness they should do so at once. The accused refused to cross-examine him then, alleging that it would prejudice their case unless all the witnesses were cross-examined together. The Deputy Magistrate then considered that the application for cross-examination was made only with the object of delaying the proceedings, and that it was not a *bonâ fide* application; and it being, under the circumstances, in his discretion to recall the witnesses or not, and the accused having lost their rights under s. 218, the Deputy Magistrate decided that he would not sign the order drawn up, and he proceeded to dispose of the case. The Magistrate, on the appeal before him, considered that the Deputy Magistrate had acted with propriety, and we are disposed to agree with the Magistrate in that opinion. We think that there is not sufficient ground for this application, and that the rule must be discharged.

**Field, J.**—I only desire to add, that the vernacular record shows that "the vakeels and mukhtears," that is, as I understand, the vakeels and mukhtears of both sides were examined on the 17th. Now, though the Code of Criminal Procedure contains no express provisions similar to those to be found in the Civil Procedure Code as to the time at which, or the order in which the pleaders and mukhtears for the prosecution, or for the defence, shall address the Court, still, according to mofussil practice, the usual practice on this point is followed. I therefore understand from the vernacular record, that the pleader or mukhtear of the accused had addressed the Court, and that the pleader or mukhtear of the prosecution had been heard in reply. This being so, I take it that the case was closed on the 17th, and the accused not having exercised the right given them by s. 218\* at the time at which they ought, if they intended to exercise it, to have expressed their intention of doing so, I think they could not afterwards claim to exercise that right.

*Rule discharged.*

**NOTES.**

[See. Rat. Unreported cases 930]

[32] ORIGINAL CIVIL.

*The 25th April, 1881.*

PRESENT :

MR. JUSTICE WILSON.

Lackersteen and others

*versus*

Rostan and others.

*Trustee Act (XXVII of 1866), ss. 2, 19, 20 and 32—Appointment of Person to convey Property on behalf of Persons out of the Jurisdiction and under other Disabilities.*

Where property has been, by an order of Court, directed to be sold, and where some of the parties interested in such property are either out of the jurisdiction, married women, or minors, and the place of abode of others of them is unknown, the Court will, on petition, under the Indian Trustee Act, appoint a person to convey the interest of such persons to any purchaser, notwithstanding that, at the time the order is applied for, no contract for the sale of the property has been entered into.

But the Court cannot make such an order with respect to the interest of a party who has not been served, and who has not entered appearance.

THIS was an application, under ss. 20 and 32 of Act XXVII of 1866, for an order, that the Receiver of the High Court (who had previously been appointed Receiver in the suit) should be appointed to convey certain premises in Calcutta, if and when the same were sold, as directed by an order already made for that purpose, to the respective purchasers thereof, for and on behalf of the estates of the several persons interested therein.

It appeared from the petition, that there were thirty-six parties to the suit who would be necessary parties to the conveyance, five of whom were infants, four married women living out of the jurisdiction, in Sydney, Moulmein, Akyab, and Allahabad ; that the place of abode of five others was unknown ; that three others were in Sydney, three in London, four at Nantes, and one at Nynee Tal. It further appeared, that an order in the suit, dated the 4th April 1881, had directed the property in question to be sold for payment of certain costs, but that, at the time of the present application, no contract of sale had been entered into.

Notice of the application had been served on the the attornies of all the parties to the suit who had appeared by attorney, and [33] they were represented by counsel, and did not oppose the application. A number of the defendants had not entered appearance in the suit, although they had been duly served with the original writ of summons. No notice of the application had been given to them, and they were not represented at the hearing of the application.

As regards one of the defendants, Joseph Polycarp Lackersteen, the summons in the suit had not been served upon him, and his whereabouts was not known, and there was no appearance made for him in the suit.

The application was for an order that the Receiver might execute the conveyance on behalf of all the parties to the suit, although as to some of them, who were stated to be living in or near Calcutta, it was admitted that no

practical difficulty existed in the way of getting their signatures to the conveyance; but that it would be a saving of expense to include them in the order.

Mr. *Stoke* for the applicants (the plaintiffs in the suit).—The order asked for can be made under ss. 20 and 32 of Act XXVII of 1866, the Indian Trustee Act. Section 32 gives the Court power to make an order vesting property in lieu of conveyance by a party to the suit *after a decree or order for sale*. Section 20 gives the Court power to appoint a person to convey in all cases where it may make a vesting order. Section 2\* defines the meaning of the words “person holding such property” used in s. 32. There are thirty-six parties to this suit, many of whom are at a great distance from Calcutta, and it would be impossible to get their signatures to any deed of conveyance which may have to be executed within any reasonable time, and a further difficulty would arise in registering such conveyance and in obtaining its acknowledgment by such of the parties as are married women. It is true that, although an order has been made for sale, no contract for sale has yet been entered into; but the words of the section are wide enough to admit of the application being granted. The cases of *Hancox v. Spittle* (3 Sm. and Giff., 478) and *In re Boden's Estate* (1 D.M.G., 57) were cited.

[34] As to the service of summons in the present case, one defendant, Joseph Polycarp Lackersteene, has not entered an appearance in the suit, nor has he been served with the writ of summons, he is out of the jurisdiction and cannot be found; others have been served, but have not appeared. I ask on the authority of *Hancox v. Spittle* (3 Sm. and Giff., 478) for an order that the Receiver may execute the conveyance for all parties whether under disability or not.

Mr. *Agnew*, Mr. *White* Mr. *Allen* and Mr. *Salé* appeared for some of the defendants, and consented to the order.

**Wilson, J.**—I cannot make an order as regards the defendant Joseph Polycarp, as he has not been served or entered appearance, but the order may run that the Receiver do convey, on behalf of all parties other than Joseph Polycarp.

Attorney for the applicants: *C. C. Robinson*.

Attorneys for other parties: *S. Dignam, J. Camell, A. Watkins, G. C. Farr, and J. F. Watkins*.

*Application allowed.*

#### NOTES.

[Referred to in (1908) 10 Bom. L. R. 1176 for the position that the Meher method for obtaining order under s. 32 of Indian Trustee Act is by way of petition.]

Interpretation.

\*[Sec. 2.—In this act, unless there be something repugnant in the subject or context—

\* “Hold” and “Holding” shall be applicable to any vested estate, whether for life or of a greater or less duration in possession, futurity, or expectancy, in any immoveable property. \*

[7 Cal. 34]

APPELLATE CIVIL.

The 18th March, 1881.

PRESENT:

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE PRINSEP.

Mohunt Megh Lall Pooree.....JUDGMENT-DEBTOR.

versus

Shib Pershad Madi and others.....Decree-holders.<sup>1</sup>

*Execution—Irregularities in Proclamation of sale—Evidence of such irregularities—Nazir's Report—Civil Procedure Code (Act X of 1877), ss. 274, 287, 289, 290, 291, and 295—Sale to satisfy Judgment-creditor who has not attached.*

The proclamation of sale required by s. 274† of the Civil Procedure Code, to be made at some place adjacent to the property to be sold, and the fixing up of a copy of the order in a conspicuous part of the property, are acts which must precede the posting of the notices in the Court-house as required by s. 290. ‡

[35] Where the sale-proceeds of a portion of several parcels of property are sufficient to satisfy the decree of a judgment-creditor who has attached the property, another judgment-creditor, although he has not attached the property, is still entitled to have the remainder of the property sold to satisfy his decree under the provisions of s. 295§ of the Civil Procedure Code.

\* Appeal from order, No. 275 of 1880, against the order of Major W. L. Samuells, Official Deputy Commissioner of Hazarcebagh, dated the 4th of August, 1880.

†[Sec. 274 —If the property be immoveable, the attachment of immovable property shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from receiving the same from him by purchase ; gift or otherwise.

The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be fixed up in a conspicuous part of the property and of the Court-house.

When the property is land paying revenue to Government, a copy of the order shall also be fixed up in the office of the Collector of the District in which the land is situate.]

‡[Sec. 290.—Except in the case of property mentioned in the proviso to section 269, no sale under this Chapter shall, without the consent in writing of the judgment-debtor, take place until after the expiration of at least thirty days in the case of immoveable property, and of at least fifteen days in the case of moveable property, calculated from the date on which the notification has been affixed in the Court-house of the judge ordering the sale.]

§[Sec. 295 :—Whenever assets are realized by sale or otherwise in execution of a decree, and more persons than one have, prior to the realization, applied to the Court by which such assets are held for execution of decrees for money against the same judgment-debtor, and have not obtained satisfaction thereof, the assets, after deducting the costs of the realization, shall be divided rateably among all such persons.

Provided that, when any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer, shall not be entitled to share in any surplus arising from such sale.

Provided also that when any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the assent of the mortgagee or incumbrancer,

Three mouzas were attached in execution of decrees obtained by A and B. Prior to the sale, C, who had also obtained a decree against the owner of the land, applied for leave to execute his decree, in order that he might participate in the sale-proceeds under s. 295 of the Civil Procedure Code. Upon the day fixed for the sale, the Deputy Commissioner was unable, through illness, to attend; and he postponed the sale for three days. Two of the mouzas were sold, and realized more than enough to satisfy the decrees of A and B. The third was then sold in satisfaction of C's decree. Upon an application by the judgment-debtor to set aside the sale on the ground of irregularity, it appeared, that notice of the sale had been posted in the Court-house more than thirty days before the date fixed for the sale, but had only been published on the properties to be sold five days before that date; that notice of the existence of a mortgage on the properties, but no further particulars, was given, and the mortgagee was allowed to purchase; and that the Deputy Commissioner had accepted the reports of the Nazir and Court-peon as to the proclamation of sale, and had refused to allow the judgment-debtor to give evidence of its insufficiency.

*Held*, that the proclamation of sale on the property having taken place only five days prior to the date of sale, and the particulars of the mortgage not having been given, there had been such material irregularities in the publication as to entitle the judgment-debtor to give evidence of them and the other allegations made by him, in order to show that he had suffered material injury by reason of such irregularities.

*Held* also, that Deputy Commissioner was not entitled to proceed upon the reports of the Nazir and Court-peon, but was bound to hear the evidence tendered by the judgment debtor, though he was justified, under s. 291, in postponing the sale as he had done.

*Okhoy Chunder Dutt v. Erskine and Co.* [3 W. R. (Mis.), 11], *Sreenath Thakoor v. Watson and Co.* (4 W. R. (Mis.) 4), and *Shah Koondun Lall v. Noor Ali* (10 W. R., 3) followed.

*Held* further, that the third judgment-creditor, who had not attached the property, was still entitled to have the sale proceeded with and his decree satisfied under the provisions of s. 295.

THIS was an application on the part of the judgment-debtor, in three execution cases, to set aside a sale held in the Court of the Deputy Commissioner of Hazareebagh on the 18th May 1880, the properties sold consisting of three mouzas,—viz., Kharn, [36] Kharkhan, and Palmo. It appeared that these mouzas had been attached in execution of two decrees held by Mohanund Dutt and Norchunder Dutt, but prior to the sale, a third decree-holder, Sheo Pershad Madi, applied for leave to execute his decree in order that he might participate in the sale-proceeds under the provisions of s. 295 of the Civil Procedure Code; but no prohibitory order had been issued or served in respect of this decree. The two first mentioned mouzas were in the first instance put up for sale and realized a sum more than sufficient to satisfy the decrees of the two judgment-creditors who had attached the properties, and on the same day, and immediately after they had been sold, the remaining mouza was put up and sold in spite of the protest of the judgment-debtor, and all three decrees were satisfied. Amongst the grounds upon which the judgment-debtor sought to have the sale of all three properties set aside, he alleged that the notices of sale were not published in the villages to be sold, which were situated

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order that the property be sold free from the mortgage or charge giving to the mortgagee or incumbrancer the same right against the proceeds of the sale as he had against the property sold.

If all or any of such assets be paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.

Nothing in this section affects any right of the Government.]

sixty miles from Hazareebagh, until the 10th May 1880, only five days before the date of the sale, which was fixed for the 15th May, and\* that, consequently, sufficient time was not allowed for purchasers to attend the sale; that as the decrees, on account of which the two mouzas, Kharn, and Kharkhan, were attached and sold, amounted to Rs. 4,579-3, and the sale-proceeds thereof amounted to Rs. 6,800, there was no necessity for the Court to proceed with the sale of Palmo; and that the sale, though fixed for the 15th May, did not actually take place till the 18th, and in consequence of such delay, the sale should not then have been proceeded with until fresh notices had been issued under s. 295 of the Civil Procedure Code. He further objected to the sale on the ground of the inadequacy of the price obtained through the properties having been imperfectly described, no further particulars being given with regard to a mortgage thereon other than the mere fact of its existence, and that, as the mortgagee who was in possession had become the auction-purchaser, under these circumstances he had suffered material injury, of which and of the other allegations contained in his petition he offered to produce evidence. The Deputy Commissioner, however, refused to admit the evidence, and, [37] acting upon the reports of the Nazir and peon, dismissed the petition and confirmed the sale.

Accordingly from this order the judgment-debtor appealed to the High Court.

Mr. W. C. Bonnerjee, Mr. R. E. Twidale, Baboo Troyluckonath Mitter and Baboo Jaggut Chunder Dey for the Appellant.

Baboo Chunder Madhub Ghose, Baboo Kallymohun Dass, and Baboo Tarrucknath Sen for the Respondents.

The following **Judgments** of the Court (CUNNINGHAM and PRINSEP, JJ.) were delivered:—

**Prinsep, J.**—In execution of two decrees held by Norchunder Dutt and Mohanund Dutt, the right, title, and interest of the judgment-debtor, appellant, in three mouzas, Kharn, Kharkhan, and Palmo, were attached and advertised for sale. Meantime a third decree-holder, Sheopershad, applied to execute his decree, in order that, under s. 295 of the Civil Procedure Code, he might participate in the sale-proceeds.

The two first mentioned properties were then sold, and realized a sum more than sufficient to liquidate the decrees of the judgment-creditors who originally put the Court in motion. The remaining property was next sold, and all the decrees have been satisfied.

Various objections were then taken to the sale, which were disallowed by the Deputy Commissioner of Hazareebagh, and the judgment-debtor has now appealed against that order. It is first of all contended by Mr. W. C. Bonnerjee, for the judgment-debtor, appellant, that, as the decrees under execution were satisfied by the two properties first sold, no further sale should have been held. What would be the effect of an application made by those whose decrees were under execution to abstain from further proceedings on another decree-holder who had merely applied to execute his decree so as to obtain the benefit of s. 295, that is, to participate in the assets realized in execution of the other decrees, we are not called upon to decide, because it does not appear that in the case now before us the [38] two decree-holders, who are actually executing their decrees, made any such application. That the amount realized by the sale of the first two properties was sufficient to satisfy their decrees is

immaterial, since by the interposition of another decree holder, under s. 295, that sum would not be payable to them alone. It would be subject also to the claim of this stranger, who, under s. 295, would be entitled to a rateable distribution of the assets. It could not then be said that by the amount realized from the first sale the decrees under execution were satisfied. We think, therefore, that the lower Court rightly proceeded to sell the third property, Palmo.

It further objected that no proclamation of sale was made on the spot as required by s. 274; that the Deputy Commissioner should have given the judgment-debtor an opportunity of proving this; that he improperly received in evidence and acted on the reports of the Nazir and peon; that even if the proclamation was made on the spot, it admittedly was not made until the 10th May, five days before the day fixed for sale, and therefore not in sufficient time; that the property was not described in the sale-proclamation; that the Deputy Commissioner was not competent to adjourn the sale for three days in consequence of his sickness; that the mortgagee in possession should not have been allowed to purchase, and that, in consequence of all these irregularities, substantial injury has been caused, an inadequate price, much below the proper value of the properties, being obtained.

It is in the first place clear, that the Deputy Commissioner was wrong both in accepting as evidence the reports of the Nazir and peon regarding the sale-proclamation having been regularly made, and in refusing to give the judgment-debtor an opportunity to adduce evidence to the contrary. The case quoted by him—*Alimooddy Chowdhry v. Chunder Nath Sen* (24 W. R., 227), is not in point. On the other hand it has been repeatedly held, that such reports are not legal evidence: *Okhoy Chunder Dhur v. Erskine & Co.* [3 W. R. (Mis), 11] *Sreenath Thakoor v. Watson & Co.* [4 W. R. (Mis), 4], *Shah Koondun Lall v. Noor Ali* (10 W. R., 3).

[39] But even if the sale-proclamation was made, it admittedly was not made until the 10th May, five days before the day fixed for sale. We are informed by the appellant's counsel, and this is not disputed by the respondents' pleader, that the place on which it is said to have been made is sixty miles from the Court holding the sale. It is pressed on us by the learned counsel for the appellant, that although the law, s. 290, declares that it is necessary only that there should be an interval of thirty days between the date of fixing up of the sale-proclamation on the Court-house and the day of sale, that "fixing up" cannot be done until proclamation has been duly made and reported to the Court. The terms of the law, s. 290, certainly leaves this in doubt, and it is difficult to understand the object of enacting a specific term, thirty days from any proceeding not the final proceeding, unless the other necessary proceeding is considered merely formal and of no material effect on the sale. It appears to me, however, that the making of a sale-proclamation on the spot is a most material proceeding, for it must be presumed that, ordinarily, purchasers will be those living in the neighbourhood, best informed of the real value of the property, and most likely to purchase from the situation of the property with respect to their own residence or properties held by them. Of course, in some cases it may be that the value of the property to be sold may put it beyond the power of neighbours to compete at the auction, and that the bidders can only be capitalists residing near the Court-house, but such would be exceptional cases, and in seeking the object of the Legislature, we must look to the vast majority of the cases which occur. It appears to me, too, that it could not have been intended that a copy of the sale-proclamation should be "fixed up in the



Court-house" until it was actually reported to the Court that the proclamation itself had been made under s. 274. I further think that the order in which these proceedings should be taken is indicated by the order in which they are expressed in s. 290. If this view be not accepted, the Court in each case would have to determine whether a sale-proclamation had been made in a reasonable time before the date of sale, so as to give a fair opportunity to persons likely to purchase, who live on or near the [40] property to be sold, although a term is specified with regard to the fixing up of the copy of the sale-proclamation in the Court-house. Such a rule would not only be inconvenient, but would be contrary to what I conceive to be the intention of the Legislature, *viz.*, to fix some term which must expire between the last formality to bring a property to sale, and the sale itself. I, therefore, have no hesitation in holding that if the proclamation was made on the spot only five days before the date fixed for sale, there has been "a material irregularity in publishing it." It would, however, be incumbent on the person seeking to set aside the sale, the judgment-debtor, to show that "he has sustained material injury by reason of such irregularity."

As regards the objection taken regarding the adjournment of the sale for three days, in consequence of the illness of the Deputy Commissioner, we consider that that officer exercised a wise discretion given to him by law (s. 291<sup>2</sup>) in refusing to hold the sale of properties of such large value except under his personal superintendence, which, in his absence from illness, would be impossible.

The next objection is, that the properties were imperfectly described in the sale-proclamation. The law requires that a proclamation of sale shall specify, as fairly and accurately as possible, any incumbrance to which the property is liable, and also every other thing which the Court considers material for the purchaser to know in order to judge of the nature and value of the property. I observe that only the right, title, and interest of the mortgagor (that is, the equity of redemption) were sold, and that the sale-proclamation states that the property is subject to a mortgage. It appears that the mortgagee is in possession of these properties, and that he is the purchaser at the auction-sale. Now it is clear that, to enable a bidder to form any definite idea of the value of these properties, the amount of the outstanding debt should have been specified. Unless that was declared, the mortgagee would be the only person who was in possession of this information; and if that information were withheld, he would be able to bid at an advantage with regard to other bidders. Such an omission, where [41] the mortgagee in possession is himself the purchaser, affords strong *prima facie* grounds for believing that an inadequate price was obtained.

We, therefore, remand this case to the Deputy Commissioner, and direct that he do give the parties an opportunity to adduce such evidence as they may desire on the points indicated, and decide the case accordingly.

\*[Sec. 291 :—The officer conducting any sale under this chapter may in his discretion adjourn the sale, recording his reasons for such adjournment : Provided

Power to adjourn sale.

that when the sale is made in or within the precincts of the Court-house no such adjournment shall be made without the leave of the Court. Every such sale shall be stopped if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to such officer or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court that ordered the sale.]

Stoppage of sale on tender of debt and costs, or on proof of payment.

**Cunningham, J.**—This is an appeal from an order refusing to set aside a judgment sale of immoveable property on the ground of material irregularities in publishing and conducting it, whereby the appellant has sustained substantial injury.

One of the alleged irregularities was, that no proclamation was made on the spot in conformity with ss. 289 and 274, Civil Procedure Code. No opportunity was given to the execution-debtor of proving this, the Court satisfying itself with the reports of the Nazir and peon as sufficient proof of the proclamation. This was irregular. In the next place, it is admitted that the proclamation on the spot, if made at all, was not made till five days before the sale. With regard to this the intention of ss. 289 and 290 must, in my opinion be taken to be that the proclamation should be made on the property in question before or at the same time that the copy of it is fixed up in the Court-house, and that the reason of the omission in s. 290 of reference to the proclamation on the spot as one of the events which must occur at a specified time before the sale, is, that the Act regards the proclamation on the spot and the fixing of it up in the Court as simultaneous proceedings.

In the present instance, as the distance of the property from the Court was sixty miles, the period allowed was clearly inadequate, and there was a material irregularity which, if it can be shown that there has resulted material injury (of which gross inadequacy of price would be an indication), would entitle the judgment-debtor to have the sale set aside.

Another of the alleged irregularities is the inadequate description of the properties in the proclamation of the sale. Section 287 of the Civil Procedure Code requires that any incumbrance to which the property is liable should be stated, as well as every other thing which the Court considers material [42] for the purchaser to know in order to judge of the nature and value of the property. In this case the proclamation stated the fact of an incumbrance, but omitted to specify the amount of the mortgage debt still outstanding. This would leave the incumbrancer in a more favourable position than any one else to judge of the value of the equity of redemption, and as he was the purchaser, it is probable enough that this irregularity did occasion substantial injury to the judgment-debtor.

The order of the lower Court must accordingly be set aside, and the case remanded to the Deputy Commissioner to rehear the application with reference to the observations made above.

Costs will abide the result.

*Case remanded.*

Mode of making proclamation.

\*[Sec. 289 :—The proclamation shall be made, in manner prescribed by Section 274, on the spot where the property is attached.]

If the Court so direct, such proclamation shall also be published in the local official Gazette and in some local newspaper, and the costs of such publication shall be deemed to be costs of the sale.]

**NOTES.**

[I. Civil Procedure Code s. 290 (1877) of O 21, r 68.

Auction sale held within 30 days from the date of publication of proclamation of sale—material irregularity.

If such a sale is held it is a case of material irregularity (1882) 11 C. L. R. 303, and the sale ought to be set aside if there is damage.

See also (1890) 5 C. L. J. 687, where the sale was held on the 22nd day. The Allahabad High Court held in (1882) 4 All. 300 that it did not amount to material irregularity. But EDGE, C. J. went further in (1889) 11 All. 333, and held that it is an illegality though BRODHURST, J. held in the same case that it is only material irregularity. The Madras High Court holds that no distinction is drawn between irregularity and illegality under this section (1894) 5 M. L. J. 70.

II. Referred to in (1891) 16 Bom. 91 for supporting the position that "all claims enforceable under attachment" includes the claim of all persons who are entitled to claim rateable distribution in the sums realised under attachment.]

[7 Cal. 42]

**APPELLATE CRIMINAL.**

*The 25th March, 1881.*

**PRESENT :**

**MR. JUSTICE PONTIFEX AND MR. JUSTICE FIELD.**

In the matter of the petition of Rochia Mohato.....Appellant.

The Empress

*versus*

Rochia Mohato.\*

*Evidence Act (I of 1872), s. 32, cl. 1, and s. 33—"Questions in Issue"—Charges added at Sessions—Depositions before Magistrate—Witness dying or absconding—Charge to Jury—Omission to notice Evidence—Qualification of Jurymen.*

In the proceedings before a Magistrate on a charge of causing grievous hurt, two (among other) witnesses, one of whom was the person assaulted, were examined on behalf of the prosecution. The prisoners were committed for trial. Subsequently the person assaulted died, in consequence of the injuries inflicted on him. At the trial before the Sessions Judge, charges of murder and of culpable homicide not amounting to murder were added to the charge of grievous hurt. The deposition of the deceased witness was put in and read at the Sessions trial.

\* Criminal Appeal, No. 162 of 1881, against the order of H. Beveridge, Esq., Officiating Sessions Judge of Patna, dated the 19th February 1881.

*Held*, that the evidence was admissible either under s. 32, cl. 1,\* or s. 33† of the Evidence Act, notwithstanding the additional charges before the Sessions Court.

[43] The question whether the proviso to s. 33 of the Evidence Act is applicable,—that is, whether the questions at issue are substantially the same,—depends upon whether the same evidence is applicable, although different consequences may follow from the same act.

At the trial it was proved that the other witness who had been examined before the Magistrate had disappeared, and that it had been found impossible to serve him with a summons. His deposition was put in and read.

*Held*, that it was properly admitted under s. 33.

In summing up the case to the jury, the Judge omitted to call their attention to the evidence of the witnesses for the defence. This evidence appeared to the High Court to be untrustworthy.

*Held*, that the summing up was not defective on account of this omission on the part of the Judge.

The fact that a person is a clerk in the office of the Magistrate of the District, is not sufficient to disqualify him from sitting on a jury.

THE facts of this case sufficiently appear from the judgment.

Mr. Gasper for the Appellant.

Mr. M. Ghose for the Prosecution.

The Judgment of the Court (PONTIFEX and FIELD, JJ.) was delivered by

**Pontifex, J.**—This is an appeal from a conviction by a jury in respect of which we can only interfere if there has been some error of law or misdirection by the Judge. Now it is alleged that we ought to interfere on two grounds,

Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.

\* [Sec. 32 :—Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases :—

When it relates to cause of death ;

(1) When the statement is made by a person, as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.]

† [Sec. 33 :—Evidence given by a witness in a judicial proceeding or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the

Evidence in a former judicial proceeding when relevant.

adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable :

Provided

that the proceeding was between the same parties or their representatives in interest ;  
that the adverse party in the first proceeding had the right and opportunity to cross-examine ;

that the questions in issue were substantially the same in the first as in the second proceeding.

*Explanation.*—A criminal trial or enquiry shall be deemed to be a proceeding between the prosecutor and the accused, within the meaning of this section.]

*first*, that evidence has been wrongly placed before the jury ; and *secondly*, that in certain particulars there has been a misdirection, or rather a want of direction by the Judge.

With respect to the first ground that improper evidence has been placed before the jury, the complaint is, that the depositions of two witnesses who were examined before the Magistrate were improperly allowed by the Judge to be put in by the prosecution and used in the Sessions Court under the following circumstances :

One of these witnesses was the person whom the defendant and his party were accused of assaulting, and who has since died. Now, before the Magistrate the only complaint was a charge of grievous hurt. But in consequence of the death of the person [44] who was hurt, *viz.*, Khedroo, other charges were added before the Sessions Judge,—*viz.*, a charge of murder and a charge of culpable homicide not amounting to murder. In consequence of these additional charges, it is argued that, under s. 33 of the Evidence Act, the questions in issue before the Sessions Court, and before the Magistrate, were not substantially the same in the two proceedings. As a matter of fact, the prisoner has only been convicted of grievous hurt ; and therefore the issue that was before the Magistrate was the only issue that has been decided against the accused by the jury. It appears to us, that, by "the questions in issue," referred to in s. 33, being required to be "substantially the same," it is not intended that, in a case where the prisoner injured dies subsequently to the enquiry before the Magistrate, his evidence is not to be used before the Sessions Court, because in consequence of his death other charges are framed against the accused. We are of opinion that the evidence of the deceased in this case was admissible under s. 33, and even if it were not admissible under s. 33, that it would be admissible under the first clause of s. 32 of the Evidence Act. The question whether the proviso to s. 33 is applicable,—that is, whether the questions at issue are substantially the same,—depends upon whether the same evidence is applicable, although different consequences may follow from the same act. Now, here the act was the stroke of a sword which, though it did not immediately cause the death of the deceased person, yet conduced to bring about that result subsequently. In consequence of the person having died, the gravity of the offence became presumptively increased ; but the evidence to prove the act with which the accused was charged remained precisely the same. We therefore think that this evidence was properly admitted under s. 33.

With respect to the other deposition which was put in and read before the Sessions Court, it appears that a person named Jan Ali, alleged to be the gomasta of the ticcadar, was examined before the Magistrate, and that he lived in the cutcherry-house. A summons was properly taken out to be served on Jan Ali, at the cutcherry-house, but the peon in his return stated that as he was unable to find Jan Ali and serve him [45] personally, he hung up the summons on the cutcherry-house. There is also evidence to show that Jan Ali suddenly disappeared from the cutcherry-house. It is further shown that inquiry was made in his native village whether he had returned there ; but the result of the inquiry was that nothing had been heard of him. It was therefore impossible to say where Jan Ali was or to serve him with a summons. We think, under these circumstances, that his deposition was properly usable under s. 33 before the Sessions Court, and it does not appear that any objection was made before the Judge to its admission. We find on the record no petition or memorandum showing that objection was made when the deposition was read ; but we do find that, on the part of the defendant himself, the deposition before the Magistrate of one of his own

witnesses was put in and was used as evidence. We think, therefore, that both these depositions were properly admitted by the Judge to be used as evidence in this case.

We then come to the next ground before us, that there has been a misdirection by the Judge, or rather a want of sufficient direction to the jury. It is alleged that many matters were not mentioned by the Judge in his charge which ought to have been brought to the notice of the jury; and, in particular, stress was laid on the fact that the Judge made no reference whatever to the evidence of the witnesses for the defence. We asked that the evidence of the witnesses for the defence should be read to us, and it has been read to us, and we have no hesitation in saying that the Judge, by making no reference to it in his charge to the jury, acted favourably rather than otherwise towards the prisoner. For, if reference had been made to that evidence, it would at the same time have been necessary to point out to the jury that the witnesses were not in accord with one another; that their statements were discrepant; and that the evidence of the principal witness, who is now relied upon for the defence, was really unreliable.

Moreover, we know that the prisoner was defended by counsel in the Court below; and although particular points may not have been alluded to in the Judge's charge to the jury, we have little doubt that they were made, and properly made, much of [46] by the defendant's counsel. It is therefore not to be assumed that these points were absent from the minds of the jury in considering their verdict. It is impossible for a Judge in summing up to go into every particular of the evidence. It is only necessary to direct the attention of the jury to the important and salient points in the case.

There is one other objection to which it is necessary to refer, and that is an objection that is taken before us as to the constitution of the jury, but about which there is nothing in the grounds of appeal to this Court. It is stated that the foreman of the jury was a clerk in the Magistrate's office. This is the only ground, as we understand it, on which objection could be made to him. He was challenged before the Judge, and it was for the Judge to decide whether the grounds of the challenge were such that he ought not to be allowed to sit on the jury.

The Judge was not satisfied that the grounds were sufficient; nor do we see any reason why his being a clerk in the Magistrate's office should disqualify him from sitting on the jury.

Under the circumstances, we must dismiss this appeal. The conviction and sentence will stand.

*Appeal dismissed.*

[7 Cal. 46]

The 23rd March, 1881.

PRESENT :

MR. JUSTICE PONTIFEX AND MR. JUSTICE FIELD.

In the matter of the petition of Kali Krishto Thakur.....Petitioner  
*versus*  
 Golam Ali Chowdhry.....Opposite Party<sup>1</sup>

*Criminal Procedure Code (Act X of 1872), s. 530—Record of grounds—  
 Police Report, Incorporation of—Evidence of possession—Evidence of title.*

In proceedings under s. 530 of the Criminal Procedure Code, the Magistrate recorded the following words, "whereas from the police report a breach of the peace probable," and found that certain persons were in possession.

*Held* that, although the record of grounds was unsatisfactory, as the initial proceeding did not contain within itself all which the law requires to be recorded, viz., in the first place that the Magistrate is satisfied that a dispute likely to induce a breach of the peace exists, and in the second place, the ground upon which he is so satisfied, yet that, as the police report from which the grounds for apprehending a breach of the peace appeared was incorporated by reference, the final order was not defective.

*In re Gobind Chunder Moitra* (I L. R. 6 Cal., 835) distinguished.

No sufficient evidence of possession was produced before the Magistrate, but evidence as to the title of the person in whose favour the Magistrate found was given, and the Magistrate based his decision upon the latter evidence, and determined the case with reference to the merits of the claims of the parties to the right of possession.

*Held* that, although the Magistrate would have been justified in looking to the evidence of title in corroboration of the evidence of possession, he was wrong in basing his decision on the evidence of title, and his order was set aside.

In this case an order had been made under s. 530 of the Criminal Procedure Code, declaring one Moonshi Golam Ali to be in possession of certain land.

\* Criminal Motion, No. 65 of 1881, against the order of Baboo Ackov Chowdhry, Deputy Magistrate of Madaripore, dated the 14th January 1881.

[Sec. 530 :—Whenever the Magistrate of a District, or a Magistrate of a division of a District, or Magistrate of the first class, is satisfied that a dispute likely to induce a breach of the peace exists concerning any land or the boundaries of any land, or concerning any houses, water, fisheries, crops or other produce of land, within the limits of his jurisdiction,

such Magistrate shall record proceedings stating the grounds of his being so satisfied, and shall call on all parties concerned in such dispute to attend his Court in person, or by agent, within a time to be fixed by such Magistrate, and to give in a written statement of their respective claims, as respects the fact of actual possession of the subject of dispute.

Such Magistrate shall, without reference to the merits of the claims of any party to a right of possession, proceed to inquire and decide which party is in possession of the subject of dispute. After satisfying himself upon that point, he shall issue an order declaring the party or parties to be entitled to retain possession until ousted by due course of law, and forbidding all disturbance of possession until such time.

*Explanation.*—Such Magistrate may satisfy himself of the existence of a dispute likely to induce a breach of the peace from a report or other information ; but the question of possession must be decided on evidence taken before him.]

A rule was obtained calling upon him to show cause why the order should not be set aside upon the grounds, *first*, that the preliminary proceeding recorded by the Magistrate, *viz.*, "whereas from the police report a breach of the peace probable," was defective; *secondly*, that the order made by the Magistrate was bad, inasmuch as it did not contain a sufficient description of boundaries so as to enable the land in respect of which the order had been obtained to be identified; and *thirdly*, that the Magistrate allowed his mind to dwell, not upon the question of possession, but on the question of title; and that he had not evidence of possession before him which could justify him in making the order.

Mr. M. Ghose, Baboo Doorga Mohun Doss, Baboo Kali Mohun Doss, and Baboo Ram Sukha Ghose in support of the rule.

Mr. H. Bell and Baboo Sektanath Roy showed cause.

The **Judgments** of the Court were as follows:—

**Field, J.**—This is a case under s. 530 of the Code of Criminal Procedure. The land in dispute is a piece of newly-formed chur land. It was claimed by one party as belonging to his estate Jahazmara, and by the other party as belonging [48] to the Mehal Panchkati. This rule was obtained substantially on three grounds: *first*, that the preliminary proceeding of the Magistrate was defective; *secondly*, that the order made by the Magistrate is bad, inasmuch as it does not contain a sufficient description by boundaries so as to enable the land in respect of which the order has been made to be identified; and *thirdly*, that the Magistrate allowed his mind to dwell, not upon the question of possession, but on the question of title and that he had not evidence of possession before him which could justify him in making the order. As to the first of these points, the learned Counsel for the petitioner relied on the case of *Sheikh Munglo v Durga Naran Nay* (25 W R. Cr. Rul., 75). In that case no proceeding whatever was recorded by the Magistrate who initiated the proceedings under s. 530 of the Code of Criminal Procedure. There was merely an order endorsed on the back of the police report, which order was in these terms: "Serve a notice on Durga Churn to at once cease from building the hut under s. 518, Criminal Procedure Code, and call on both parties to appear before me this day week with their documents, that I may determine, under s. 530, Criminal Procedure Code, who is in possession of the disputed land."

Now, in the case at present before us, there is a proceeding. The Magistrate has recorded the following words: "whereas from the police report a breach of the peace probable." It would seem that some such word as "is" or "appears" has been omitted. In *re Gobind Chunder Moitra* (I. L R., 6 Cal., 835), which was before this Bench a few days ago, I expressed an opinion, that it is the duty of the Magistrate, before taking proceedings under s. 530, to record a proceeding stating, in the first place, that he is satisfied that a dispute likely to induce a breach of the peace exists, and in the second place, the ground upon which he is so satisfied; and these observations have been now pressed upon me. I certainly think that it is the duty of a Magistrate to record distinctly, in cases under s. 530, that which the law requires to be recorded. But whether the omission on the part of a Magistrate to comply precisely with the requirements of the law will, in every case, afford a sufficient [49] ground for setting aside his order, is another matter. In the case *In re Gobind Chunder Moitra* (I. L R., 6 Cal., 835), which was recently before this Bench, a reference was made, in the Magistrate's proceedings, to the police report, and I expressed an opinion that even if the police report were taken to be incorporated by reference in the initial proceeding, there would not be matter sufficient to satisfy the requirements of the law. In the present case, the Magistrate's proceeding by itself is not a sufficient compliance with



the requirements of the law ; but if the police report, to which this proceeding refers, be taken to be incorporated, there is sufficient to show, *first*, that a dispute likely to induce a breach of the peace existed ; and *secondly*, to show grounds upon which the Magistrate might reasonably be so satisfied. I am distinctly of opinion that a Magistrate who records a proceeding like that which has been recorded in the present case, performs his duty in a perfunctory and unsatisfactory manner, but I am not prepared to say that the final order in the present case is defective, on the ground that the initial proceeding did not contain within itself all which the law requires to be recorded, but that we have to look to the police report in order to find matter sufficient to satisfy the requirements of the section. On this *first* ground, then, it appears to me that the objection taken by the learned Counsel must fail. As to the *second* ground that, namely, connected with the boundaries, there is, in all probability, a sufficient description, regard being had to the nature of the land which formed the subject of dispute and to the difficulty of giving precise boundaries of chur land, but it is not necessary to go farther into this question, because the order of the Magistrate ought, in my opinion, to be set aside on the remaining ground, which I am about to deal with. This ground is, that there was not evidence of possession before the Deputy Magistrate to justify his order ; that he has allowed his mind to wander away from the question of possession, which it was his duty to adjudicate upon ; and that his order is based entirely upon the view which he has taken with respect to title.

I have read through the evidence of the witnesses examined [50] on behalf of the petitioner before the Magistrate, and it appears to me that this rule ought to be made absolute upon the ground so taken. Section 530 of the Code of Criminal Procedure enacts that the Magistrate shall, without reference to the merits of the claims of any party to the right of possession, proceed to enquire and decide which party is in possession of the subject of dispute. Now it has been contended before us, that the proper meaning to be placed upon these words is, that the Magistrate is entirely precluded from receiving any evidence whatever as to the title of the parties. In that argument I do not concur. That possession should follow title is a reasonable and natural presumption ; and if a Magistrate, in a case of this kind, uses evidence of title merely in order to guide and assist his mind in coming to a decision upon the question of possession, it appears to me that he is not transgressing the provisions just quoted by using evidence of title for this limited purpose, but if, instead of proceeding to decide as to the actual possession, he virtually puts aside the consideration of this question and determines the question of title alone, then I think he is clearly doing that which the law has forbidden him to do. In the present case, the Deputy Magistrate, in the commencement of his judgment, says, that the parties were called upon to show their respective claims to it, *i.e.*, the chur. He does not say that they were called upon to show their respective claims to possession. He then proceeds to enter into the question of title, to consider the circumstances under which the chur came into existence, and to give reasons for thinking that this newly-formed chur is part of the estate of one party rather than of the estate of the other party. Having devoted a considerable portion of his judgment to the question of title, he then proceeds to deal with the question of possession. He commences this part of his judgment by saying, "Now to show possession, Baboo Kali Kristo Thakoor's men have examined several witnesses, one of whom is a Munsif's peon." He then deals with the evidence of the witnesses called to prove the distraint proceedings, which he believes to be fictitious ; and finally he says, "I lay not much stress on the deposition of such witnesses. As the circumstance and probability [51]

go in favour of Moonshi Golam Ali and as (to?) what I have stated in paragraph two of this decision, the disputed land lies beyond Jahazmara and is adjoined to Chur Panchkati; and as I believe it is in Golam Ali's possession, I direct that the disputed land should remain in Moonshi Golam Ali's possession till otherwise decided by competent Court." Here the Deputy Magistrate expressly states that he does not lay much stress upon the testimony of the witnesses; and if we put aside this oral evidence, the other evidence before him is concerned mainly, or indeed altogether, with the question of title. It is therefore clear that, apart from the oral evidence upon which he did not lay much stress, there was not evidence upon which the Deputy Magistrate could determine the question of actual possession, for evidence of title, though it may supplement and support direct evidence of possession, cannot, standing alone, be proof of possession. If the oral testimony of the witnesses went to show that the possession was with Golam Ali, and if the circumstances and probabilities of the case and the evidence of title had been used merely to corroborate this testimony, there would be sufficient on the record to support the order of the Deputy Magistrate; but on examining this oral evidence I find that it is mainly directed to the question of title, and contains little or nothing upon the question of possession.

On the whole, it is clear from the matter upon which the witnesses were examined, and from the Deputy Magistrate's judgment, that he did not properly address his mind to the question which it was his duty to try,—that is, the fact of actual possession, but did that very thing which by the provisions of s. 530 he was precluded from doing,—namely, determined the case with reference to the merits of the claims of the parties to the *right* of possession. This being so, it appears to me that the Deputy Magistrate's order under s. 530 of the Code of Criminal Procedure must be set aside.

This rule will be made absolute.

**Pontifex, J.**—I also agree that the proceedings must be set aside, and after the judgment of my learned brother, it is only necessary for me to say that, in my opinion, there was a sufficient proceeding recorded for the purpose of initiating pro-[52]ceedings under s. 530 of the Code of Criminal Procedure. I also wish to add that, if there had been substantial evidence of possession or a conflict of evidence on that question, the Magistrate would have been justified in looking to the evidence of title in corroboration of the evidence of possession. But as my learned brother has read the deposition of the witnesses, and it does not appear that there was sufficient evidence of possession, I agree that the case should not have been decided upon evidence of title alone.

*Rule absolute.*

[7 Cal. 52]

APPELLATE CIVIL,

The 11th February, 1881. -

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Goburdhon Lall.....Defendant

*versus*

Singessur Dutt Koer and others.....Plaintiffs.\*

*Hindu Law—Mitakshara—Mortgage of Ancestral estate by father for family purposes—  
Attachment of property in execution of decree—Death of judgment-debtor prior to sale.*

Where a decree on a mortgage was obtained against the father of a joint Hindu family governed by the Mitakshara law, the debt having been incurred for joint family purposes, and in execution thereof the joint family property was attached, but prior to sale the judgment-debtor died: in a suit subsequently brought by the other members of the joint family, praying for a partition of their shares, and for a declaration that such shares were not liable to be sold in execution of the mortgage decree,—

*Held*, that there could not be a partition as between a person already dead and his sons, and that the whole of the ancestral property was liable for the mortgage-debt, the only declaration to which the plaintiffs could be entitled being, that they were not liable to pay the debt.

[This headnote does not clearly express the decision in the case and is rather misleading. The second para of the headnote might be thus altered :—

*Held*, that there could not be a partition as between a person already dead and his sons the only declaration to which the plaintiff could possibly be entitled being, that they were not liable to pay the debt, and that the whole of the ancestral property was liable for the mortgage-debt, as the plaintiffs had not established that the debt was contracted for immoral purpose.”]

THIS was a suit brought by the plaintiffs, seven in number, for the purpose of obtaining a partition of a four-annas share of Mouza Nirpur, and seven-annas of Mouza Chuck Ibrahim, [53] between themselves and Chundermun Koer, the deceased father of the plaintiffs Nos. 1 to 6, and husband of the plaintiff No. 7; and for a declaration that the share which should be allotted to them was not liable to be sold in execution of a decree, dated 26th July 1875, passed against the said Chundermun Koer. The facts alleged in the plaint were, that the plaintiffs Nos. 1 to 6, with Chundermun Koer their father, and the plaintiff No. 7 their mother, were members of a joint Hindu family, holding jointly possession of ancestral property consisting of, among others, the mouzas aforesaid; that Chundermun Koer, on the 17th of May 1874, executed a bond in favour of the defendant (the plaintiffs not being aware for what necessity the bond was executed); that in that bond the abovementioned shares of the mouzas were hypothecated; and that the defendant, on the 26th of July 1875, obtained a decree on the strength of the bond, and that, in execution of the decree, the shares were attached. Chundermun Koer subsequently died. Upon these facts the plaintiffs contended that they were entitled to the declaration and the relief abovementioned. The defendant alleged in his written statement that the mouzas in dispute were the

\* Appeal from Original Decree, No. 231 of 1879, against the decree of Baboo Koylash Chunder Mookerjee, Subordinate Judge of Tirhoot, dated the 9th May 1879.

self-acquired property of Chundermun Koer; that the debt contracted by Chundermun Koer, being not for immoral purposes, but, on the other hand, having been necessary for the joint family, was binding upon the sons. The defendant, therefore, contended that the shares in question were liable to be sold in execution. The Subordinate Judge found that the property in dispute was the ancestral property of Chundermun Koer, and that it was not proved that the loan advanced by the defendant on the 17th of May 1874 was necessary for joint family purposes; and, in giving the plaintiffs a decree, declared, that only four-eighth anna of Nirpur and  $\frac{3}{4}$ th-anna share of Chuck Ibrahim was liable to be sold in satisfaction of the defendant's decree against Chundermun Koer, dated the 20th July 1875, and that the remaining portion of the four annas share and seven annas share of those estates belonged to the plaintiffs, and that their shares should be separated from that of Chundermun, and be equally partitioned between themselves.

From this decree the defendant appealed to the High Court.

[54] Baboo Mohesh Chunder Chowdhry and Baboo Aubinash Chunder Banerjee for the Appellant.

Baboo Kally Kissen Sein for the Respondents.

The Judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

Mitter, J. (who, after stating the facts as above, continued).—Upon these findings of fact by the Subordinate Judge he framed the following judgment:—

“It is hereby declared that only four-eighth-anna of Nirpur and  $\frac{3}{4}$ th-anna share of Chuck Ibrahim are liable to be sold in satisfaction of the defendant's decree against Chundermun Koer, dated 20th July 1875. The remaining portions of four annas share and seven annas share of those estates belong to the plaintiffs, and their shares should be separated from Chundermun's share, and “would be equally partitioned between themselves.” We think that this decree is erroneous, because it seems to us that there could not be a partition between a person who is already dead and his sons. No doubt, according to the case of *Suraj Bansi Koer v. Sheo Proshad Singh* (L. R., 6 I. A., 88), if the property under attachment had been sold, and if it had been proved that the decree was a personal decree against the father, and that the debt for which the decree was passed was contracted for immoral purposes, the purchaser would have acquired only the interest of the deceased father, and a partition might have taken place between the purchaser on the one hand, and the sons and the widow on the other. That is not the case here, because although there was an attachment in the lifetime of the father, that attachment was not followed by a sale. It may be that the defendant, decree-holder, would not proceed upon that attachment. In that case, the decree which has been passed by the lower Court would be wholly infructuous. We are, therefore, of opinion that the decree passed by the lower Court cannot stand. It appears to us that the only declaration which in this suit the plaintiffs can obtain is, that they are not liable to pay the debt due to the defendant under the decree of [55] July 1875. The lower Court has gone into that question in its judgment, and has decided it in favour of the plaintiffs.

This question has been set at rest by the decision in the case of *Muddun Thakoor v. Kantoolall* (L. R., 1 I. A., 321). In the course of the judgment in that case, their Lordships of the Judicial Committee observe:—“In the case, “which has been referred to in argument, of *Hunooman Persaud Panday v. Mussumat Babooee Munraj Konweree* (6 Moore's I. A., 421), Lord Justice KNIGHT BRUCE, who delivered the judgment of the Privy Council, says,—“though an estate be ancestral, it may be charged for some purposes against the “heir, for the father's debt, by the father, as indeed the case above cited—

"*Omed Rai v. Heera Lall* (6 S. D. N. W. P., 218)—incidentally shows. Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it, even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindu law the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt, and not to the nature of the estate, whether ancestral or acquired, by the creator of the debt." It is quite clear from this passage that, whether the original debt was a personal debt of the father or not, the ancestral property in the hands of the sons would be liable to satisfy it, unless it be proved that it was contracted for immoral purposes. This is clearly an authority to show that, unless the debt is proved to have been contracted for immoral purposes, the defendant is entitled to recover it by the sale of the ancestral property in the hands of the sons. In this case, although the plaintiffs did not allege that the debt was contracted for immoral purposes, still that question has been gone into by the lower Court and found to be not established. That being so, we are of opinion that the lower Court was wrong in holding that the whole of the ancestral estate in the hands of the sons is not liable for the money which is due to the defendant under the decree of July 1875.

The plaintiffs' suit must, therefore, be dismissed with costs in all the Courts.

*Appeal allowed.*

#### NOTES.

[As regards the headnote, see the footnote below it, see also (1881) 8 Cal. 517]

[56] *The 11th March, 1881.*

PRESENT :

MR. JUSTICE MORRIS AND MR. JUSTICE TOTTENHAM.

Asmutullah Dalal and another.....Judgment-debtors

*versus*

Kally Churn Mitter.....Decree-holder.\*

*Execution of decree—Debt payable by instalments—Failure to pay—Limitation Act (XV of 1877) sched. II, art. 179.*

The terms of compromise in a suit for money, provided that the debt should be paid by monthly instalments, and that, on the failure to pay any three successive instalments, the entire amount should be recoverable by application to execute the full decree. The decree was dated the 12th June 1875, the first instalment was due in July 1875, and the last in October 1877. Default was made in payment of the first three instalments, but the decree-holder did not apply for execution, and accepted subsequent payments. On the 13th December 1879, he applied for execution for the amount then remaining due.

*Held*, that the period of limitation prescribed by art. 179, sched. II of Act XV of 1877, began to run on the third default taking place, and that no subsequent payment could stop limitation once begun.

ON the 12th June 1875, one Kally Churn Mitter obtained a decree against one Asmutullah Dalal and another for Rs. 751-1-6. The parties had filed a solenamah in the suit, and it was provided, that the sum for which the decree

\* Appeal from order, No. 326 of 1880, against the order of T. D. Beighton, Esq., Judge of Rungpore, dated the 19th August 1880, reversing the order of Baboo Jogendro Nath Deb, Munsif of that District, dated the 25th May 1880.

had been obtained should be paid by instalments, commencing from the 10th Assar 1282 (July 1875), and extending to the 30th Assin 1284 (October 1877); and that, on failure to pay any three consecutive kists, the entire amount should be recoverable by application to execute the full decree. Default was made by the judgment-debtors in the first three instalments, but the decree-holder did not apply for execution, and accepted payments in subsequent months in satisfaction of the various instalments. On the 13th December 1879, an application for execution for Rs. 345-7-9, the amount remaining due, was made. The Munsif held, that the right to levy execution accrued on the 1st Bhadro 1282, or August 1875, when the judgment-debtors failed to pay the [57] third instalment; and that, as more than three years had elapsed from that date, the application was barred by limitation. This decision was reversed by the District Judge, who held, that the "certain date," mentioned in art. 179,\* cl. 6 of sched. ii to Act XV of 1877, was in this case any one of several successive dates, "i.e., the 30th of each successive group of three months in which default was made," and that time began to run after default of any three of the kists.

The judgment-debtors appealed to the High Court.

Baboo *Traslokynath Mitra* for the Appellants.

Baboo *Kali Charan Banerjee* and Baboo *Ishan Chunder Chuckerbutty* for the Respondent.

The Judgment of the Court (MORRIS and TOTTENHAM, JJ.) was delivered by

' [Art. 179 -

Description of application.	Period of limitation.	Time from which period begins to run.
For the execution of a decree or order of any Civil Court not provided for by No. 180 or by the Code of Civil Procedure, Section 230	Three years. Where a certified copy of the decree or order has been registered, six years.	1. The date of the decree or order, or 4. (Where the application next hereinafter mentioned has been made) the date of applying in accordance with law to the proper Court for execution, or to take some step in aid of execution, of the decree or order, or

5. (Where the notice next hereinafter mentioned has been issued) the date of issuing a notice under the Code of Civil Procedure, Sec. 248, or

6. (Where the application is to enforce any payment which the decree or order directs to be made at a specified date) the date so specified.

*Explanation I* — Where the decree or order has been passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each, the application mentioned in clause 4 of this number shall take effect in favour any of such of the said persons or their representatives as it may be made by.

But when the decree or order has been passed jointly in favour of more persons than one, such application, if made by any one or more of them, or by his or their representatives, shall take effect in favour of them all.

Where the decree or order has been passed severally against more persons than one, distinguishing portions of the subject-matter as payable or deliverable, by each, the application shall take effect against only such of the said persons or their representatives, as it may be made against. But where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of them, or against his or their representatives shall take effect against them all.

*Explanation II.*—"Proper Court" means the Court whose duty it is (whether under section 226 or 227 of the Code of Civil Procedure or otherwise) to execute the decree or order. ]

**Tottenham, J.**—The question for decision in this appeal is, whether the execution of the decree held by the respondent is barred by limitation as is contended by the appellants. The law applicable is Act XV of 1877.

The date of the decree is the 12th June 1875, and this application for execution, apparently the first, was filed on the 13th of December 1879,—i.e., four and-a-half years after the above date.

It appears that the parties had filed a solenamah in the original suit, the terms of which were embodied in the decree. It was accordingly directed that the decretal amount should be paid off by instalments on particular dates specified, the last instalments falling due between two and three years after the date of the decree. And it was provided, that should the judgment-debtors make default in the payment of any three instalments, the decree-holder might thereupon execute the decree for the whole amount at once, without waiting for the subsequent instalments. In the very first three instalments there occurred default, and on no subsequent occasion was the due instalment paid up, punctually or in full. Payments were, however, made at uncertain intervals down to the month of Assar 1286,—that is, one year and nine months after the last instalment ought, accord-[58]ing to the decree, to have been paid off. A considerable amount is said to be still outstanding, and the present application, which is simply for execution of the decree for the amount still due, after deduction of the various sums already realised, was filed, as already stated, on the 13th December 1879, which corresponds with the end of Aghran 1281.

The period of limitation applicable to the case is admittedly three years. The dispute is as to the date from which the period is to be counted. The first Court was of opinion, that it should be counted from the date on which the judgment-debtors had first been guilty of three defaults in paying the instalments specified in the decree. The Munsif thus held that limitation began to run on the 1st Bhadro 1282, or in August 1875, and the application not having been made within three years of that date, he held that execution was barred. The lower Appellate Court reversed this decision, being of opinion that cl. 6 of art. 179 in the second schedule of the Limitation Act governed the application, and that the "certain date" therein mentioned is in this case "any one of several successive dates,—i.e., the 30th of each successive group of three months in which default is made." And further on the Judge says,—"According to my view, time may begin to run after default 'of any three of the kists'."

By this decision the Judge seems to accord to the decree-holder the privilege of selecting for himself the date from which limitation shall be counted. Clearly he will not allow the first Court or the judgment-debtors to settle the date. It seems to us that the Judge is wrong in supposing that the law intends to leave the question of limitation to the option either of any Court or of any party to the proceedings.

The Judge refers to two cases, *Upendra Mohan Tagore v. Takalia Bepari* (2 B. L. R., 345) and *Krishna Chandra Shaha v. Omed Ali* (6 B. L. R., Ap., 31), dealing with the old law of limitation in respect of execution of decrees, viz., s. 20, Act XIV of 1859, decided in this Court, in order to show, that, under that law, fresh limitation ran from each fresh default made by a judgment-debtor in paying instalments provided by a decree.

\*[Sec. 20.—No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree, or order, or to keep the same in force, within three years next preceding the application for such execution.]

Time for enforcing execution of judgment, &c., of a Civil Court not established by Royal Charter.

[59] He observes, that these rulings are no doubt based on the principle, that a creditor shall not suffer in consequence of having shown consideration to a defaulting debtor by any strained application of the law. And he goes on to say that his own view is, that the new Limitation Act does not alter the law in this particular.

The rulings quoted do not, however, seem to us to be based upon any sentimental principle whatever. The first case was decided upon the principle, that the law allowed a period of three years from the date upon which the right to execute accrued, which, in the case of a decree for instalments, could not be until the first default in payment of an instalment, and the decree-holder was within three years of the accrual of his right to execute. In the second case it was simply held, with reference to the provisions of s. 20, that proceedings to keep the decree alive had, in fact, been taken within three years before the application then under consideration.

We find nothing in the present law to show that there are, or may be, various recurrent starting points from which limitation is to run in respect of the execution of a decree *as a whole* after it has become final. Excepting that each application or notice referred to in cls. 4 and 5 of art. 179 of the second schedule gives a fresh starting point, otherwise there is but one starting point provided for limitation in respect of execution of a decree *as a whole*, viz., the date of its becoming final, or if the decree orders that the whole amount be paid on a certain date, then such date. Section 4 of the Act requires, that any application made after the period of limitation prescribed therefor by the second schedule, shall be dismissed.

The decree before us ordered certain sums to be paid on certain dates, and in respect of those sums the provision contained in cl. 6 of art. 179 was applicable. But the decree nowhere directs that the payment of the whole amount outstanding shall be made at a certain date. It only gives the decree-holder, the option of applying for execution of the whole decree still unsatisfied, upon the occurrence of default in three of the prescribed instalments. Under the decree, therefore, the decree-holder had several courses open to him, subject, of course, to the rules of limitation. He could have, upon the occurrence of [60] three defaults, forthwith taken out execution of the whole decree, or he could have executed for each instalment severally within three years after it became due, or he might have contented himself with accepting whatever was paid from time to time and then applied for execution of the decree for the outstanding balance, taking care to do so before the expiry of three years from the date of the decree or from the date of the third default, if he thought the terms of the decree altered the period of limitation. The law, by cl. 6 of art. 179, sufficiently recognizes and provides for the Court's power under s. 210\* of the Civil Procedure to order the amount of a decree to be paid by instalments, but there is nothing in the limitation law which recognizes any authority in this Court

\*[Sec. 210 :—In all decrees for the payment of money, the Court may for any sufficient reason order that the amount shall be paid by instalments, with or without interest.]

And after the passing of any such decree the Court may, on the application of the judgment-debtor, and with the consent of the decree-holder, order that the

When Court may order payment by instalments. amount decreed be paid by instalments on such terms as to the payment of interest, the attachment of the property of the defendant, or the taking of security from him, or otherwise, as it thinks fit. Save as provided in this section and section 206 no decree shall be altered at the request of parties.]



to supersede its provisions by extending the period of limitation and admitting an application for execution of a decree as a whole more than three years after the date mentioned in art. 179.

The lower Appellate Court seems to have supposed that the decree ordered the whole amount to be paid at the date of any third default in the prescribed instalments, and that, therefore, cl. 6 would save limitation any time within three years of the last such instalment falling due. But that opinion is untenable. If the bar to immediate execution contained in the decree itself does at all extend the period prescribed by art. 179, that period certainly began to run on the third default taking place, and no subsequent payment could stop limitation once began (s. 9). This application was not made within three years of even the third default, and therefore, in so far as it is an application under the penalty clause of the decree for execution of the decree as a whole, it is barred by limitation. But we think that the decree-holder is still entitled to the benefit of cl. 6 of art. 179 as respects any instalments ordered in the decree, and which fell due on dates not exceeding three years before the application was filed.

The present appeal is, therefore, dismissed, and the lower Court will be directed to execute the decree for such instalments as are not barred, and the amounts of which may be found to be still outstanding on an account being taken.

We make no order as to costs.

*Appeal dismissed.*

#### NOTES.

#### [LIMITATION—WHOLE DECREE BEING EXECUTABLE ON FAILURE OF AN INSTALMENT—

The same view as in this case was taken in (1888) 13 C. L. R. 243; but in (1888) 15 Cal. 502 it was held that *waiver* would make an exception, to a similar effect is 27 Bom. 1 F.B. (on the ground of estoppel), See also (1894) 21 Cal. 542; (1889) 11 All. 482, (1894) 16 All. 371; (1895) 20 Bom. 109 as to waiver, (1909) 13 C. W. N. 1004=36 Cal. 394, 13 C. W. N. 1010. In (1882) 5 All., 201 the effect of part payment as an acknowledgment was considered.]

[61] The 17th March, 1881.

PRESENT:

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE PRINSEP.

Radha Kissore Bose and another.....Judgment-debtors

*versus*

Aftab Chundra Mahatab, Maharaja of Burdwan.....Decree-holder.\*

*Execution of Decree—Partial Satisfaction under Arrangements made by Court—Limitation—Subsequent Application for execution.*

In execution of a decree, an order was made by the Court, directing the payment of the rents of certain property, which had been attached, as they became due from the mukuraidar to the judgment-debtors to be made to the decree-holder to satisfy his decree; and afterwards the execution case was struck off the file. Subsequently, default having been made by the mukuraidar in the payment of the rents of certain years, and the decree not having been fully satisfied, the decree-holder applied for an order directing the payment of the rents which were in arrear to be made by the mukuraidar in accordance with the previous order. Notice having been directed to be served on the judgment-debtors, they came in, and pleaded limitation.

*Held*, that as the application was not strictly one for fresh execution, limitation could not apply, and that as the effect of the order in the execution proceedings was virtually to appoint the decree-holder receiver under the provisions of s. 243 of Act VIII of 1859, and as the attachment was still in force, his proper course was to file a regular suit *qua* receiver against the mukuraidar.

*Hurronath Bhunjo v. Chunna Lall Ghose* (I. L. R., 4 Cal., 877) distinguished.

THE facts of this case were as follows :—

The decree upon which execution had, in the first instance, been obtained, was that of the High Court on special appeal, dated the 29th June 1865. The decree-holder applied for execution in 1867, and attached a mouza, alleged to be the property of the judgment-debtors; but, in attempting to sell it, he was met with the objection that it was debutter property. This objection was sustained by the Principal Sudder Ameen, who, [62] on the 29th February 1868, ordered, that the property was to remain under attachment, and that the decree-holder was to continue to receive from the mukuraidar who held the mouza the annual rent payable by him to the judgment-debtors, until his decree was satisfied. After that, on the 14th March 1868, the execution case was struck off the file.

The decree-holder filed his present application for execution on the 14th April 1880, and stated therein that the amount still due to him, allowing for what had been paid, was Rs. 1,761-6-4; that the mukuraidar, in accordance with the order of the 29th February 1868, paid him the rents from 1275 to 1284, corresponding with the years 1868 to 1878, but had not paid him those accrued due since, and he asked therefore for an order that he might be compelled to pay him the rents for the years 1285 and 1286, corresponding with 1878 to 1880, towards the satisfaction of the decree.

The application was made before the Subordinate Judge, who directed notices to be served on the judgment-debtors, and they came in and

\* Appeal from order, No. 386 of 1880, against the order of Baboo Brojendra Coomar Seal, Additional Judge of West Burdwan, dated the 6th September 1880.

pleaded limitation to fresh execution being issued. The Additional Judge, however, held, that the effect of the order of the 29th February 1868 was virtually to constitute the decree-holder receiver under the provisions of s. 243 of the Civil Procedure Code (Act VIII of 1859), and as the attachment was still in force, this application was not for execution, but merely to enforce compliance of that order against the mukuraridar; consequently limitation could not apply. Inasmuch, however, as the relief sought could not be granted in this summary proceeding, he disallowed the petition, but without costs, and referred the decree-holder to a regular suit for rent in his capacity of receiver against the mukuraridar.

From this order the judgment-debtors appealed.

Baboo *Hem Chunder Bannerjee* for the Appellants.

Baboo *Chunder Madhub Ghose* and Baboo *Bussunt Coomar Bose* for the Respondent.

[63] The Judgment of the Court (CUNNINGHAM and PRINSEP, JJ.) was delivered by

**Cunningham, J.**—In execution of the decree which forms the subject of this appeal, the Subordinate Judge, on the 29th February 1868, found, that the property under attachment being debutter could not be sold, but while exempting it from making them applicable towards satisfaction of the decree. His order directed the mukuraridar, the lessee of the judgment-debtors to pay his rents to the decree-holder. The terms of this order may be somewhat informal, but, as we understand them, they amounted to an appointment of the decree-holder to be a receiver under s. 243, Act VIII of 1859, without the direct intervention of the Court, as is usual between the receiver and the decree-holder.

These collections were made up to the end of 1284 (April 1878), that is, for about ten years. For some reason or other the decree-holder then had some difficulty in realizing his rents, and he has been badly advised to apply to the Court for re-execution of his decree against the judgment-debtors, instead of acting under the authority of the order of February 1868, and he has asked for an order directing the mukuraridar to pay the rents for 1285 and 1286.

The judgment-debtors have, accordingly, pleaded limitation in bar of further execution of this decree.

The Subordinate Judge has disallowed this objection, holding that the matter now before him was not in execution of the decree, but simply one between the decree-holder and the Court, the decree being under execution in the hands of the Court; and that, under such circumstances, there could be no limitation. We think that this view of the law is correct. The property is still under attachment, and the Court has itself undertaken the duty of satisfying the decree from the usufruct of the property by appointing a receiver. The decree-holder, *qua* decree-holder, is powerless. He is merely the recipient of money deposited at his credit in the Court. In the present instance, through the accident that the decree-holder has himself been appointed receiver, payments are made without the direct intervention [64] of the Court; but they are, nevertheless, from time to time, certified to the Court, since the decree-holder has been ordered to submit his accounts to the Court.

The proceedings in execution under the order of February 1868 have never yet terminated, and therefore no question of limitation arises.

The case of *Hurronath Bhunjo v. Chunni Lall Ghose* (I. L. R. 4 Cal., 877), which was relied upon by the judgment-debtors' pleader, both before the Subordinate Judge and before this Court, is not in point. The Subordinate Judge has rightly distinguished this case, which was one in which, by private arrangement, the judgment-debtor agreed to satisfy the decree by monthly payments without any intervention of the Court. The proceeding in execution then terminated, so far as they were conducted through the Court, and when it was sought to revive them, it was found that they had become barred by limitation.

No doubt, the form which the present proceedings have taken at the instance of the decree-holder is, as I have already pointed out, irregular, for there was no necessity to apply for execution of the decree or to bring the judgment-debtors before the Court. The judgment-debtors would, therefore, ordinarily be entitled to their costs, but they have chosen to plead limitation both in the lower Court and before us in appeal, and as that plea has been rejected we cannot give them any costs.

We, therefore, dismiss this appeal, but without costs.

*Appeal dismissed.*

#### NOTES.

[For another case that the appointment of a receiver makes the decree executable, see 17 Cal. 53; for similar decrees, see 11 Mad. 135, 12 Cal. 559.]

[65] APPELLATE CRIMINAL.

*The 2nd April, 1881.*

PRESENT :

MR. JUSTICE MORRIS AND MR. JUSTICE PRINSEP.

In the matter of the petition of Chandra Nath Sirkar and others.

The Empress

*versus*

Chandra Nath Sirkar and others.

*Confession—Persons jointly charged—Statement by prisoner in absence of co-prisoners—  
Evidence Act (I of 1872) s. 30.*

Several persons were charged together with offences under s. 148†, 302, 324, and 326 read with s. 149 of the Penal Code. The Sessions Judge, when about to examine the prisoners, required all but the prisoner under examination to withdraw from the Court, until his turn for examination came round, and convicted each prisoner chiefly upon what was said by his co-prisoners during his absence from the Court.

*Held*, that the evidence so given was inadmissible.

THE facts of the case fully appear from the judgment.

Mr. *Gasper* and Baboo *Grish Chunder Chowdhry* for the Appellants.

The Judgment of the Court (MORRIS and PRINSEP, JJ.) was delivered by

**Morris, J.**—This is a case of riot, which resulted in the death of one Gopeenath Manjhi, permanent injury to the right arm of Khaim Sheikh caused by gunshots, and minor injuries to others, also caused by gunshots and by cutting weapons.

The Sessions Judge, in concurrence with both the assessors, has convicted Chandra Nath Sirkar, Alum Poramanick, Nundo Manjhi, and Hukim Poramanick of riot under s. 148 of the Penal Code, but differing from the assessors, he has also convicted Chandra and Nundo Manjhi of culpable homicide not amounting to murder; and he has sentenced Chandra Nath Sirkar to transportation for life, Nundo Manjhi to transportation for ten years, and Alum Poramanick and Hukim Poramanick to rigorous imprisonment for three years.

[66] Concurring with one assessor, but differing from the other, the Sessions Judge has further convicted Malu Sheikh, Modhone Sheikh, Mudhee Sheikh, and Kolimuddeen Pathan, of riot, but he has, differing from both assessors, also convicted the last named of culpable homicide not amounting to murder; and he has sentenced Kolimuddeen Pathan to transportation for life, and the other three persons to three years' rigorous imprisonment. Two other men were acquitted by the Sessions Judge.

Appeals have been preferred against all these sentences.

The Appellants have been defended by Mr. *Gasper* both in the Sessions Court and before us, and we are surprised to find that, in a case of such public

\* Criminal Appeal, No. 756 of 1880, against the order of C. D. Winter, Esq., Officiating Sessions Judge of Pubna, dated the 25th October 1880.

†[Sec. 148 :—Whoever is guilty of rioting, being armed with a deadly weapon, or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.]

importance and of so serious a character, the Legal Remembrancer has not been instructed to appear on behalf of the prosecution.

It appears that disputes have been existing, for some time past, in the village of Tepri, between two parties claiming to receive rents from the ryots, the one party being certain Sandlyals of Solop, Kali Sunder Sandyal and another, and the other party, one Debi Doss, the auction-purchaser of the rights and interests of Bykunt Sandyal, brother of the Sandlyals of the first party. Before this occurrence, Debi Doss died, but his interest is represented by his son Jibun Ram.

The existence of these disputes, and the likelihood of their terminating in a serious riot, was well known to the local police, whose station is two and-a-half kos, or five miles, distant from Tepri: and so late as the morning of the riot, which forms the subject of the present trial, the head constable left the place on completion of an investigation into an offence which arose out of the disturbed state of the village. The evidence shows that both sides had then assembled forcibly to assert their respective claims, and foreign clubmen (deshwalis) had been enlisted to overawe the villagers, and, in the event of a disturbance, to give to their respective sides the benefit of their superior strength and skill.

Under his purchase in 1283 or 1276 of the rights and interests of Bykunt Sandyal, Debi Doss claimed the entire sixteen annas share of the rents of the village. The other Sandlyals opposed him, alleging that the interest of Bykunt Sandyal was only a small fractional share not exceeding one anna. The villagers [87] generally had yielded to the claim of Debi Doss, but a certain number of men of the fisher-class, inhabiting the quarter called Manjhipara, refused to pay him the rent demanded of them, and were supported and encouraged in their resistance by the Sandlyals.

The zamindari cutcherry of Debi Doss was held at the house of Nundo Manjhi, close to the Manjhi's quarter, and a fence had been set up, barring the passage into the homestead of Dusrut and Subul Manjhi, at the head of the path, which runs west and north of Nundo Manjhi's homestead. The object of this was apparently to protect the Manjhis against any sudden attack from the cutcherry quarter. These facts must have been patent to the head constable, who was in Tepri on the morning of the riot, and it is impossible to believe that they were not also known to the superior police officers at the adjoining police station. It is matter, therefore, of extreme surprise that they did not take strict measures to prevent the breach of the peace that was evidently imminent, or at any rate to hinder the introduction of firearms and large bodies of "deshwalis" into the village. This negligence on their part has deprived this Court of independent testimony, and made it extremely difficult to ascertain from the garbled accounts of the partisans of either side what the real facts connected with the origin of this riot are or to say which party took the initiative. We gather, however, from the evidence that, on the 10th July 1880 (Assar 27th, 1287), Chandra Nath Sirkar held open cutcherry under a gab-tree close to the house of Nundo Manjhi, which had been set apart for a cutcherry, and began collecting rent from the villagers on the part of Debi Doss.

An attempt was evidently made to collect the rent from the residents of the Manjhipara close by, and this was at once met by an attack in force by the Manjhis, aided by deshwalis of the Sandlyals, who were either stationed in the house of Gopal Manjhi or in the neighbouring house of Bhagirathi Thakur. The houses of Gopee Manjhi, Dusrut, and Subul, which were in one cluster, became the scene of the disturbance, and almost immediately a large body of men on

both sides assembled there and began the fight. One or more guns were discharged at the Manjhis, resulting in the wounding of Gopeenath Manjhi, [68] Khaim Sheikh, and Dhonai. Gopeenath died in hospital on the 13th from peritonitis caused by this injury, and Khaim has been permanently deprived of the use of his right arm. It would seem that they were standing in the lane near the bamboo fence. There is much discrepancy in the evidence regarding the number of shots fired and by whom they were fired, but it is clear from the nature of the injuries inflicted, and the shot-marks found on the spot, that there must have been more than one discharge of firearms. There was some attempt made on behalf of the prisoners to account for these gunshots by an accidental discharge in the struggle brought on by the Manjhis, but there is no reason for accepting this explanation. There can be no doubt that the guns were fired deliberately at the Manjhis, to injure some of them, and to ensure success to Debi Doss' party. Some of the witnesses even declare that certain persons, one of whom was the prisoner Kolimuddeen, were ordered to fire to drive off the Manjhis; whichever party, therefore, made the first move, it is clear that the other was fully prepared to resist, and it is equally clear that the party of Debi Doss overcame the Manjhis and looted their houses after they ran away. There is no evidence to show that the prisoners acted in the exercise of their legal rights of self-defence, and therefore any one of them who is proved to have been present, engaged in this riot, is liable to be convicted of some offence connected therewith. The Sessions Judge has felt the difficulty of relying implicitly on the evidence of the Manjhi witnesses, who, no doubt, were actively engaged on their side; and he has adopted the extraordinary expedient of convicting the prisoners principally on what each has said regarding the other. However much the law (s. 30, Evidence Act) may allow him to take into consideration a confession made by one of the prisoners as affecting himself and also another prisoner, the course which Mr. Gasper states the Sessions Judge adopted in recording the statements of the prisoners, and which is not denied by the Sessions Judge in reply to our enquiry on this subject, would prevent us from giving full effect to that law. It would seem that when the Sessions Judge was about to examine the prisoners, he required each to withdraw from the Court until [69] his turn for examination came round. In consequence of this procedure, the principal prisoner, Chandra Nath Sirkar, was examined in the absence of the other prisoners, who never had an opportunity of denying or even knowing what he had said, and yet that statement, made behind their backs, is made the chief ground for convicting them. It is an elementary rule that no one should be condemned in his absence, and yet the Sessions Judge has acted in a manner directly opposed to it. We, therefore, are obliged to place entirely out of consideration any statement made by any of the accused in the absence of another prisoner so far as it affects the latter. (His Lordship then proceeded to consider the evidence and dismissed the appeals.)

*Appeal dismissed.*

#### NOTES.

[See (1882) 6 Bom. 124.]

*The 17th February, 1881.*

PRESENT :

MR. JUSTICE MORRIS AND MR. JUSTICE TOTTENHAM.

Baba Chowdhry and others.....Plaintiffs

*versus*

Abedooddeen Mahomed and others.....\*Defendants.\*

*Suit for arrears of rent—Beng. Act VI of 1862, s. 10—Irregular proceedings of Collector under—Shareholder—Proprietor.*

An applicant under s. 10 of Beng. Act VI of 1862 must be the proprietor of the estate, and not merely a shareholder in the proprietary body.

*Mahomed Bahadoor Mojoondar v. Rajah Raj Kishen Singh* (15 W. R., 522), *Moolook Chand Mundul v. Modhonsoodun Bachusputty* (16 W. R., 126), *Shoorender Mohun Roy v. Bhuggobut Churn Gungopadhya* (18 W. R., 332) followed.

Under the above section, the Collector is not entitled to assess the rents at what he considers to be fair and reasonable rates from the rents prevailing in the neighbouring properties, but is only authorised to ascertain for the landlord what the existing condition of his estate is, what are the measurements, what the names of his tenants, and what the rents they are paying.

*Anunt Manjhee v. Joy Chunder Chowdhry* (12 W. R., 371) followed.

In a suit for rent by one co-sharer, the plaintiff claimed that the rent should be calculated at the rate fixed by the Collector, in a proceeding held [70] by him under s. 10 of Beng. Act VI of 1862. It appeared that the defendants had not had notice of the proceeding, and that the Collector had ascertained the rate from the rents paid in the neighbouring properties.

*Held*, that the proceedings of the Collector were irregular, as he had acted without jurisdiction, and that they were not binding on the defendants for the purpose of showing the rate at which rent was payable by them.

IN all these cases, which were analogous and tried together by the consent of all parties, the plaintiff sued the defendants for arrears of rent for the years 1281, 1282, 1283, and part of 1284, corresponding with the years 1874 to 1878, at a rate fixed by the Collector in a proceeding held by him under s. 10 of Beng. Act VI of 1862. The defendants contended that the rates claimed were in excess of those actually due, and that they were exorbitant; and further, that they were not bound by the proceedings of the Collector, as neither they, nor their predecessors, had been parties thereto, and that such proceedings were irregular and illegal.

It appeared that the plaintiff had become the purchaser of a two annas eight gandas share in the mouza in which the defendants held their jamas, and he alleged that, having failed to realize any rents through the ryots having combined against him at the instigation of his other co-sharers, and refused all information, he was forced to apply to the Collector under s. 10 of Beng. Act VI of 1862. The Collector

\* Appeal from Appellate Decrees, Nos. 1189 to 1211 of 1879, against the decree of Baboo Bhugwan Chunder Chuckerbutty, Subordinate Judge of Rungpore, dated the 19th March 1879, reversing the decree of Baboo Bhubun Mohun Ghose, Munsif of Bhatmari, dated the 26th August 1878.



thereupon deputed an Amin to ascertain the tenures and the rates in respect thereof, and it was upwards of three years before this enquiry could be completed. During his proceedings, the Amin, being unable to proceed in the ordinary way, applied to the Collector, and under his instructions proceeded to ascertain the rents payable in the disputed mouza from those paid in the adjoining village, and having duly prepared the necessary papers, submitted them to the Collector, along with the jamabandi terij, on the 27th June 1870. The Collector, subsequently on the 29th June 1870, confirmed the report and directed a decree to issue in accordance therewith.

It appeared also during the hearing of these cases that the same jamabandi terij had been filed in certain other suits in which the present defendants were not parties, which had been [71] instituted by the plaintiff against other ryots, and in which he had obtained decrees; but it seemed that there was ample evidence on the record in those suits, apart from the jamabandi terij, to prove that the rents which he then claimed were calculated at the rates actually payable to him, whereas in the present cases no such evidence had been given, but, on the contrary, it was shown from the jama-waseel-bakee papers of the other thirteen annas nine and a quarter gandas proprietor in the estate, that the defendants were in possession of these respective tenures at and after the several rents admitted by them to be justly due, which were calculated at a rate far less than that now claimed by the plaintiff. From the evidence of the plaintiff's own witnesses it was further shown, that he had been in receipt of rent from the defendants since 1272, corresponding with the years 1864-65, which was previous to the application being made to the Collector to have the measurement taken and the rent ascertained; and that, after he had become a shareholder by purchase in the mehal, he had instituted a suit for mesne profits which had accrued due to him from the persons who had withheld possession since the date on which he had acquired the right by purchase; and consequently it was urged by the defendants that there had been no necessity for the proceedings held by the Collector.

The defendants admitted rent to be due by them, but at a considerably lower rate than that claimed; and pleaded tender of that amount, but failed to prove any such tender.

The Munsif accordingly, after having heard the evidence on both sides, gave the plaintiff a decree with costs for the full amount claimed by him, calculating the same at the rate fixed by the Collector in the above proceeding and set out in the jamabandi terij; but on appeal this decree was varied by the Subordinate Judge, who held that the Collector's proceedings were not binding on the defendants, and gave the plaintiff a decree for the rent claimed, calculating the same at and after the rates admitted by the defendants.

From this decree the plaintiff appealed to the High Court.

Mr. Branson, Mr. C. Gregory, and Baboo Grija Sunker Mozoomdar for the Appellants.

[72] Baboo Sreenath Dass and Baboo Golap Chunder Sircar for the Respondents.

The Judgment of the Court (MORRIS and TOTTENHAM, JJ.) was delivered by

**Morris, J.**—In all the suits for arrears of rent out of which these appeals arise, the Subordinate Judge has declined to recognize the rates of rent fixed by the Collector in the proceedings held by him at the instance of the plaintiff under s. 10 of Beng. Act VI of 1862, and has dismissed the plaintiff's suits,

save in respect of certain sums admitted by the defendants themselves. The judgment of the Subordinate Judge is appealed against, on the ground that he cannot go behind the decision of the Collector under Beng. Act VI of 1862, that the defendants made no appeal at the time against the decision under s. 10, and that, therefore, the proceedings under that section are final.

It seems to us, however, clear on the face of those proceedings, that the Collector acted without jurisdiction; and that, therefore, the Subordinate Judge is right in declining to accept the rates that have been fixed by him.

First, the Collector proceeded on the application of a fractional holder of the estate only, and not on the application, as the law requires, of "the proprietor" of it. In his plaints in the several suits before us, the plaintiff himself admits that it was he alone who instituted proceedings in the Collectorate, and that, out of the entire sixteen annas, he held a two annas eight gandas share only. But in numerous decisions of this Court it has been held, that an applicant under s. 10 of Beng., Act VI of 1862 must be the proprietor of the estate, not a shareholder only in the proprietary body, and that such shareholder cannot demand separate measurements: see *Mahomed Bahadoor Mojomdar v. Rajah Raj Kishen Singh* (15 W. R., 522), *Moolook Chand Mundul v. Modhoosoodun Bachusputty* (16 W. R., 126), and *Shoorender Mohun Roy v. Bhuggobut Churn Gungopadhya* (18 W. R., 332). On the application, therefore, of the present plaintiff only, the Collector had no jurisdiction to proceed under that section. A second [73] fatal objection is, that the Collector did not proceed to ascertain, determine, and record the rates of rent payable in respect of the lands in question. On the contrary, he assessed them at the rates which the Amin ascertained to be prevailing in the neighbouring villages, and not in the village itself. That the Collector based his decision, as to the lands and jamabandi, entirely upon the report and enquiry of the Amin, is indisputable. It is so stated by him in his own proceedings. But the Amin, as is apparent from his report, was unable to ascertain from the ryots themselves what the actually existing rates of rent payable by them were. He refused to accept the rates which were entered in the papers of one of the co-sharers in the estate which he saw, and he avowedly adopted the rates which he found to prevail in the neighbouring villages. It is evident, therefore, that, instead of ascertaining and recording the existing rates, he assessed what he considered to be fair and equitable rates. But this he clearly had no power to do, and the Collector was acting equally *ultra vires* in accepting and adopting them. This is the view of the law taken in *Anunt Manjhee v. Joy Chunder Chowdhry* (12 W. R., 371); there the learned Judges say:—"In the present instance what the Revenue Officer did was to assess upon the land such rent as he thought proper. This is quite beyond the power of any one acting under s. 10 of Beng. Act VI of 1862. The sole object of that section is to authorize the Revenue Courts to ascertain for the landlord what the existing condition of his estate is, what are the measurements, what the names of the tenants, and what the rents that they are paying."

In other particulars the Collector has acted irregularly and contrary to the provisions of s. 10. But the above-mentioned two instances suffice to show that he has far exceeded the power given him under s. 10, and that his decision cannot be sustained.

We, therefore, affirm the decision of the lower Court, and dismiss all these appeals with costs.

*Appeal dismissed.*

NOTES.

[In (1888) 10 Cal. 86 this case was distinguished on the ground that here, all the proprietors were not parties.] \*

[74] ORIGINAL CIVIL.

*The 13th April, 1881.*

PRESENT :

MR. JUSTICE WILSON.

Attermoney Dossee.....Plaintiff

*versus*

Hurry Doss Dutt.....Defendant.

*Ex parte Suit on a Former Decree of the High Court—Procedure on Revivor.*

There is nothing in Act X of 1877 which prevents a suit from being instituted on a decree of the High Court.

THE plaintiff stated, that one Gostobehary Mullick had, on the 8th May 1875, in a mortgage suit against one Hurry Doss Dutt, obtained a decree for an account and for a sale of the mortgaged premises, and for payment of any deficiency that might remain after sale, that, in June 1876, Gostobehary Mullick died intestate, having received nothing under his decree save a sum of Rs. 130 for interest. On the 31st March 1879, letters of administration to the estate of Gostobehary were granted to his mother Attermoney Dossee (the present plaintiff). The decree, however, remained unsatisfied, no steps having been taken to revive the suit. Attermoney Dossee, therefore, brought the present suit on the decree of the 8th May 1875 (it being too late to revive the suit in the usual way under the Civil Procedure Code), asking that her suit might be taken as supplemental to the former suit, and that she might be declared entitled to the benefit of the former decree; that the amount due under the said decree and indenture of mortgage and costs might be paid to her as administratrix, or that, in default, the premises might be sold as directed by the decree; and for further and other relief. At the hearing the facts were proved as alleged in the plaint.

Mr. R. Allen for the Plaintiff.

No appearance having been entered for the Defendant, the case was heard *ex parte*.

[75] The Judgment of the Court was delivered by

Wilson, J.—This case raises a question which, so far as I know, has not been before decided. I do not think the question is one of any great difficulty; but as the suit is undefended, and I therefore had not the advantage of hearing the matter argued from the defendant's point of view, I thought it right to take time to consider.\*

I think the suit is well brought. It may be regarded in either of two ways. It may be looked at as a suit upon the former decree. As a general rule a suit lies upon the decree of a Court of competent jurisdiction, unless the right to sue be taken away expressly or by implication. I see nothing to prevent a suit

being brought upon a decree of this Court. And the Limitation Act prescribes the period of limitation for such a suit in sched. ii, div. i, art. 122.

This suit may again be regarded as a suit supplemental to the former suit, and to revive the decree. And so regarded, I think, the suit is properly brought. Under the older procedure in the Supreme Court, a common law judgment was revived by *scire facias*, a proceeding which was of the nature of a new action to give effect to the old. An equity suit was revived by bill of revivor.

Act VI of 1854, s. 31, introduced a simpler method of reviving a suit on the Equity Side of the Court, by order in the suit founded upon a suggestion without the necessity of a Bill. But I can see nothing in that enactment to take away the right to proceed by bill, if for any reason the simpler mode of proceeding was not available.

The High Court inherited all the jurisdiction and powers of the Supreme Court.

The provisions of Act VIII of 1859 were, by rule, made generally applicable to this Court; and that Act contained provisions for reviving suits by a summary process. The present Procedure Code, which, for the most part, applies by its own authority to this Court, contains provisions of a like nature. But in these Acts again I find nothing to take away the right to proceed by the older and more cumbrous methods, if for any [76] reason the parties to a suit are unable to take advantage of the newer and simpler procedure.

In my opinion, therefore, the plaintiff is entitled to maintain this suit, and should have a decree in the terms of the first and second prayers of the plaint, the defendant having six months' time to redeem. The defendant, however, is not to blame for the necessity having arisen for recourse to a suit. That was in consequence of differences between the parties interested in Gostobehary Mullick's estate. The decree will, therefore, be without costs up to decree.

Attorneys for the Plaintiff: *Swinhoe & Co.*

#### NOTES

[In (1881) 6 Bom. 7 the Court dissented from this case observing that it was decided *ex parte* and that sec. 244 of the C. P. C., 1877, was not brought to the notice of the Court. See also (1883) 8 Bom. 1.

In (1905) 33 Cal. 560 the general principle that a suit is maintainable on a judgment of a Court of competent jurisdiction was affirmed, and applied to a suit on an order of the Insolvent Court.]

APPELLATE CIVIL.

\* *The 1st March, 1881.*

PRESENT:

MR. JUSTICE MORRIS AND MR. JUSTICE TOTTENHAM.

Nityyanund Roy.....Plaintiff

*versus*

Abdar Raheem and another.....Defendants.\*

*Public documents—Evidence Act (I of 1872), s. 74.*

In a suit to obtain possession, under a title acquired by purchase at an auction, of certain lands, together with meane profits, upon setting aside an alleged taluqua etmami right claimed by the defendants, the defendants, in support of their claim, produced certain documents purporting to be abstracted from, or copies of, Government measurement chittas, dated Mughl 1126-27 (1764). These documents were produced from the Collectorate, but there was nothing to show that they were the record of measurements made by any Government officer.

*Held*, that they were not "public documents" within the meaning of s. 74† of the Evidence Act.

Baboo Chunder Madhub Ghose and Baboo Okhil Chunder Sen for the Appellant.

[77] Baboo Bama Churn Bannerjee for the Respondents.

THE facts of this case sufficiently appear from the **Judgment** of the Court (MORRIS and TOTTENHAM, JJ.), which was delivered by

**Morris, J.**—The only point at issue in this case is, whether the etmami tenure of the defendants existed at the time of the Permanent Settlement. The lower Appellate Court, reversing the decision of the first Court, has decided in favour of the defendants. It relies entirely upon certain papers of the year 1126-27 Mughl, corresponding with the English year 1764, which purport to be abstracts from, or copies of, chittas made apparently in that year. The Judge says: "I am inclined to admit them," and he does so, because, to use his own words, "they are public documents compiled by, used by, and guarded by public officers, and their certified copies are admissible as evidence of the contents of the original." Now, in the first place, these documents are not copies of the originals, but they are copies of copies. No reason is assigned why the originals or their copies are not produced. Then, again, there is nothing to

\* Appeal from Appellate Decree, No. 690 of 1879, against the decree of Baboo Koilash Chunder Mookerjee, Second Subordinate Judge of Chittagong, dated the 12th December 1878, modifying the decree of Baboo Chunder Coomar Roy, Munsif of Fatikchhari, dated the 31st January 1877.

Public documents.

[Sec. 74:—The following documents are public documents:—

I Documents forming the Acts, or records of the Acts—

(i) of the sovereign authority,

(ii) of official bodies and tribunals and,

(iii) of public officers, legislative, judicial, and executive, whether of British India or any other part of Her Majesty's dominions, or of a foreign country.

II Public records kept in British India of private documents.]

show, beyond the fact that they came from the Collectorate, that they are the record of measurements made by any Government officer. So far as we can judge, they are only abstracts of measurement chittas of the year 1126-27. Whether they correctly represent the khutian, or abstract of those chittas, it is impossible to say, for there is no evidence whatever on this point; nor is it apparent in what year they were made, or in what respect they were of public use. Therefore, we find ourselves unable to hold that these documents are "public documents" within the meaning of s. 74 of the Evidence Act. Independently of these documents, there is no evidence which throws back the tenure of the defendants to a later date than 1200 Mughli, which corresponds with the year 1839. In that year this tenure was measured with other tenures of the turuff of the plaintiff under the name of Elmam Allal Roshan. No doubt, in the measurement record of certain plots of this tenure, other tenures, such as Inas, Rofi, Razak, Aziz, and Razak Aziz Kutab, are referred to as apparently connected with [78] it. But whether Inas, Rofi, Aziz, and Kutab were relations of the ancestors of Allal and Roshan, grandfathers of the present defendants, is unknown. Even assuming that the etmams bearing those names have some connection with the original etmams of Allal and Roshan, there is no evidence to show how long they existed,—that is to say, whether they were created before or after the Permanent Settlement. It seems to us, therefore, that there is no evidence to support the finding of the Judge in favour of the defendants that the etmam in suit was in existence at the time of the Permanent Settlement. We, therefore, set aside his judgment and restore that of the first Court, with costs of this Court and of the Court below.

*Appeal dismissed.*

**NOTES.**

[Compare (1883) 9 Cal. 741; (1886) 14 Cal. 120.]

[7 Cal. 78]

The 11th March, 1881.

PRESENT :

MR. JUSTICE MORRIS AND MR. JUSTICE TOTTENHAM.

Rajkishore Shaha..... Plaintiff

versus

Bhadoo Noshoo and others..... Defendants.\*

*Money-decree on Mortgage Bond—Subsequent suit by Mortgagee to enforce his  
lien on the property mortgaged.*

The plaintiff, a mortgagee of certain specific property, given as security for an advance, obtained a money-decree against the representatives of his debtor. A third person, having a claim against the same debtor, seized and attached the specific property mortgaged to the plaintiff, and sold it to A, who had notice of the plaintiff's lien. The plaintiff then brought a suit against A and the representatives of his debtor, to have his lien declared and debt satisfied.

*Held*, that, notwithstanding the plaintiff's previous money-decree, he was still entitled to enforce his lien against the property pledged.

IN December 1875, one Asman Singh executed a bond in favour of the plaintiff in consideration of a loan of Rs. 899, pledging, as collateral security, an elephant. Asman Singh subsequently died, and on the 8th May 1877, the plaintiff obtained a money-decree on the bond against the representatives of Asman Singh.

[79] On the 16th May 1877, one Kenaram (who was also a creditor of Asman Singh) obtained a decree against his representatives, and in execution of this decree put up the elephant for sale. The elephant was purchased by the defendant Bhadoo, who had express notice of the plaintiff's lien.

Bhadoo, after the purchase, refused to recognize the plaintiff's lien, whereupon the plaintiff brought this present suit to have his lien declared, and the elephant sold in satisfaction thereof.

The defendant contended that the question was *res judicata* under the plaintiff's decree of the 8th May 1877; that the plaintiff's lien had merged in the judgment under that decree, and that the lien had passed to himself when he purchased at the auction-sale.

The District Judge held, that the plaintiff's lien had not been extinguished by the judgment, and that it did not pass to the purchaser of the elephant; but that, as against the defendant, the plaintiff's lien was lost, that the suit was not barred as *res judicata*, but that the plaintiff was only entitled to a declaratory decree.

The plaintiff appealed to the High Court, on the grounds that he ought to have obtained a decree for the sale of the elephant, and that the Judge was in error in deciding that the plaintiff's lien was extinguished as against the defendant.

\* Appeal from Original Decree, No. 278 of 1879, against the decree of J. W. Campbell, Esq., Judge of Rungpore, dated the 16th June 1879.

Baboo Nulit Chunder Sen for the Appellant.

Baboo Sreenath Doss, Baboo Ganendro Nath Dass, Baboo Amarendra Nath Chatterjee and Moonshee Serajul Islam for the Respondents.

The Judgment of the Court (MORRIS and TOTTENHAM, JJ.) was delivered by

**Morris, J.**—The plaintiff, appellant, lent money, in December 1875, to one Asman Singh, who, as security for the repayment of the loan, mortgaged an elephant to the plaintiff, retaining possession of the animal.

Asman Singh having died without paying off the debt, the plaintiff sued his representatives in 1877, and obtained a money-decree on the 8th May 1877. Subsequently, one Kenaram [80] Oswal, who held another decree against Asman Singh, caused the mortgaged elephant to be sold in execution of that decree. The present plaintiff objected to the sale, on the ground of his own lien upon the elephant, and the sale was effected with notice to the purchaser of the plaintiff's claim. The present suit was brought against the auction-purchaser and against the debtors to obtain an order for the sale of the elephant in satisfaction of the debt.

The purchaser, the defendant No. 1, represented that the elephant had passed into the hands of the third parties, who intended to buy it from him.

Thereupon these parties were made defendants. It does not appear, however, even in the statement of the defendant No. 1, that they have acquired any interest in the elephant. As, therefore, they are not properly parties to the suit or the appeal, the appeal against them must be dismissed with costs. The point in dispute is, whether or not the plaintiff, having once obtained a decree for the money due to him, can bring another suit of the present kind to recover the money from the property that was pledged to him.

The lower Court has held that such suit is not barred, but that the plaintiff is entitled to a declaratory decree only, affirming that his lien on the pledged elephant still exists. It has refused him the full relief sought, because he has not demonstrated his inability to execute the decree of the 8th May 1879, by proceeding against other property of the debtors before seeking to follow the pledged property in the hands of another party.

We may note that no objection has been taken by the respondent, the defendant No. 1, to the judge's findings, so far as they are in favour of the plaintiff; we think that those findings ought to have been followed up by a decree for the relief sought, it being of course left to the option of the defendant No. 1 to pay off the claim and retain the elephant. Had he bought it at the execution-sale without notice of the plaintiff's lien, we might have been disposed to hold that the plaintiff was bound to exhaust all other property of his debtors if it could be shown they had any, before attaching what had been sold to [81] another, although that was the very property pledged to him. But we are not aware of any principle of law or equity which should compel a creditor to abstain from executing his decree against the property pledged, and to harass himself with endeavours to find other property to attach, merely because a third party has chosen to buy the pledged property with full knowledge of the lien existing upon it. It is admitted by the lower Court that the plaintiff must have ultimately had recourse to such a suit as the present one, on failure to recover the amount of his decree by other means. We think that he was entitled to bring his suit in the first instance as he has done, and was not bound to avail himself of this remedy only as a last resource. In the Full Bench case of *Haran Chunder Ghose v. Dinobundhoo Bose* (23 W. R., 187), the Judges expressly lay down that, notwithstanding a previous money-decree against the



mortgagor, there is a right of suit against a third party to enforce the lien against the property pledged. Mr. Justice MARKBY observed, that the right to sell the very thing pledged is inherent to the pledgee, and, as a general rule, no claimants upon the property posterior to the first pledgee can interfere with this right, though of course they may have a right to redeem before sale.

Entirely concurring in this opinion, we think that the appellant has established his right to the relief sought for in his plaint against the defendant No. 1.

We accordingly amend the decree of the lower Court by adding to the declaration therein contained an order that, subject to the right of the defendant No. 1 to redeem the elephant, the amount of the plaintiff's claim, or as much of it as possible, be realised by the sale of the said elephant, any surplus sale-proceeds being returned to the defendant, and we effect that the defendant No. 1 do pay the plaintiff's cost in both Courts.

*Appeal allowed.*

#### NOTES.

[In (1906) 33 Cal. 849 it was held that a different rule would be applied if the object of the previous suit had been to realise the money by sale of the estate, see also (1884) 10 Cal. 567; 24 Cal. 473; 9 All. 23.

The C. P. C. 1908, Or. 34, r. 14, corresponds to T. P. A. sec. 99 (repealed by it)]

[82] *The 28th March, 1881.*

PRESENT:

MR. JUSTICE MORRIS AND MR. JUSTICE TOTTENHAM.

Fakuruddeen Mahomed Assan.....Judgment-debtor

*versus*

The Official Trustee of Bengal.....Decree-holder.\*

#### *Execution of Decree—Merger—Foreign Judgment—Act X of 1877, ss. 12 and*

The judgment of a foreign Court, obtained on a decree of a Court in British India, is no bar to the execution of the original decree.

THIS was an appeal from an order passed by the Judge of Pubna, allowing execution to issue under a decree obtained by the late N. P. Pogose, against Azeemuddeen Chowdhry, in the Court of the District Judge of Furriddpore. In 1880, the decree-holder brought a suit on this decree in the French Court at Chandernagore, where the defendant was then residing, and obtained a judgment, allowing the claim, on the 21st of April 1880. \*

In September 1880, the decree-holder applied to the Court in Furriddpore, which passed the decree, praying that it should be sent to the District Court

\* Appeal from order, No. 57 of 1881, against the order of C. D. C. Winter, Esq., Officiating Judge of Pubna, dated the 29th January 1881.

of Pubna for execution. This was done, and the decree-holder then made an application in the latter Court to have the decree executed. The judgment-debtor opposed the application, which was granted by the District Judge.

The judgment-debtor appealed.

**Baboo Kissory Lall Sircar** for the appellant.—The decree of the French Court has extinguished the previous decree of the Furrirdpore Court. All the decree-holder can do now is to bring a fresh suit on the French decree. How can the Pubna Court know whether the French decree is satisfied? The lower Court relies on *Saroda Prosaud Mullick v. Luchmееput Sing Doogur* (14 Moore's I. A., 529; s. c., 10 B. L. R., 214); but that case does not apply now, for s. 243 of Act VIII of 1859, on which the Privy Council relied, has [83] no corresponding section in the present Civil Procedure Code. See also Story's Conflict of Laws, pp. 498-9, and s. 14\* of the new Civil Procedure Code.

**Mr. Jackson** for the respondent.—It is impossible that a decree of a Court in British India, which is here of a higher nature than the French decree, could merge in the latter. *Smith v. Nicholls* (5 Bing. N. C., 208) and *The Bank of Australasia v. Harding* (19 L. C. P., 345) are clear to show, that a foreign judgment does not merely not merge a decree, but does not merge even the original cause of action. See also *Godard v. Gray* (L. R., 6 Q. B., 139). If by s. 12† of the Code of Civil Procedure the pendency of a suit in a foreign Court does not preclude the Courts in British India from trying a suit founded on the same cause of action, why should the foreign decree be a bar to the execution of the decree of the British Court?

*Cur. ad. vult.*

The **Judgment** of the Court (MORRIS and TOTTENHAM, JJ., was delivered by

**Morris, J.**—We agree in the view of the law that has been laid down by the District Judge of Pubna, and consider that the Pubna Court can, upon the certificate that has been sent to it, execute the decree of the Furrirdpore Court. The circumstance that the judgment-creditor, in order to secure property of the judgment-debtor, which was in a foreign territory, *viz.*, Chandernagore, has obtained a decree in the Chandernagore Court on the basis of the decree

When foreign judgment  
no bar to suit in British  
India.

\*[Sec. 14 :—No foreign judgment shall operate as a bar to a  
suit in British India.

- (a) if it has not been given on the merits of the case ;
- (b) if it appears on the face of the proceedings to be founded on an incorrect view of international law or of any law in force in British India ;
- (c) if it is, in the opinion of the Court before which it is produced, contrary to natural justice ;
- (d) if it has been obtained by fraud ;
- (e) if it contains a claim founded on a breach of any law in force in British India.]

†[Sec. 12 :—Except where a suit has been stayed under section 20, the Court shall not try any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit for the same relief between the same parties, or between parties under

\* Pending suits.  
whom they or any of them claim, pending in the same or any other Court, whether superior or inferior, in British India having jurisdiction to grant such relief, or in any Court, beyond the limits of British India established by the Governor-General in Council and having like jurisdiction, or before Her Majesty in Council.

**Explanation.**—The pendency of a suit in a foreign Court does not preclude the Courts in British India from trying a suit founded on the same cause of action.]

of the Furriddpore Court, does not, in our opinion, constitute a bar to the execution of the latter decree. The foreign Court does not stand in a higher position than the British Court, so that a decree of the latter should be merged in that of the former. According to the explanation given in s. 12 of the Procedure Code, "the pendency of a suit in a foreign Court does not preclude the Courts in British India from trying a suit founded on the same cause of action." It seems to follow, therefore, as a necessary consequence, that the existence of a decree in a foreign Court is no bar to the [84] execution of a decree of a Court in British India, even though the cause of action in both suits be the same.

Nor does it follow, as has been contended, that such concurrent decrees work injustice in the matter of their execution to the judgment-debtor, for any payment made in satisfaction of the decree of the Chandernagore Court, can, under the procedure prescribed in s. 258\* of the Civil Procedure Code, be at once certified to the Pubna Court, and the amount placed to the credit of the judgment-debtor. In the event of execution of the two decrees being taken out simultaneously, it would be open to the judgment-debtor to bring this circumstance to the notice of the Court, and the Court would, doubtless, exercise its discretion in the manner indicated by the Privy Council in the case of *Saroda Prosaudd Mullick v. Luchmееput Sing Doogur* (14 Moore's I. A., 529; s. c., 10 B. L. R., 214). But no hardship of this kind exists here. It is not suggested that execution has issued and property of the judgment-debtor is about to be sold by the Chandernagore Court. Even if this was the case, the judgment-debtor could, as already mentioned, secure himself from loss by certifying to the Pubna Court the payment of the sale-proceeds to the judgment-creditor. We, therefore, dismiss the appeal with costs.

*Appeal dismissed.*

#### NOTES

[The able commentary of **Hukm Chand** in his Civil Procedure Vol. 1 (1900) p. 211 *et seq* throws much light on this subject, and may be consulted.]

\*[Sec. 258 :—If the money is paid out of Court or the decree is otherwise adjusted to the satisfaction of the decree-holder, he shall certify the payment or adjustment to the Court whose duty it is to execute the decree, and no satisfaction of a decree in part or in whole by such payment or adjustment shall be recognized by such Court unless the payment or adjustment be certified as aforesaid. Where the decree-holder fails to certify as aforesaid, the judgment-debtor may apply to such Court for an order directing the decree-holder to certify as aforesaid, and the Court, after hearing the decree-holder, may make such order, and if the decree-holder disobeys the same, may refuse further to execute the decree.]

[7 Cal. 84]

The 2nd April, 1881.

PRESENT:

MR. JUSTICE MORRIS AND MR. JUSTICE TOTTENHAM.

In the Matter of the Petition of Juggodishari Dabi.\*

*Executors—Administration-bond—Indian Succession Act (X of 1865), s. 256—Probate.*

Executors, as well as administrators, are liable, under s. 256 of the Succession Act, to give a bond to the Judge of the District Court for the due collection, getting in, and administering the estate of the deceased.

IN this case, one Juggodishari Dabi, the universal legatee and executor under the will of one Doyamoyi Dabi, applied to the [85] Court of the District Judge of Rajshahye for probate of the will. On the 20th of January 1881, the Judge made an order directing probate to issue, on security, to the amount of Rs. 20,000, being given by the applicant. The latter then applied to the High Court for a rule calling upon the Judge to show cause why the above order should not be set aside, and why probate should not be granted to the applicant without requiring a bond under s. 256 of the Succession Act.

Baboo Grija Sunker Mozoomdar in support of the application.—The Judge was wrong in demanding a bond from the executor to the will. A bond is only taken from administrators under s. 256—*Run Bahadur Singh v. Moharanee Rajrup Koer* (4 C.L.R., 498) and *In the matter of Mondhur Mookerjee* (6 C. L. R., 228). The reason why security is not required from an executor is, that the testator has put faith in him without requiring security. [MORRIS, J.—Section 3 of the Succession Act says, "Probate" means the copy of a will certified under the seal of a Court of competent jurisdiction with a grant of administration to the estate of the testator. The form of grant of probate in s. 254 declares "that administration of the property and credits of the deceased was granted to" the executor. It is clear that, under these two sections, an executor who obtains probate, obtains some grant of administration; and s. 256 says, that every person to whom any grant of administration has been made shall give a bond.

*Cur. ad. vult.*

The Judgment of the Court (MORRIS and TOTTENHAM, JJ.) was delivered by

MORRIS, J.—Regard being had to the definition of probate in s. 3, Act X of 1865, and to the words of s. 256,† which section appears to us to refer as much to s. 254, as to s. 255, we cannot say that the District Judge was wrong in law to require an administration-bond from the person to whom the Court had ordered probate to be granted. In fact the Act scarcely seems to leave any option in the matter. A case has been brought to our [86] notice—*Run Bahadur Singh v. Moharanee Rajrup Koer* (4 C.L.R., 498)—in which the learned Judges, who were asked to direct that an order for probate should be

\* Rule No. 235 of 1881, against the order of J. Tweedie, Esq., Officiating Judge of Rajshahye, dated the 20th January 1881.

†[Sec. 256:—Every person to whom any grant of administration shall be committed shall give a bond to the Judge of the District Court to enure for the benefit of the Judge for the time being, with one or more surety or sureties, engaging for the due collection, getting in, and administering to the estate of the deceased, which bond shall be in such form as the Judge shall from time to time by any general or special order direct.]

conditional on the petitioner's furnishing security, stated, that the uniform practice of this Court was not to take security from an executor named in the will. In that case, however, there was no judicial declaration that the taking of a bond would not be in accordance with the law. And we find no reported case in which this Court has interpreted the law in the sense contended for by the pleader for the petitioner, viz., that s. 256 authorizes the taking of a bond only in the case of the grant of letters of administration under s. 255, and not in the case of grant of probate under s. 254. We have found a case, not reported, Mis. App. No. 321 of 1875, in which a Division Bench, following a supposed ruling of the Madras Court, in H. C. Rul., 3 Mad., App., 10, held, that there was nothing in the law to authorize the District Judge in calling on the applicant for probate to give security. But, on referring to the report cited, we find that there was apparently nothing more than an extra judicial expression of opinion, for which no reasons were assigned, elicited by a letter from a District Judge. This is not sufficient authority for disregarding what appears to be the clear provision of the Act.

We think, therefore, that in law the lower Court was entitled to call for the bond mentioned in s. 256. But at the same time we are clearly of opinion that the Judge ought to exercise a reasonable discretion in prescribing the sum for which the bond should be given; and that this question should be regulated by the circumstances. Where, as is stated in the present case, the person to whom probate is granted is himself the universal legatee and sole executor under the will, it seems to us that the District Judge should be satisfied with a bond for an amount almost nominal. With this expression of opinion, which may probably induce the lower Court to reconsider its order, we discharge the rule.

*Rule discharged.*

[87] APPELLATE CRIMINAL.

*The 26th April, 1881.*

PRESENT :

MR. JUSTICE MORRIS AND MR. JUSTICE TOTTENHAM.

In the matter of the Petition of Sokhina Bibi.

The Empress

*versus*

Grish Chunder Nundi.\*

*False Charge—Penal Code (Act XLV of 1860), s. 211—Opportunity of substantiating Charge.*

Upon a trial for bringing a false charge with intent to injure, it appeared that the original complaint was lodged in the Court of the Extra Assistant Commissioner, and a local enquiry by a competent police officer was directed. The officer reported that the charge was false, and recommended that the prisoner should be prosecuted. The Extra Assistant Commissioner ordered the papers to be sent to the Deputy Commissioner, who ordered the prosecution, and the prisoner was convicted.

*Held*, that the conviction was bad. The Extra Assistant Commissioner should, on receipt of the report of the police, have communicated its contents to the prisoner and afforded her an opportunity of substantiating her complaint, and should then have decided the case.

Baboo Joy Gobind Shome for the Petitioner.

THE facts of the case sufficiently appear from the **Judgment** of the Court (MORRIS and TOTTENHAM, JJ.), which was delivered by

**Morris, J.**—It appears to us that there is no legal foundation for the trial of Sokhina Bibi under s. 211 of the Indian Penal Code. Sokhina Bibi lodged a complaint under ss. 354 and 376, coupled with s. 511, in the Court of the Extra Assistant Commissioner. After her examination, the Court, under s. 146 of the Code of Criminal Procedure, directed a local enquiry to be made

\* Criminal Motion, No. 91 of 1881, against the order of T. J. Murray, Esq., Assistant Commissioner of Sylhet, dated the 12th February 1881.

†[Sec. 211.—Whoever, with intent to cause injury to any person, institutes or causes to be instituted any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both; and if such criminal proceeding be instituted on a false charge of an offence punishable with death, transportation for life, or imprisonment for seven years or upwards, shall be punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.]

Assault or use of criminal force to a woman with intent to outrage her modesty.

‡[Sec. 354.—Whoever assaults or uses criminal force to any woman, intending to outrage, or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description, for a term which may extend to two years, or with fine, or with both.]

§[Sec. 376.—Whoever commits rape shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.]

by a competent police officer. This officer, a Sub-Inspector, submitted a report, in which he expressed the opinion that the charge preferred was false, and that the complainant should be prosecuted for making a false complaint. [88] Thereupon the Extra Assistant Commissioner passed the following order :—“ Let the papers be recorded as false, and let the papers be sent to the Deputy Commissioner for proper orders as regards instituting a case against the complainant under ss. 211 and 182.\*” Upon this the Deputy Commissioner, on the 3rd December, passed an order to the effect that in his view no notice ought to have been taken of the complaint owing to the character of the complainant; but as an enquiry had taken place he would allow the petitioner to be prosecuted, if the District Superintendent of Police wished it. The District Superintendent of Police expressed a wish that a prosecution should follow. Upon this the Deputy Commissioner, on the 20th December, ordered the prosecution.

It seems clear to us that there has been no proper adjudication by the Extra Assistant Commissioner of the complaint preferred by Sokhina Bibi. On the receipt of the report of the Sub-Inspector, he should have communicated its contents to the complainant and afforded her an opportunity, if she so desired it, of producing the witnesses named in her complaint, or of giving such other proof in support of her complaint as she might think proper. Having thus put the complainant to the proof and given her the opportunity of substantiating her complaint, the Extra Assistant Commissioner should have proceeded to decide the case. This course he has not adopted at all, and as Sokhina Bibi was prepared to give evidence in support of her complaint, the Deputy Commissioner had, we think, no power to direct a prosecution under s. 211 to be instituted. This is in accordance with the rulings of this Court in *Syed Nissar Hossein v. Ramgolam Singh* (25 W.R., Cr. Rul., 10) and in *Government v. Karimdad* (I.L.R., 6 Cal., 496). It also strikes us as improper that this prosecution should have been directed by the Deputy Commissioner contrary to his own expressed opinion as to its propriety, and solely in deference to the wishes of the District Superintendent of Police, whose subordinate had been complained against.

We have to observe, with reference to the Assistant Commissioner's explanation as to the examination of the complainant's witnesses, that their examination by the Sub-Inspector of [89] Police when enquiring into the original complaint, and their subsequent examination in the present case as witnesses for the defence before himself could not give the prisoner the opportunity of proving that the original complaint was true, to which she was entitled before she could legally be prosecuted for making a false charge.

We, therefore, quash the proceedings, which have resulted in the conviction of Sokhina Bibi under s. 211, and setting aside the sentence of eighteen months' rigorous imprisonment, direct her release.

#### NOTES.

[In (1887) 14 Cal. 707 F. B. this subject was fully discussed ; see also (1884) 7 Mad. 292. ]

\*[Sec. 182 :—Whoever gives to any public servant any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause such public servant to use the lawful power of such public servant to the injury or annoyance of any person, or to do or omit any thing which such public servant ought not to do or omit if the true state of facts respecting which such information is given were known by him, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.]

[7 Cal. 89]

## APPELLATE CIVIL.

*The 29th March, 1881.*

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE McDONELL.

Shoshi Bhooshun Pal and others.....Plaintiffs

*versus*

Guru Churn Mookhopadhyaya and others.....Defendants.\*

*Limitation—Principal and Agent—Account, suit for—Zemindar—Beng Act VIII of 1869, s. 30.*

A suit by a zemindar against his land-agent, for payment of sums not accounted for by the latter, must, under s. 30 of Beng. Act VIII of 1869, be brought within three years from the termination of the defendant's agency

The zemindar should never bring a suit of this kind for an account merely, or for the delivery of accounts or account papers merely; but the suit should be framed for an account and for payment of what, on the taking of the account, may be found due from the defendant to the plaintiff.

IN this case, the first defendant, Guru Churn Mookerjee, had been the agent in charge of the plaintiffs' zemindari, and the second, third, and fourth defendants were his sureties. Guru Churn ceased to be the plaintiffs' agent on the 16th July 1875, and in the year 1877 the plaintiffs sued the present defendants for the purpose of obtaining possession of the zemindari papers and accounts, which possession they obtained on the 2nd of [90] April 1878. On examination of these papers it was found that the defendant had failed to account for the sum of Rs. 375-15-0-14, which had come to his hands as the plaintiffs' agent; and on the 10th of September 1878, the plaintiffs instituted the present suit for that sum. The Court of first instance held, that the suit as against Guru Churn was barred under s. 30 of Beng. Act VIII of 1869, and as against the sureties, by s. 134\* of the Contract Act; and dismissed the plaintiffs' suit. This decision was upheld on appeal. The plaintiffs then appealed to the High Court.

Baboo Bhoobun Mohun Dass for the Appellants.

Mr. Piffard and Baboo Hurry Mohun Chuckerbutty for the Respondents.

The **Judgment** of the Court (GARTH, C.J., and McDONELL, J.) was delivered by

**Garth, C.J.**—We regret very much that we have no power to assist the appellants. This is, undoubtedly, a very hard case upon them.

\* Appeal from Appellate Decree, No. 80 of 1880, against the decree of Baboo Nobin Chunder Gangooly, Second Subordinate Judge of Dacca, dated the 1st October 1879, affirming the decree of Baboo Jodu Nath Dass, First Munsif of Moonshigunge, dated the 23rd April 1879.

† [Sec. 134:—The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.]



The defendant was sued for an account, but managed to delay delivering the account till it was too late for the plaintiffs to sue him for the amount due.

The lower Courts have both decided in favour of the defendants upon the ground of limitation, and very properly so. But it was very hard, under the circumstances, to visit the plaintiffs (who have been thus unjustly treated by the defendant), with costs, and although we are compelled by law to confirm the decision of the lower Courts, we give the respondents no costs of this appeal.

This is one of the inconveniences which we pointed out here a few days ago, of bringing a suit of this kind for an account only, and not suing at the same time to have the account adjusted and the balance found to be due paid to the plaintiff. In a suit of this kind properly framed (as it always is on the Original Side of this Court), the whole question between the parties is disposed of in one suit, and the plaintiff secures his [91] just rights without the risk, which he always runs in a suit *for an account only*, of being barred by limitation when the the account is delivered.

The plaintiffs have duly sued within one year from the time when the account was delivered, but they are barred unfortunately by the last clause of s. 30 of Beng. Act VIII of 1869, which requires the suit to be brought within three years from the date of the termination of the defendant's agency.

The appeal is, therefore, dismissed, but without costs.

*Appeal dismissed.*

NOTE.—In a plaint filed by a principal against his agent for an account, the ordinary form of prayer is as follows :—

1. That an account may be taken of all sums of money received by, or come to the hands of, the defendant as such agent of the plaintiff as aforesaid, for, or an account of, or for the use of, the plaintiff, and of the application thereof, and of all dealings and transactions of the defendant as the plaintiff's agent; and that the defendant may be decreed to pay to the plaintiff what, on taking such accounts, shall be found due from the defendant to the plaintiff; and to deliver up to the plaintiff all documents in the defendant's possession or power belonging to the plaintiff.

2. That the defendant may be ordered to pay the costs of this suit.

3. That the plaintiff may have such further or other relief as the nature of the case may require.

[7 Cal. 91]

The 18th April, 1881.

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND  
MR. JUSTICE McDONELL.

In the matter of the petition of Mahomed Hossein.....Petitioner.

versus

Kokil Singh and others.....Opposite Party.\*

*Decree for Sale—Sale and Confirmation—Execution barred at time of sale—Position of Auction-purchaser—Civil Procedure Code (Act X of 1877), s. 316—Act XII of 1879—Limitation Act XV of 1877, sched. ii, art. 165.*

A person purchased certain property at a sale in execution of a decree in November 1878; his purchase was confirmed, and he obtained a certificate of sale on the 23rd May 1879, from which date he remained in possession. The [92] judgment-debtor applied to have the sale set aside for irregularity, but his application was dismissed both at the hearing and on appeal. He had applied, before the sale took place, to stay the sale, and the ground that the right to apply for execution was barred. This application was dismissed, but was allowed on appeal. It did not appear that the auction-purchaser was a party to the proceeding, or that he was cognisant of the application.

Two years from the date of the sale, and one and-a-half year from its confirmation, the judgment-debtor, on a summary application, obtained an order setting aside the sale and putting the auction-purchaser out of possession. *Held*, that the order was erroneous, the Subordinate Judge having no power, after the sale had been confirmed, to set aside the sale by a summary order; and that, under art. 165†, sched. ii of Act XV of 1877, the application for such an order was barred.

The words "*subsisting decree*," in s. 316 of Act X of 1877, as amended by Act XII of 1879, mean a decree *unreversed and in full force*, and not merely one upon which execution cannot be issued.

ONE Gridari Mahton brought a suit against Bissessi Dutt Singh, in which he was unsuccessful, the defendant obtaining a decree dismissing the plaintiff's suit with costs.

On the 18th November 1878, the defendant applied for execution of his decree for costs, and obtained an order for the sale of certain properties belonging to the plaintiff, and on the same day the judgment-debtor applied to the Court to have the sale stayed, on the ground that the right to apply for execution

\*Rule, Nos. 1210 of 1880 and 1922 of 1880, against the order of Baboo Poresh Nath Banerjee, First Subordinate Judge of Patna, dated the 13th September 1880.

†[Art. 165:—

Description of application.	Period of limitation.	Time from which period begins to run.
Under the Code of Civil Procedure, by a person dispossessed of immovable property, and disputing the right of the decree-holder or purchaser at a sale in execution of a decree to be put into possession.	Thirty days ...	The date of the dispossession.]

had been barred by limitation; but his application was refused and the sale proceeded with. At this sale, Mahomed Hossein Halmoki Mahulla became the purchaser of the right, title, and interest of the judgment-debtor in certain properties, and he, on the 23rd May 1879, obtained an order confirming the sale. Prior to this order the judgment-debtor applied, under s. 314\* of Act X of 1877, to set aside the sale for irregularity, but his application was dismissed, and the decision confirmed on appeal.

The judgment-debtor appealed to the District Judge against the order of the 18th November 1878 dismissing his application to stay the sale; and the District Judge, on the 5th July 1879, reversed the decision of the Subordinate Judge, and held that the right to apply for execution was barred, and his decision was confirmed on appeal to the High Court.

The judgment-debtor then applied to the Subordinate Judge to have the sale set aside and the purchase-money refunded to [93] the auction-purchaser; and on the 13th September 1880, the following order was passed: "I think the sale ought to be set aside and the purchase-money refunded. The decree under which the sale took place has been declared to have been barred by limitation at the date of the attachment and sale. The decree was therefore not subsisting when the sale took place, and the sale passed nothing to the auction-purchaser, the auction purchaser will get back his purchase-money and the judgment-debtor will be restored to possession."

The auction-purchaser obtained a rule calling upon the judgment-debtor to show cause why the order of the Subordinate Judge, of the 13th September, should not be set aside, on the ground that the Subordinate Judge had no jurisdiction, after the sale had become absolute and had been confirmed, to make such an order.

Baboo Amarendronath Chatterjee, in support of the rule, cited *Basappa bin Malappa Aki v Dundaya bin Shirlingaya* (I. L. R., 2 Bom., 540) and *Jan Ali v. Jan Ali Chowdhry* (1 B. L. R., 1 C., 56).

Baboo Tarucknath Palit and Babu Nilmadhub Sen, for the opposite party, relied on the case of *Nojabut Ali Chowdhry v Sherkh Moha Busseerivollah Chowdhry* (11 B. L. R., 42).

The Judgment of the Court (GARTH, C. J., and McDONELL, J.) was delivered by

**Garth, C. J.**—This is a rule obtained by Mahomed Hossein, who is the purchaser of certain land at an execution-sale, to discharge an order made by the Subordinate Judge of Patna on the 13th of September 1880, which order set aside the sale made to the plaintiff, directed the purchase-money to be refunded and also directed the judgment-debtor to be restored to possession.

The rule was obtained on the ground that the Subordinate Judge had no jurisdiction, after the sale had become absolute and had been confirmed by the Court, to make any such order.

The facts were these. In a suit which was brought by Gri-[94]dari Mahton against Bissessi Dutt Singh, the defendant obtained a decree dismissing the plaintiff's suit with costs.

On the 18th November 1878, an auction-sale was held in execution of that decree, at which the present applicant purchased the right, title, and interest of one of the judgment-debtors in certain property, and by a certificate duly granted and dated the 23rd of May 1879, the sale was afterwards confirmed.

Confirmation of sale.

\*[Sec. 314.—No sale of immoveable property shall become absolute until it has been confirmed by the Court.]

Meanwhile, an application had been made by the judgment-debtor to set aside the sale for irregularity, under the provisions of s. 314 of Act X of 1877, but this was refused by the Subordinate Judge on the 17th May 1879, and on appeal to the District Judge, this decision was confirmed, it being admitted by the appellant that he could not support his case upon the ground of irregularity.

It appears, however, that, on the 18th of November 1878, before the sale took place, another application had been made to the Subordinate Judge to stay the sale, on the ground that the right to apply for execution had been barred by limitation; but the Subordinate Judge decided against this application also, and consequently the sale proceeded. This order of the Subordinate Judge was also appealed to the District Judge, who reversed the decision of the Subordinate Judge on the 5th July 1879, holding that the right to apply for execution was barred and the High Court, to whom a second appeal was made, confirmed that decision.

It appears that these last mentioned proceedings were in some way or other brought to the notice of Mr. Beveridge, the District Judge, on the hearing of the appeal in the other case on the 24th March 1880; but he very properly considered that, for the purposes of that appeal, he ought not to go into them.

At the same time he threw out a suggestion in his judgment, that possibly the last words of s. 316, as amended by Act XII of 1879, might help the judgment-debtor, or might operate to make the certificate already granted a nullity, and that a substantive application might perhaps have the effect of cancelling the certificate.

Upon this the judgment-debtor appears to have made an application to the Subordinate Judge to have the sale set aside, [95] and the purchase-money refunded to the auction-purchaser; and the Subordinate Judge made an order to that effect, upon the ground that the decree under which the execution took place *was not subsisting* at the time of the sale, because the right to execute the decree had been barred by limitation.

The present application was then made to us to set aside this order of the Subordinate Judge, as having been made without jurisdiction, and the question which we have to decide now is undoubtedly one of great importance to auction-purchasers.

The plaintiff purchased this property in November 1878. His purchase was confirmed by the Court, and he obtained a certificate on the 23rd day of May 1879, from which time he has been in possession. No application appears to have been made by the judgment-debtor during the pendency of either of the appeals from the Subordinate Judge to stay the confirmation of the sale, until those appeals had been decided. The purchaser was no party to the proceedings in which the question of limitation was raised, nor is he shown even to have been cognizant of these proceedings. He purchased, apparently, in perfect good faith; and the question now is, whether, after the lapse of nearly two years from the date of the sale, and one and-a-half year from the date of its confirmation, the auction-purchase is to be set aside, and the plaintiff turned out of possession, upon a summary application made in the execution-proceedings to the Subordinate Judge.

The ground upon which the Subordinate Judge bases his judgment seems obviously erroneous. He seems to suppose that because the right to take out execution upon a decree is barred by limitation, the decree itself *has ceased to subsist*; whereas, of course, the decree remains, and will ever remain, in full force, as an adjudication of the rights of the parties, whether execution can be

taken out upon it or not. A decree *subsists for ever*, unless it is set aside or reversed by some competent authority.

The words upon which the Subordinate Judge relies at the close of s. 316 as amended have been probably added to the section in consequence of what fell from the Bombay High Court in the case of *Basappa bin Malappa Aki v. Dundaya [96] bin Shivlingaya* (I. L. R., 2 Bom., 540); but whether they were or no, the words "subsisting decree" evidently mean a *decree unreversed and in full force*, and not merely one upon which execution cannot be issued.

We think that, after the sale had been confirmed, and no attempt made by the execution-debtor to stay its confirmation, the Subordinate Judge had no power to set aside the sale by a summary order; and we think moreover, that under sched. ii, art. 165 of the Limitation Act, the Application which was made to him ought not to have been entertained.

We say nothing as to the right of the Judgment-debtor to raise the question in a substantive suit; though we give him no encouragement to bring such a suit.

The rule must be made absolute with costs.

*Rule absolute.*

#### NOTES.

[As to when sale may be set aside see (1885) 11 Cal. 376, (1883) 10 Cal. 220.]

[7 Cal. 96]

APPELLATE CRIMINAL.

*The 21st April 1881.*

PRESENT

MR. JUSTICE MORRIS AND MR. JUSTICE TOTTENHAM

In the matter of the Petition of Gopal Dhanuk.

The Empress

*versus*

Gopal Dhanuk.

*Plea of Guilty—False Charge—Penal Code (Act XLV of 1860), s. 211—Record of Plea—Explaining Charge—Criminal Procedure Code (Act X of 1872), s. 237*

A prisoner, charged under s. 211 of the Penal Code with having brought a false charge with intent to injure, by accusing A of having caused the death of a person by doing a rash or negligent act not amounting to culpable homicide under s. 304 A, stated at the trial that the original complaint made by him was false, and that he made it unthinkingly. The Sessions Judge treated this statement as a plea of guilty, and sentenced the prisoner to rigorous imprisonment. No record of the prisoner's plea, as required by s. 237† of the Criminal Procedure Code, appeared on the proceedings, nor did it appear that the charge had been explained as well as read to the prisoner. [97] and the Judge considered that the original complaint did not amount to a false charge of an offence under s. 304 A.

*Held*, that the conviction was bad

IN this case one Gopal Dhanuk was charged under s. 211 of the Penal Code with having made a false charge with intent to injure one Bedwa. It appeared that the prisoner had stated to the Police that Bedwa had assaulted one Manjar, who died shortly afterwards, and that the death was the result of, or accelerated by, the blow. At the trial before the Sessions Judge, the prisoner stated that the original complaint made by him to the Police was false, and that he made it unthinkingly. The Judge treated this statement as a plea of guilty, and sentenced the prisoner to eight months' rigorous imprisonment. No record of the prisoner's plea, as required by s. 237† of the Criminal Procedure Code, appeared on the proceedings, nor did it appear that the charge had been explained as well as read to him, and the Sessions Judge, in giving judgment, stated that the original complaint, though malicious, could hardly be regarded as amounting to a charge of culpable homicide.

The prisoner appealed to the High Court.

No one appeared.

The **Judgment** of the Court (MORRIS and TOTTENHAM, JJ.) was delivered by

\* Criminal Appeal, No. 188 of 1881, against the order of W. H. Verner, Esq., Officiating Sessions Judge of Bhagulpore, dated the 26th February 1881.

† [Sec. 237 :—When the Court is ready to commence the trial, the accused person shall be brought before it, and the charge shall be read and explained to him, and he shall be asked whether he is guilty of the offence charged or claims to be tried.

Plea of guilty, If the accused person pleads guilty, the plea shall be recorded, and he may be convicted thereon.]

**Morris, J.**—This conviction is bad in law, and must be set aside. The Sessions Judge states that the prisoner pleads guilty to the charge, and that the only question is as to what punishment should be allotted. We find in the proceedings no record of the prisoner's plea, as required by s. 237 of the Code of Criminal Procedure, when he pleads guilty. All that we find is a narrative by the Judge of what occurred and of the statements made by the prisoner. We do not find from this, that the charge was explained as well as read to the prisoner (*vide* s. 237), and we do find that he did not admit one very important element in an offence under s. 211 of the Penal Code, *viz.*, the intention to injure another. The prisoner is said to have represented that he made the false complaint unthinkingly. This certainly does not amount to a plea of guilty.

[98] The Judge was further somewhat inconsistent, for, after stating that the prisoner pleaded guilty, he proceeds to show that he was not guilty of the charge as framed, inasmuch as he had not made a complaint of an offence under s. 304A of the Penal Code, which was alleged in the charge.

The Judge committed an error, therefore, in convicting the prisoner without a trial. We therefore set aside the conviction and sentence, and direct that the prisoner be tried according to law, and that the Judge conform to the procedure laid down in chap. XIX, Code of Criminal Procedure.

*Conviction set aside.*

#### NOTES.

[See (1886) 10 Mad. 232 F. B. and the notes thereto]

[7 Cal 93]

#### APPELLATE CIVIL.

*The 21st April, 1881.*

PRESENT:

MR. JUSTICE PONTIFEX, MR. JUSTICE MORRIS, AND MR. JUSTICE PRINSEP.

Womesh Chunder Ghose.....Plaintiff

*versus*

Shama Sundari Bai.....Defendant.

*Evidence—Secondary Evidence—Bond—Loss or Destruction of Instrument—  
Evidence Act (I of 1872), s. 65, cl. (c).*

In a suit by the purchaser of a debt, the plaintiff stated that, in 1873, A executed a bond in favour of B to secure the repayment of Rs. 1,000, and that he had purchased the interest

\* Appeal from Appellate Decree, No. 794 of 1879, against the decree of T. T. Allen, Esq., Judge of Rajshahye, dated the 5th February 1879, reversing the decree of Baboo Jibun Krishna Banerjee, Subordinate Judge of that district, dated the 12th September 1878.

of *B* at a sale in execution of a decree against him. The plaintiff now sued *A* upon the bond, making *B* a party. At the trial, *A* denied the execution of the bond, and it was not produced by the plaintiff, who, having served *B* with notice to produce, tendered secondary evidence of its contents. *B* was not examined as a witness, and no evidence was given of the loss or destruction of the bond.

*Held* by PONTIFEX and MORRIS, JJ. (PRINSEP, J., *dissenting*), that secondary evidence was not admissible.

THE plaintiff in this case alleged that the defendant No. 1 executed a registered bond on the 16th Choit 1279 (28th March [99] 1873) in favour of the defendant No. 2, Ramjoy Sircar; that the bond was for Rs. 1,000, and stipulated that that amount, with interest at 3 per cent. per mensem, should be paid in the month of Joisto 1280 (May 1874); that, in execution of a decree against Ramjoy Sircar, his interest in the alleged debt was put for sale, and was purchased by the plaintiff for Rs. 200 on the 28th of December 1877, four years and nine months after the alleged execution of the bond. On the 12th of March 1878, nearly five years after its alleged execution, the plaintiff instituted the present suit against the alleged obligee, and he also made Ramjoy Sircar a defendant. He claimed that Rs. 2,783 was due on the alleged bond, and asked for a decree for that amount against the defendant No. 1. The defendant No. 1, whom the Judge stated to be a purdanashin lady, by her written statement, denied having ever executed any such bond. The Subordinate Judge gave the plaintiff a decree, but his decision was reversed by the District Judge.

The plaintiff then appealed to the High Court. The learned Judges, before whom the appeal was heard in the first instance, differed in opinion, and the case was accordingly re-argued before three Judges.

Mr. G. Gregory and Baboo Gurudass Banerjee for the Appellant.

Mr. Bell and Baboo Doorga Mohun for the Respondent.

The following **Judgments** were delivered :—

**Pontifex, J.**, (who, after stating the facts of the case, continued) :—The plaintiff, when he purchased for Rs. 200, does not appear to have made any enquiry as to the existence of the bond. He took no steps to obtain possession of it or to satisfy himself that if it had really been executed by the defendant No. 1, it still existed uncanceled and untransferred by Ramjoy Sircar. His purchase was, in fact, a mere speculative purchase, and may have been a collusive one. In this suit, the plaintiff neither produces the alleged bond, nor does he adduce any evidence that it is still in existence uncanceled; or that, at the date of his purchase, Ramjoy Sircar continued to be [100] interested under it. But he made Ramjoy Sircar a defendant to the suit, and served him with notice to produce the bond, which, however, was not produced; nor was it shown to be in Ramjoy Sircar's possession or power. Upon this he sought to use a copy from the Registry Office as secondary evidence. But making Ramjoy Sircar a defendant, and giving him notice to produce, would not, in my opinion, entitle the plaintiff to use the copy from the Registry Office as secondary evidence against the defendant No. 1. The plaintiff can stand in no higher or better position than Ramjoy Sircar would himself have occupied. Before Ramjoy Sircar could have used secondary evidence, it would have been necessary for him to prove the destruction or loss of the alleged instrument. But Ramjoy Sircar has not been examined, and as the evidence stands, there is no proof of destruction or loss. For all that appears, the bond, if really executed, might, at the date of the institution of this suit, have been cancelled, or in the hands of a third party, or purchased for value. To



admit secondary evidence under these circumstances would, in my opinion, be most dangerous, and inasmuch as the plaintiff purchased without requiring delivery or proof of the continued existence of the bond, he is not, in my opinion, entitled to claim any benefit under the last part of cl. (c) of s. 65 of the Evidence Act, otherwise he, as appears, would be placed in a better position than the obligee. I am, therefore, of opinion, that the decree of the lower Appellate Court is right, and that this appeal should be dismissed with costs.

So far I have treated this as a special appeal upon which we are unable to look at the evidence. But, as the defendant No. 1 had, in her written statement, denied execution of the bond, I asked the question of the plaintiff's counsel whether execution of the alleged bond had been proved. In answer to my question their evidence was read to us. None of the witnesses, named as attesting witnesses on the registered copy, has proved the execution of the bond by the defendant No. 1. One of such attesting witnesses was called, but he admitted that he did not see the defendant No. 1 execute. Another person, a servant, who was not named as an attesting witness, was called, [101] and he stated that he saw the defendant No. 1 execute a bond and a power-of-attorney to register on the same occasion. But a writer in the Registration Office, who says he has been for the last two years out of employment, deposed that he had witnessed the execution of the power-of-attorney, and that the bond was not there at the time the power was executed.

Again, according to the copy sought to be used as evidence, the bond, if unpaid at the prescribed time in Joisto 1280 (May 1874), was to be paid by instalments, and the payments were to be endorsed. Therefore, even if the bond had been executed, there may be substantial reasons for its non-production. And no explanation is given why the bond has not been sued upon earlier; or why Ramjoy Sircar allowed a well-secured debt, which, at the time of plaintiff's purchase, must have amounted to Rs. 2,500 at the least, to be sold for Rs. 200.

Under these circumstances I should myself have had no hesitation in dismissing the plaintiff's suit, on the ground that he had not proved the execution of this alleged bond by this purdanashin lady. And these circumstances also show, how dangerous it would be to let in secondary evidence in a case like the present.

**Morris, J.**—I quite agree with Mr. Justice PONTIFEX, that the plaintiff, as purchaser of a possible debt due under an alleged bond, cannot stand in a higher position than the obligee of that bond. When he sues to recover upon the bond, he must either produce it or satisfactorily account for its loss or non-production; and unless he can show that the obligee had it in his possession and power when his interest in it passed to him, and failed to produce it, though called upon and legally bound to do so, he cannot be allowed to give secondary evidence of its contents, nor can the Court presume that it is still in force.

The appeal is dismissed with costs.

**Prinsep, J.**—The plaintiff, in execution of a decree against Ramjoy Sircar on 28th December 1877, purchased the debt due to the said Ramjoy on a registered mortgage bond, dated 16th Cheyt 1279 (March 28th, 1873), purporting to have been [102] executed by Shama Sundari Bai. The law (Act VIII of 1859) nowhere provides for delivery by the judgment-debtor of such a bond before sale to the Court, or after sale to the auction-purchaser, but requires that "attachment shall be made by a written order prohibiting the creditor from receiving the debt, and the debtor from making payment thereof to any

person whomsoever until further orders of the Court." The sale apparently took place without any objection on the part of either the obligee (the judgment-debtor) or the obligor Shama Sundari Bai.

The auction-purchaser of the debt due to the obligee has now sued to recover the full sum of money due on the bond with interest up to date, and in this suit he has made Ramjoy Sircar, the original obligee, a defendant, as well as Shama Sundari Bai.

Shama Sundari Bai, in her written statement, denied that she had taken any loan from Ramjoy Sircar, or that she executed any bond to him. She further stated, that Ramjoy Sircar and another person were her mooktears; that they always had cash in their hands; that they still owe her money, that they have never furnished her with their accounts, and that as she has not been able to obtain possession of her papers which were with her father Kashi Singh (deceased) she has not been able to sue them.

She next disputed the necessity specified in the bond for borrowing the money, and contended that the copy of the bond filed by the plaintiff was not admissible in evidence.

Several processes were issued for the attendance of the original obligee Ramjoy Sircar, with the bond, but without any success, and a prosecution in the Criminal Court was instituted against him. It appears that, during the pendency of the appeal in the District Judge's Court, he has died. An attested copy of the bond obtained from the Registration Office was, therefore, tendered and received as secondary evidence. When the case was first heard by Mr. Justice MORRIS and myself, we differed on the only point raised, *viz*, the presumption arising from the non-production of the original bond, and we have now heard this special appeal re-argued.

[103] As I have the misfortune to differ from my learned colleagues in being of opinion that the order of the District Judge should be set aside and a decree given to the plaintiff, it is necessary that I should state my reasons for this opinion.

The District Judge on appeal has found, in concurrence with the first Court, that "it is proved that in Cheyt 1279 B. S. (March 1873), a sum of Rs. 1,000 was borrowed in the name, and for the interest, of defendant Shama Sundari from her Mooktear Ramjoy Sircar, and a bond for the amount, with interest at 3 per cent. per mensem, duly registered, executed in his favour to secure repayment." The District Judge then expresses himself in the following terms: "Now on the woman's part the substance of the defence, besides a false denial of the execution of the bond and contraction of the debt in 1279, consists of a general assertion, that Ramjoy Sircar, as her agent, had money constantly in his hands belonging to her, and might, therefore, have cleared off any such debt. I consider that such a defence throws upon the plaintiff the onus of proving the actual existence of a subsisting debt from the defendant to Ramjoy Sircar at the time of his purchase in December 1877.

"His certificate tells us that he bought the interest of Ramjoy Sircar in the debt; he must further show what that interest at the time was. It is too much to presume that, because a debt was contracted in 1279 B. S., under an express agreement that the said debt should be extinguished in three months, it was, therefore, subsisting seven years afterwards. The possession of a bond by the creditor raises the presumption of the subsistence of the debt; here the creditor does not produce the bond. For all we know the debt was extinguished in 1280 Jaisito, as agreed, and the bond handed back to the

woman's father. It would be very hard to expect a purdanashin woman, after her creditor is dead, and her father who managed her affairs is dead, to prove by positive evidence, that a debt contracted seven years before has been actually paid off, especially when the creditor was her trusted agent, and there is nothing whatever on the other side to raise a presumption of the subsistence of the debt at the present day. I think the Subordinate Judge has been in error in laying any such onus on the woman. The [104] non-production of the original bond by the plaintiff raises a presumption against the subsistence of a debt. If he meant to make his speculative purchase effected, he should have got the bond, if any such bond was then in the possession of Ramjoy Sircar."

As I understand the ground upon which the plaintiff is considered to have failed in this suit, it is that, because he has been unable to produce the original mortgage bond, it is to be presumed that it is not in the possession of the obligee, and consequently that no debt to him existed at the time of sale. His purchase is condemned as speculative, and though he has purchased at a public auction held by a Civil Court, and done all that can possibly be expected from him to obtain the necessary evidence of the debt; and though the defendant, the obligor, has never stated that the debt has not been paid off, nor indeed pleaded any payment at all, we are to give her the benefit of a liquidation in full of a debt found to have been contracted on her behalf, the money having been applied to her benefit.

No doubt, all purchases of debts through the Courts in execution of a decree must generally be speculative, because in mostly every case the judgment-debtor is obstinately passive. The Codes of Civil Procedure, however, have always recognized debts as saleable property, and though under the present Code of 1877, enquiry is made before sale to ascertain, with as much accuracy as possible, the exact property to be sold, no such provision existed under the law of 1859 under which the sale now under consideration was held. A purchaser like the plaintiff would, therefore, have little means of ascertaining what he purchased, except that in the present case he would have something tangible in the knowledge that the debt was secured by a registered instrument; and though the obligor was not bound to appear on service of the notice of attachment under s. 236, Act VIII of 1859, to deny the existence of any debt, he would be entitled to draw some inference from her non-appearance. Further, I would observe, the Court, under Act VIII of 1859, had no power to compel the appearance of the judgment-debtor or the production of any instrument forming evidence of the debt under sale, and, therefore, a purchaser would be at some [105] disadvantage in establishing the debt when the entire evidence might be in the hands of one who, like Ramjoy Sircar, has persistently declined to appear. That has, as far as my experience goes, been the practice in the Mofussil Courts.

Now, as regards possession of the original bond, it is clear that, originally, it was with Ramjoy Sircar the obligee, and as I understand the law, the presumption would be that it has so remained. It is not for us to suggest what may have happened. There has been the publicity of a public sale in Court, and we have in the present case the additional security that even supposing that it has been transferred to a third party, it could no longer be made the subject of a suit, as the claim has become barred by limitation.

It has, however, been stated that, before bringing the present suit, the plaintiff should have sued Ramjoy Sircar for delivery of the bond; but the uselessness of such a proceeding is shown by what has happened in the

present case. Ramjoy would not have appeared, and with an *ex parte* decree the plaintiff would be in no better position than he now is without the expense of such a suit. It appears to me that the plaintiff has done all that is in his power to prove his case, and that, in the absence of any proof or even any plea of payment on this bond, we are bound to give him a decree.

It has been suggested that the plaintiff may have colluded with Ramjoy Sircar, but this is amply explained away by his action in prosecuting him criminally for not appearing in answer to process of the Court to produce this bond. We should be more justified in imputing collusion on the part of the female defendant with Ramjoy Sircar, her old servant, to evade payment of a portion of her debt by inducing him to withhold production of the bond.

We have it found in two Courts that the bond was executed by the defendant Shama Sundari; that it was duly registered under a power-of-attorney executed by her; and that the money was paid to her father Kashi Singh, and applied to the payment of Government revenue due for her estates. With these findings, and in the absence of any allegation of payment of any portion of the debt, it appears to me that the plaintiff is [106] entitled to a decree. Evidence of any payment would clearly be in the hands of Shama Sundari, and if, as has been thrown out at the second hearing of this special appeal for the first time, the bond itself might bear evidence of this by endorsements of payments, we should expect that this would have been the obligor's case, and that she would have united with the plaintiff in requiring the production of the original bond. The evidence in this case has been read to us, though we are sitting in special appeal, and that shows that whatever may be the value of the direct evidence as to the execution of the bond by Shama Sundari, and that has been believed by two Courts, there can be little doubt that she executed the power-of-attorney to her father Kashi Singh and another, to register it; and that in that mookhtarnamah the bond is so described as sufficiently to connect it with the bond now set up, and while referring in passing to the evidence, I would remark that the first Court finds that "no money was kept with Ramjoy Sircar, and no revenue was paid from such a fund as alleged by the defendant," but the District Judge on appeal merely states that Ramjoy Sircar the creditor was her trusted agent. The transaction was, however, conducted on behalf of the lady by her father Kashi Singh, against whom nothing has been said, and to say the least of it, it has been left doubtful whether Ramjoy Sircar had any other money dealings with Shama Sundari. If anything turned on this, we ought to remand the case to the District Judge to determine this point.

We have, therefore, in the present case the finding of the lower Court, that the bond was executed by the defendant, that the money paid on it was received by her father and applied to her use; and in my opinion, it follows, that the onus lies on her to prove payment. It is not for us to suggest for her what she has never said in her defence, or to consider what may have become of the bond itself. It is sufficient, I conceive, that execution of the bond has been proved, and that the defendant has received the benefit of the money paid. She has not attempted to plead any repayment of that debt. I would, therefore, give the plaintiff a decree.

*Appeal dismissed.*

#### NOTES.

[See the commentary of Ameer Ali and Woodroffe on the Evidence Act 1872, s. 65, cl. (c); also 10 C. P. L. R. 59; 12 C. P. L. R. 117; 13 C. P. L. R. 94.]

[107] PRIVY COUNCIL.

*The 30th November, 3rd and 4th December, 1880, and 26th January, 1881.*

PRESENT :

SIR J. W. COLVILLE, SIR B. PEACOCK, AND SIR R. P. COLLIER.

Dinendronath Sannial and another.....Defendants

*versus*

Ramkumar Ghose and others.....Plaintiffs.

Tarakchandra Bhattacharjia

*versus*

Baikantnath Sannial and others

[*On appeal from the High Court of Judicature at Fort William in Bengal.*]

*Private sale of property attached in execution—Incumbrance created after attachment—Civil Procedure Code (Act VIII of 1859), s. 240.*

The title obtained by the purchaser on a private sale of property in satisfaction of a decree, differs from that acquired upon a sale in execution. Under a private sale, the purchaser derives title through the vendor, and cannot acquire a title better than his. Under an execution-sale, the purchaser, notwithstanding that he acquires merely the right, title, and interest of the judgment-debtor, acquires that title, by operation of law, adversely to the judgment-debtor, and freed from all alienations and incumbrances effected by him after the attachment of the property sold.

In 1858, the respondent obtained a decree against *B*. In 1863, in satisfaction thereof, he caused to be attached a decree for mesne profits, made in favour of *B* against the appellants in 1860. In May 1865, the respondent obtained an order for the sale thereof, but instead of proceeding to execution-sale, he purchased, in 1866, the whole of the mesne profits due under the decree of 1860, by private sale from *B*. Meanwhile, in September 1865, an order of Court had been made, between *B* and the appellants, on their consent (but without the respondent being a party to it), whereby the decree for mesne profits was set off, *pro tanto*, against a prior decree for a larger amount, which the appellants had obtained against *B*.

*Held*, that the sale of 1866 having been a private one, and not in process of execution, the respondent only obtained such title as *B* had in the decree of 1860—*viz.*, a title subject to the effect of the order of September 1865.

APPEAL from a decree of the High Court (16th March 1877), reversing a decree of the Subordinate Judge of Rajshahye (10th July 1875).

The principal question on this appeal was as to the effect of an order made on consent by a Divisional Bench of the High [108] Court, on the 14th of September 1865, in reference to the execution of two cross-decrees. In 1828, persons called in these proceedings the Sannials had obtained a decree for more than Rs. 82,000, on which interest accrued, against others called the Bhattacharjias. In 1860, the Bhattacharjias obtained a decree against the Sannials, setting aside a sale of lands which had taken place in execution of the decree of 1828, and awarding mesne profits. On the 14th September 1865, an order of Court was made, on consent of the parties, that the decree of 1860 should be set off in part satisfaction of the decree of 1828. Meanwhile, in 1858, the father of the respondent Ramkumar Ghose had obtained a decree against

the Bhuttacharjias for money; and in May 1863, in consequence thereof, the decree of 1860\* was attached. In 1866, Ramkumar Ghose, not proceeding to execution by sale of the attached decree, purchased from the Bhuttacharjias the whole of the mesne profits due to them under their decree of 1860.

This appeal rose out of proceedings afterwards taken by Ramkumar Ghose, jointly with the Bhuttacharjias, in execution of the decree of 1860. The Sannials opposed this execution, on the ground both of limitation and of the right of set-off established in 1865.

In the Court of first instance, stay of proceedings was ordered on the latter only, of the above grounds of defence. The High Court concurred in holding that limitation did not bar the proceeding to execution, but declined to give effect to the order for the set-off, and reversed the decree of the first Court.

The Judgment of the Court (KEMP and AINSLIE, JJ.), after giving at length a history of the litigation, continued thus:—

The only question we have to deal with is, whether Ramkumar Ghose, by purchasing the Bhuttacharjias' claim to mesne profits on the 27th March 1866, after their agreement with the Sannials to have their decree adjusted by set-off, recorded in the order of this Court of 14th September 1865, is bound by that order, and, consequently, loses the advantage which he had gained by attaching the Bhuttacharjias' decree. It has been decided that, as against him as a rival decree-holder, no right [109] of set-off under the law (s. 209, Act VIII of 1859) existed; and it is admitted that, if he had proceeded on his attachment and caused the Bhuttacharjias' decree to be sold, and had himself become the purchaser, the Sannials could not have resisted his claim to put that decree into execution without reference to their cross-decree. But it is contended that his decree been satisfied, and that the attachment thereby came to an end, and that he stands in precisely the same position in respect of the Sannials as any third party, wholly unconnected with this litigation, who might have acquired by private purchase the Bhuttacharjias' rights at a date subsequent to September 1865.

There are several reported decisions, of which it is only necessary to mention the judgment of the Privy Council in *Anund Lall Doss v. Jullodhur Shaw* (14 Moore's I. A., 543), which point out that the object of s. 240 is to secure the rights of an attaching decree-holder. These, however, do not carry us very far; but there is the Madras case of *Annayunavadan Iyasawmy v. Pillai* (6 Mad. H.C. Rep., 65), which is in many respects analogous to this case. In that case, the plaintiff, having sued on a bond by which property was hypothecated, obtained a decree establishing his rights under the hypothecation, and attached the property in execution. Eventually, the judgment-debtors, in 1868, sold the property to the plaintiff while still under attachment for the amount decreed. The defendant set up various claims arising out of an alleged mortgage and sale to his vendor, and subsequent agreement in 1857; but these had already been rendered fruitless by the result of a suit instituted in 1862. He further relied on an agreement made in 1866 while the property was under attachment, but not made with him with the consent of the plaintiff for the satisfaction of his decree. The Court held the plaintiff entitled, by s. 240, to recover on his purchase unincumbered by the prior agreement between his vendor and the defendant.

If, then, a private sale of the attached property with the consent of the attaching creditor for the satisfaction of his decree, whether to the creditor himself or to a third person, is protect-[110]ed by s. 240 from any incum-

branches imposed on the property subsequent to attachment as much as if it was a sale effected under the orders of the Court, Ramkumar Ghose, who purchased the property attached by him in satisfaction of his own decree, is entitled, so far as may be necessary to secure his own rights, to hold it clear of the incumbrance created by the consent-decree between the Sannials and the Bhuttacharjias recorded behind his back, while the property was subject to his attachment. It is evident, that that consent-decree was made with full knowledge that it might not be operative against Ghose; for, six days after it was recorded, the Sannials commenced their suit for the express purpose of preventing Ghose from interfering with this arrangement. Failing on the ground first taken, that they were by law entitled to take the amount of the Bhuttacharjias' decree in satisfaction *pro tanto* of their own by set-off, they then tried to secure their end by putting forward a right by prior attachment: this was more than a year after the purchase by Ghose. This having failed, they now contend that the benefit of the attachment was waived by the private purchase, but, as it seems to us, with equal ill-success. But while we hold that we are not at liberty to close our eyes to the result of the Sannials' suit of 1865, which was, that, as against Ghose, they had no right to touch the decree obtained by the Bhuttacharjias against themselves until Ghose's claim should be satisfied, we do not think we are bound to extend the protection claimed by Ghose under s. 240, Act VIII of 1859 further than is necessary for the purpose of satisfying his decree. What would be the consequence? That the Sannials having a decree of 1828, which, with the accumulated interest, was calculated by the Judge to have amounted to Rs. 4,97,612 on the 3rd August 1872, and (assuming the correctness of that calculation) is now nearly 5½ lakhs, would have nothing to recover from except such interests of the Bhuttacharjias as may exist other than the decree in dispute, while Ramkumar Ghose, with a decree obtained in 1858 for Rs. 67,000 and odd, which may be roughly estimated as now amounting with accumulated interest to Rs. 2,30,000, would be enabled to execute against them the decree of the Bhuttacharjias, whose claim, [111] assessed in 1862 as something over Rs. 2,11,000, must now, with interest, come to about Rs. 5,91,000.

This is a result so disastrous to the Sannials and the Bhuttacharjias, and so unduly favourable to Ghose, that we think we are bound in equity to see whether some relief cannot be given against it. We think this case may be distinguished from the Madras case cited above, in which the Court refused to allow the first purchaser to retain his claim to the land subject to payment of the sum due to the plaintiff under his decree. The subject of sale in that case was land valued and sold for a certain sum, which may be taken to have been a fair, though probably not a maximum, value: at any rate, the thing sold was certain, and capable of immediate valuation. In the present case, the subject of sale was a claim to money, and the actual value of it was, and still is, uncertain. The purchase was effected at a time when a settlement had been arranged between the Sannials and the Bhuttacharjias, and while the former were prosecuting a suit against the purchaser for the purpose of giving effect to that settlement. It may be that, under these circumstances, the price was as much as there was any prospect of the vendors then realizing; but, unquestionably, the transaction was a speculative one so far as the purchaser was concerned: to the vendors [who apparently were insolvent], it seems to have been of no great consequence whether the money due under their decree went to Ghose or was retained by the Sannials.

If, instead of attempting to sell the Bhuttacharjias' decree, the Court had, under s. 243, done what we think it ought to have done, namely, appointed a

manager to put the decree into execution so far as was necessary to satisfy the claim of the attaching creditor, Ghose's interest would have been duly protected without any avoidable sacrifice of the interest of the Sannials.

We should now, we think, deal with this case as if this course had been adopted. The result will be, that while Ghose is enabled to recover that which he might claim under his decree against the Bhuttacharjias unfettered by any agreement between them and the Sannials, the balance of the decree will be subject to that agreement.

[112] The decree of the Sannials must be calculated with simple interest from the date of the decree to the 14th September 1865; and that of the Bhuttacharjias, from the date of the ascertainment of mesne profits to the same date. The amount of Ghose's decree with interest as therein awarded must also be calculated to the same date. After deducting Ghose's decree from the Bhuttacharjias' decree, the balance of the latter must then be set off against the Sannials' decree; the Bhuttacharjias' decree, so far as they are concerned therewith, must be declared finally satisfied. Satisfaction will be entered on the Sannials' decree, taking effect from 14th September 1865, to the extent of this balance; and for the remainder, with the subsequently accruing simple interest, they will be at liberty to proceed in execution against the Bhuttacharjias, while Ramkumar Ghose is declared entitled to proceed against them (the Sannials) upon the unsatisfied portion of the Bhuttacharjias' decree with interest on the principal sum of his own decree. The order of the Subordinate Judge in execution suit No. 69 is set aside, and the case remanded to him with instructions to proceed at once upon these orders and wind up the account with as little delay as may be.

We make no order for costs.

Mr. *Leith*, Q.C., and Mr. *C. W. Arathoon* for the Appellants.

Mr. *R. V. Doyne* and Mr. *T. D. Mayne* for the Respondent.

For the appellants it was contended that the respondent, Ramkumar Ghose, was not protected against the consequences of an alienation by the Bhuttacharjias effected in 1865, before his purchase from them. The consent given in September 1865 to the order of Court, declaring the set-off, established a prior charge on the decree of 1860. The respondent having bought the decree by a private sale, the result was, that his attachment in no way interfered with the right of set-off established by the order of September 1865. Even if the sale had taken place in due process of execution, the attachment of May 1865 would not prevail over the order of September 1865; for, at the time of the attachment, the litigation was pending, which resulted [113] in the order of set-off, and the respondent must be deemed to have had notice that the decree of 1860 was subject to a claim prior to his own.

For the respondent, Ramkumar Ghose, it was argued, that the order of the 14th September 1865 was not a complete judicial order disposing of the right of execution set-off. Nothing less than a complete order of a Court would prevent the respondent's right to execute from arising, and an execution set-off, as distinguishable from equitable set-off, depended upon distinct direction given to the Court under the legal obligation to execute. The order of the 14th of September 1865 was insufficient in this respect. Again, at the time when the order of September 1865 was issued, the property was subject to this attachment at the suit of the respondent already placed upon the decree of 1860.



Reference was made to *Jhatu Sahu v. Baboo Ramacharn Lal* (3 B. L., App. 68), *Sheikh Golam Yabeya v. Mussamut Shamasundari Kuari* (3 B. L., App. 134), *Puddomonee Dossec v. Roy Muthooranath Chowdhry* (12 B. L. R., 411), *Maharaja Dhiraj Mahatab Chand v. Surnomoyee Dossee*, (12 B. L. R., 414, note).

Mr. Leith, Q.C., replied.

At the end of the arguments, on the 4th December 1880, their Lordships having stated that the decree of the High Court must be reversed, reserved the statement of their reasons till after the hearing of the appeal—*Tarakchandra Bhattacharjia v. Baikantnath Sannial*.

This latter case was finally disposed of on the 26th January 1881, when, W. A. Raikes (Cowie, Q.C., with him) argued the case for the Appellants.

Mr. Leith, Q.C., and Mr. C.W. Arathoon for the Respondents.

Mr. W. A. Raikes replied.

Sir B. PEACOCK, on the 26th January 1881, after the death of Sir J. W. COLVILLE, stated their Lordships' reasons.

[114] Sir B. PEACOCK.—This is an appeal from a judgment and decree of the High Court at Calcutta, dated the 16th of March 1877, which reversed an order of the Subordinate Judge of Rajshahye, dated the 10th July 1875, by which he ordered, amongst other things, that an execution case, No. 69 of 1875, instituted by the respondents against the appellants should be postponed until further orders.

At the close of the arguments on the hearing of the appeal their Lordships, after deliberation, stated that they would humbly advise Her Majesty by their report to reverse the decree of the High Court and to affirm that of the Subordinate Judge of Rajshahye so far as it related to the execution case, No. 69 of 1875, and that the respondents must pay the costs of the appeal. They, however, reserved the statement of their reasons for this report until after the argument of another appeal in some respects connected with this case, in which Tarakchandra Bhattacharjia is the appellant and Baikantnath Sannial and others are the respondents.

Their Lordships will now proceed to give their reasons for the report in the first appeal, which will be submitted to Her Majesty at the next Council.

The history of the case is stated by the learned Judges in the judgment under appeal. It appears that, in the year 1828, certain persons who are now represented in estate by the appellants, and whom, as well as the appellants, it will be convenient to speak of as the Sannials, obtained a decree against certain other persons who, as well as the Bhattacharjia, respondents, may be called the Bhattacharjias, for a sum exceeding Rs. 82,000. It was subsequently held that the judgment carried interest at 12 per cent. from the date of the decree until the realization thereof. In execution of the decree the Sannials attached, sold, and became the purchasers of certain immoveable properties of the Bhattacharjias, and obtained possession thereof, which they retained for many years. After considerable delay the Bhattacharjias instituted proceedings to set aside the sale in execution, and on the 10th of November 1857 obtained a decree of the Principal Sadr Amin of Rajshahye, setting aside the sale and declaring the right of the [115] Bhattacharjias to be restored to possession of their property with mesne profits. That decree was affirmed on appeal by the late Sadr Court on the 23rd May 1860.

In the interval, between the date of the decree of the Principal Sadr Amin and the affirmance thereof by the Sadr Court, viz., on the 17th of May 1858, Anund Mohun Ghose, the father of the respondent Ramkumar Ghose,

and who is now represented by him, obtained a decree against the Bhuttacharjias for a sum exceeding 67,000 rupees. In execution of that decree Anund Mohun Ghose attached, in May 1863, the Bhuttacharjias' right to mesne profits under their decree against the Sannials of the 10th of November 1857, and on the 26th May 1865, an order was issued by the District Court for sale of the decree for mesne profits.

The sale in execution of the Sannials' decree of 1828 having, as before stated, been set aside, they took fresh proceedings to have the decree again executed for the amount of principal and interest due thereon. Numerous conflicting judgments were, from time to time, given by different Courts as to the amounts due to the Sannials and to the Bhuttacharjias respectively, on their respective decrees, and as to the right to set off one judgment against the other. The amount due to the Sannials under their decree exceeded the amount due by them to the Bhuttacharjias under their decree for mesne profits. It is unnecessary, and it certainly would not be profitable, to point out in detail the effect of the several conflicting judgments which were delivered in the course of the litigation between the Sannials and the Bhuttacharjias. It is sufficient to say that, on the 14th of September 1865, upon an application for a review of a judgment which is not set out in the record, a judgment was given by Justice KEMP, and CAMPBELL, stating that it had been arranged, by consent of both parties, that the Sannials should have simple interest only on their original decree from the year 1828 to the date of payment, it being understood that the cross-decree of the Bhuttacharjias for mesne profits should also bear simple interest from the date of ascertainment only. The learned Judges, having then proceeded to modify an order which had been previously made, declared that simple interest [116] only should be calculated on the Sannials' decree from 1828, and that then the decree of the Bhuttacharjias should be set off against the gross amount of the Sannials' decree once for all.

It is not clear that the operative part of the order was made by consent, but the fact has not been disputed, and it may be taken to have been so. The judgment was given in a proceeding in which the Sannials were petitioners, and the Bhuttacharjias were judgment-debtors. Ramkumar Ghose was not a party to the proceeding. He did not, however, proceed to a sale under the execution against the Bhuttacharjias of the decree for mesne profits which he had attached, but he entered into a private arrangement with them, by which they sold to him the whole of the mesne profits due to them under their decree against the Sannials, together with all interest due thereon, in lieu of the sum of Rs. 74,506 due to him upon the decree obtained against them by Anund Chundra Ghose, his father. The arrangement was carried into effect by a deed of sale, dated the 15th Chait 1272, corresponding with the 27th March 1866. It was correctly stated by the High Court that the only question they had to deal with was, whether Ramkumar Ghose, by purchasing the Bhuttacharjias' claim to mesne profits on the 27th of March 1866, after their agreement with the Sannials to have their decree adjusted by set-off, recorded in the order of the 14th September 1865, was bound by that order, and consequently lost the advantage which he had gained by attaching the Bhuttacharjias' decree.

The Subordinate Judge had held that Ramkumar Ghose, by privately purchasing the mesne profits from the Bhuttacharjias, had destroyed the right which he possessed under his attachment as a decree-holder, and stayed his execution against the Sannials. The High Court reversed that decision, and held that the benefit of the attachment was not affected by the private

purchase, and that Ramkumar Ghose was entitled, 'so far as might be necessary to secure his own rights, to hold the decree clear of the incumbrance created by the consent-decree between the Sannials and the Bhuttacharjias which had been recorded behind his back while the property was subject to his attachment. They, however, limited the right of Ram-[117] kumar Ghose to avail himself of the mesne profits freed from the Sannials' right of set-off to the extent of satisfying the amount of his decree against the Bhuttacharjias with simple interest to the 14th September 1865, the date of the consent order.

Their Lordships are of opinion that the private sale to Ramkumar Ghose was not tantamount to, and had not the same effect as, a sale in execution of Ramkumar Ghose's decree, under which the mesne profits had been attached; and that Ramkumar Ghose, by virtue of his purchase, acquired no greater interest than the Bhuttacharjias had in the decree for mesne profits, and consequently that he was bound by the order of the 14th September 1865.

By s. 201 of Act VIII of 1859, it is enacted that if the decree be for money (which Ramkumar Ghose's decree was), it shall be enforced by the imprisonment of the party against whom the decree is made, or by the attachment and sale of his property, or by both, if necessary. By s. 205 debts due to the judgment-debtor may be attached and sold as property in execution of a decree. By s. 236, where the property shall consist of debts not being negotiable instruments or shares in any railway, banking, or other public company or corporation, the attachment shall be made by a written order prohibiting the creditor from receiving the debts, and the debtor from making payment thereof to any person whomsoever until the further order of the Court, and then by s. 240, in the case of an attachment by written order, any payment of the debts to the judgment-debtor after the order shall have been made known in the manner in the said Act mentioned, and during the continuance of the attachment, shall be null and void.

It is not necessary to decide whether, if Ramkumar Ghose had purchased at a sale, under his execution, the attachment would have protected him from the effect of the order of the 14th September 1865, the attachment having been issued *pendente lite*,—that is to say, pending the proceedings between the Sannials and the Bhuttacharjias, in which the question was raised as to the right of set-off. It may be admitted for the sake of argument, but only for the sake of argument, that [118] the order of the 14th September 1865, made by consent of the Sannials and of the Bhuttacharjias, directing the set-off, amounted to a payment of the mesne profits by the Sannials to the Bhuttacharjias, and a receipt thereof by the Bhuttacharjias within the meaning of s. 240. The effect of that section, however, is, not to render the payment of a debt which has been attached in execution absolutely void, under all circumstances and against every one, but merely to make it void, so far as may be necessary to secure the execution of the decree. The principle is clearly laid down in the case of *Anund Loll Doss v. Jullodhur Shaw* (14 Moore's I.A., 549, 550). The private sale, pending the attachment, was binding upon Ramkumar Ghose, and also upon the Bhuttacharjias. Ramkumar's decree was satisfied by the sale to him of the mesne profits in lieu of the sum due to him under his decree. He never afterwards could have proceeded to execute that decree or to sell under the attachment. By privately purchasing the mesne profits which he had attached, he abandoned his execution, and also the attachment, which was a part of the execution.

There is a great distinction between a private sale in satisfaction of a decree and a sale in execution of a decree. In the former, the price is fixed by the vendor and purchaser alone; in the latter, the sale must be made by public auction conducted by a public officer, of which notice must be given as directed by the Act, and at which the public are entitled to bid. Under the former, the purchaser derives title through the vendor, and cannot acquire a better title than that of the vendor. Under the latter, the purchaser, notwithstanding he acquires merely the right, title, and interest of the judgment-debtor, acquires that title by operation of law adversely to the judgment-debtor, and freed from all alienations or incumbrances effected by him subsequently to the attachment of the property sold in execution.

The High Court relied upon the case of *Annayunavadan v. Iyasawmy Pillai* (6 Mad. H. C. Rep., 65), but there is a distinction between that case and the present, for there the property sold was hypothecated to the plaintiff by the bond for which the decree was obtained. The case, however, is of no greater authority than [119] the decision under consideration, and their Lordships are not prepared to say that it would have been affirmed on appeal.

Their Lordships cannot but regard as lamentable, the long, harassing, and expensive litigation to which the Sannials have been subjected in endeavouring to obtain the fruits of their decree of 1828, an object which, although upwards of half a century has elapsed since the date of the decree, they have not as yet attained. It is indeed a subject of deep regret that in the course of that litigation so many contradictory and conflicting judgments have been delivered, sometimes on appeal from an inferior to a superior Court, and sometimes even by the same Judges in reviewing their own judgments.

#### NOTES.

#### [DISTINCTION BETWEEN A PURCHASER AT A COURT SALE AND A PURCHASER AT A PRIVATE SALE.

The distinction pointed out here has been held not to make the title of the execution-purchaser any the less *derivative* from that of the Judgment-debtor.

He derives his title from him, however, and as such,

- (a) has been declared to be the Judgment debtor's legal representative :—(1896) 24 Cal. 62 F. B. overruling (1889) 16 Cal. 355
- (b) is bound by the adverse possession running against the Judgment-debtor :—(1891) 16 Bom. 197.
- (c) is bound by the estoppel affecting the judgment-debtor and thus cannot question prior encumbrancers.—(1909) 10 C.L.J. 150 per Mookerjee J relying on (1895) 22 Cal. 909 P.C. Mookerjee J **disapproves** of the views to the contrary held in (1887) 14 Cal. 401; (1892) 20 Cal. 236; (1908) 38 Bom. 311=11 Bom. L.R. 26

#### LIS PENDENS.

The distinction suggested at the end of the Judgment in this case was thought to indicate that in involuntary Court-sales as distinguished from voluntary sales the doctrine of *lis pendens* would apply.—(1886) 10 Bom. 400; 8 Cal. 690; 402; etc;

But this is an erroneous view :—15 Cal. 756; 25 Cal. 179; 26 Cal. 966; 28 Cal. 23.]

[7 Cal. 119]

*The 26th January, 1881.*

PRESENT:

SIR B. PEACOCK, SIR M. SMITH, SIR R. P. COLLIER, AND SIR R. COUCH.

Tarakchandra Bhattacharjia

versus

Baikantnath Sannial and another.

THE hearing of the appeal of *Tarakchandra Bhattacharjia v. Baikantnath Sannial and another*, having been interrupted by the lamented death of Sir James COLVILLE, the case was reargued this day before the Committee, and their Lordships' Judgment, at the close of the argument, was delivered, in the following terms, by

**Sir B. Peacock.**—Their Lordships are of opinion that the decision of the High Court was correct as to the construction of the order of the 14th September 1865. That order runs as follows.—

'At the hearing of this case this day by consent of both parties it (torn) arranged that the plaintiff (torn), have simple interest only (torn), original decree from the year (torn), date of payment. it being (torn) that the cross-decrees of (torn), for wasilat also bears simple interest from date of ascertainment only. The orders, therefore, for calculating interest on the one hand upon the sum ascertained to be due in 1250, and for setting off the wasilat due to defendants year by year is modified, and there will be no annual account to set the two accounts against one another. The simple interest only will be [120] calculated from 1828, when the other decree can be set off against the gross amount once for all. Decree as above, with costs in proportion.'

From this judgment, and from the decree which was drawn up upon it, it appears to their Lordships that the intention of the Court was, as the Court have themselves subsequently expressed in the judgment now under appeal, that the interest should be calculated on the Sannials' decree from 1828 down to the time of that order, and that interest on the mesne profits, which had been assessed as due to the Bhattacharjias, should be calculated at the same rate of 12 per cent. from the date when those mesne profits were ascertained, down to the time of that order of the 14th September 1865. In point of fact the interest was calculated up to the 31st of December in that year, but in that respect the Bhattacharjias, who were the appellants, have gained a benefit, and the other side have not objected. Their Lordships, therefore, think that the judgment of the High Court, so far as it relates to the calculation of interest, is quite correct.

The decree of the Bhattacharjias has not been set out on this record, but it appears that that decree included other matters than the mesne profits which were alluded to in the order. On the taking of the accounts before the Judge of the lower Court, the Sannials admitted a set-off to the amount of Rs. 3,00,104-0-1. That amount included the sum of Rs. 16,324-10-15, in addition to the Rs. 2,11,914-11-11, the amount of mesne profits as appears in the Appendix A-1 referred to in the judgment of the Judge of the lower Court. But in the account taken by the officer of the High Court, and in the decree of the High Court itself which was drawn up upon that account, no allusion whatever is made to the sum of Rs. 16,324-10-15. No explanation could be given at the Bar of this omission. Their Lordships, therefore, think that the cause

should be remanded to the High Court to consider and determine whether or not that sum or any part thereof should be deducted from the sum decreed to the respondents.

In adjusting the accounts between the parties, the High Court has calculated interest on the Rs. 291-7 allowed for the Amin's fees from the 28th September 1828, whereas interest on that [121] account should have been calculated only from the 25th June 1844. It is a very small matter, but their Lordships think that the decree ought to be amended in that respect by deducting from the amount decreed to the respondents the excess of interest so allowed.

Their Lordships will, therefore, humbly advise Her Majesty that the decree be varied to that extent, and that the case be remanded to the High Court for the purpose of considering and determining whether the sum of Rs. 16,324-10-15, or any part thereof, should or should not be deducted from the sum decreed to the respondents, and that in all other respects the decree ought to be affirmed.

Upon the whole their Lordships think that the appellants ought to pay the costs of this appeal.

Solicitors for the Appellants . Messrs. *Wrentmore* and *Swinhoe*.

Solicitors for the Respondent, Ramkumar Ghose : Messrs. *Oehme* and *Summerhays*.

[7 Cal. 121]  
FULL BENCH.

*The 13th April, 1881.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE PONTIFEX,  
MR. JUSTICE MORRIS, MR. JUSTICE MITTER, AND MR. JUSTICE McDONELL.

*The Empress versus Kassim Khan*

and

*The Empress versus Mussamut Dahia and another.*

*Criminal Procedure Code (Act X of 1872), ss. 118, 119—Penal Code  
(Act XLV of 1860), s. 191.*

Neither the words "shall answer all questions" in s. 118 of the Code of Criminal Procedure, nor the words "shall be bound to answer all questions" in s. 119 of the same Code, constitute "an express provision of the law to state the truth" within the meaning of s. 191 of the Penal Code

[122] Sections 118 and 119 are merely intended to oblige persons to give such information as they can to the Police, in answer to the questions which may be put to them, and they impose no legal obligation on those persons to speak the truth.

IN Kassim Khan's case it appeared that the accused was a witness for the prosecution in a criminal trespass case tried by the Deputy Magistrate of the Sudder Sub-division of Midnapore, and he there stated on oath that some previous information which he had given to the Police was false. The Police officer who conducted the case for the prosecution, applied for and obtained sanction to prosecute the witness under s. 193† of the Penal Code. The accused witness was tried by the Joint Magistrate, who discharged him, on the ground, that the statement made by him on oath could not be used against him as a defendant, and that there was no prospect of proving that the accused's statement to the Police was actually false. The Magistrate of the District referred the case to the High Court, under s. 296 of the Code of Criminal Procedure, in

\* Full Bench References made by Mr. Justice Pontifex and Mr. Justice Field, in Criminal Reference No. 36 of 1881, and by Mr. Justice Mitter and Mr. Justice Maclean, in Criminal Appeal No. 790 of 1880.

† [Sec. 193.—Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

*Explanation 1.*—A trial before a Court Martial or before a Military Court of Request is a judicial proceeding.

*Explanation 2.*—An investigation directed by law preliminary to a proceeding before a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

*Explanation 3.*—An investigation directed by a Court of Justice according to law, and conducted under the authority of a Court of a Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.]

order that the proceedings of the Joint Magistrate should be quashed and a retrial of the accused ordered. The reference came on before Mr. Justice PONTIFEX and Mr. Justice FIELD, who referred the matter to a Full Bench in the following terms :

" FIELD, J.—The question submitted to the Full Bench I understand to be this : Can a person be convicted under s. 193 of the Penal Code for giving false evidence, the words alleged to be false having been spoken to a Police officer engaged in making an investigation under the provisions of the Code of Criminal Procedure ?

" The definition of giving false evidence (s. 191) is,—

' Whoever —

- (1) being legally bound by an oath,
- (2) or by any express provision of law, to state the truth, or
- (3) being bound by law to make a declaration upon any subject,

makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, is said to give false evidence.'

" If will probably be admitted that (3) has no application to [123] the present case, and that it is concerned only with that class of cases, of which the declaration to be made by a person obtaining a marriage license is an example.

" Sections 118\* and 119† of the Code of Criminal Procedure empower a Police officer making an investigation to examine persons acquainted with the facts of the case under inquiry, and enact that such persons *shall answer* all questions relating to such case, put by such officer, except criminating questions. Such answers may be reduced to writing, but they are not to be signed by the person making them, nor are they to form part of the record, or be used as evidence.

" These provisions of the Code of Criminal Procedure require the persons examined to *answer* the questions put to them, but they contain no express provision that such persons *shall state the truth*. This seems to take the case at once out of (2).

Then as to (1), can a Police officer administer an oath ? The Code of Criminal Procedure does not provide for the administration of an oath by a Police officer, but does not expressly prohibit it. In the case of accused persons, an oath is expressly prohibited. It has never been usual for Police officers to administer an oath. Then were ss. 4 and 5 of The Indian Oaths

\* [Sec. 118 :—An officer in charge of a Police-station or other officer making an investigation may, by an order in writing, require the attendance before himself of any person, being within the limits of his own or any adjoining stations, who, from the statement of the complainant or otherwise, appears to be acquainted with the circumstances of any case which such officer is investigating ; and such person shall attend as required and shall answer all questions, relating to such case put to him by such officer. Provided that no person shall be bound to answer any questions tending to criminate himself.]

† [Sec. 119 :—An officer in charge of a Police-station or other Police officer making an investigation, may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and may reduce into writing any statement made by the person so examined.

Such person shall be bound to answer all questions relating to such case put him by such officer other than questions criminating himself.

Proviso.

No statement so reduced into writing shall be signed by the person making it, nor shall it be treated as part of the record or used as evidence.]



Act, X of 1873, intended to alter this practice? Consider the words 'who may lawfully be examined.....before any person having by law.....authority to examine such persons,' in s. 5. My own view is, that the practice was *not* meant to be altered.

"If, as a matter of fact, no oath was administered by the Police officer, I think there is an end of the question.

"The accused in this case gave certain information to the Police. Before the Magistrate he swore that this information was false. The District Magistrate desired to have him punished under s. 193 of the Penal Code for giving false evidence in his statement made to the Police. It is suggested that he can be convicted on an alternative charge of giving false evidence *either* in his statement made to the Police *or* in that made to the Magistrate.

"The Joint Magistrate discharged the accused without drawing up a charge or calling upon him to plead to it, on the [124] ground, as it would seem, that there was no other evidence besides these two contradictory statements. The Magistrate of the District asks us to quash the Joint Magistrate's proceedings and order a retrial.

"I do not concur with the case of Nim Chand Mookerjee (20 W. R. Cr. Rul., 41). There is, as I have above pointed out, no provision of law which binds a person to state the truth in answer to a question put by a Police officer, and unless a person is legally bound by an oath or by an express provision of law to state the truth, the offence of giving false evidence cannot be committed."

"PONTIFEX, J.—I agree. The man might possibly be tried for making a false charge, or giving false information to a Public officer."

*The Empress v. Mussamu Dahia and Chedee Dhitanuk* was an appeal from a judgment and sentence passed upon them by the Sessions Judge of Tirhoot. The facts of the case are set out in the Reference to the Full Bench made by Mr. Justice MITTER and Mr. Justice MACLEAN, the terms of which are as follows:—

"A woman of thirty years of age, called Guniya, was drowned in a well; she was the daughter of the appellant, Dahia.

"Information was given at the thana by a chowkidar on the 8th September, that Guniya had accidentally fallen into the well. The head constable enquired into the case, and the appellant, Dahia, made a statement that her daughter had fallen into the well.

"On the 12th September, the same chowkidar reported that there was a rumour that the deceased had been pushed into the well by boy called Mahadeo; and on the 13th September, Dahia made another statement to the head constable, which is marked B on the record. In this statement she distinctly stated that she had seen Mahadeo push her daughter into the well.

"Mahadeo was sent up on a charge of murder, but it was found to be false. In those proceedings Dahia gave evidence before the Magistrate to the effect that her daughter fell into the well accidentally. Mahadeo was discharged, and proceed-[125]ings taken against Dahia and three others. They were committed on charges under s. 211, but the Judge added charges under s. 193, and, in concurrence with the assessors, has convicted Dahia and her relative Chedee under that section.

"We think it is sufficiently proved that Guniya fell into the well, and that Mahadeo did not intentionally push her in. It is also, we think, clear,

that Dahia falsely told the head constable that she had seen Mahadeo push her daughter into the well. The head constable proves her statement to him. The case against the appellant Chedee is similar, except that the head constable proves only the record he made of Chedee's statement, and not the words of that statement.

"We entertain considerable doubts whether, on the facts stated above, a conviction for an offence under s. 193 of the Penal Code can be sustained. The Judge relies upon the decision of this Court in *Nim Chand Mookerjee's case* (20 W. R., Cr. Rul., 41), in which this passage occurs at page 43 :—

" 'But it is not necessary under s. 194 that the false evidence which is given should be the evidence given in a Court of Justice. Section 191 provides that whoever is bound by any express provision of law to state the truth upon any subject, and makes any statement which is false, and which he knows or believes to be false is said to give false evidence. Now, under s. 119 of the Code of Criminal Procedure, a Police officer making an investigation may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and such person shall be bound to answer all questions put to him by such officer ; and it would be a complete offence of giving false evidence as defined by s. 191, taking into consideration the provisions of s. 118 of the Code, if a false statement had been made by such person.'

"As we are not prepared to follow this decision, we should be glad to have an authoritative ruling on the point, which we would put in the form of this question—

"Whether the words, 'shall answer all questions' in s. 118, or the words 'shall be bound to answer all questions' in s. 119, Criminal Procedure Code, constitute an express provision of law to state the truth within the meaning of s. 191, Penal Code?"

[126] Mr. G. C. Kilby for the Crown.—Under s. 118 of the Criminal Procedure Code, the accused was bound to answer all questions put to him. If he refuses to answer, he may be punished under s. 179 of the Penal Code, and the accused cannot be said to have answered the questions put to him within the meaning of the section if he gives answers which are intentionally false. Besides, being "bound to answer" in s. 119 of the Criminal Procedure Code, must mean bound to answer truly. He is legally bound to speak the truth, and if he does not, he is punishable under s. 191 of the Penal Code. A person who gives information, or who is examined under ss. 118 and 119 of the Criminal Procedure Code, is a witness. He is called so in the marginal notes to those sections. [PONTIFEX, J.—I see no reason why he should be called so.] He is punishable under s. 193 for giving false evidence.

*Cur. ad. vult.*

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\* [Sec. 191.—Whoever being legally bound by an oath, or by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, is said to give false evidence.

*Explanation 1.*—A statement is within the meaning of this Section, whether it is made verbally or otherwise.

*Explanation 2.*—A false statement as to the belief of the person attesting is within the meaning of this section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know.]

The Judgment of the Full Bench was delivered by .

**Garth, C. J.**—We think it plain that, neither the words “shall answer all questions” in s. 118 of the Criminal Procedure Code, nor the words “shall be bound to answer all questions” in s. 119, of the same Code, constitute “an express provision of law to state the truth” within the meaning of s. 191 of the Penal Code.

Sections 118 and 119 are, in our opinion, merely intended to oblige persons to give such information as they can to the Police in answer to questions which may be put to them, and they impose no legal obligation on those persons to speak the truth, unless we import the word “truly” in each section after the word “questions” which we clearly have no right to do.

Investigations in a Police Court are not, as a rule, conducted with the same care and accuracy as proceedings in a Court of Justice, and we think that it would be extremely dangerous to the liberty of the subject, if information thus loosely taken by a Police officer could be made the subject of a prosecution for giving false evidence.

It may be that, in some cases, the giving of false information may be made the subject of a different charge under other sections of the Penal Code, but this is a matter upon which we are not now called upon to give an opinion.

#### NOTES.

[It was thought in (1884) 10 Cal. 405 that s. 161 Cr. P. C. 1882 had the effect of altering the law laid down here, but see (1900) 23 Mad. 544.]

### [127] APPELLATE CIVIL.

*The 2nd April, 1881.*

PRESENT .

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE MORRIS, AND MR. JUSTICE PRINSEP.

Gureebullah Sirkar.....Judgment-debtor

*versus*

Mohun Lall Shaha and others.....Decree-holders.”

*Limitation—Instalments—Decree Payable by Instalments—Rent Decree—Beng. Act VIII of 1869, s. 58—Construction of Statutes.*

*Per GARTH, C. J., and MORRIS, J. (PRINSEP, J., dissenting).*—The words “from the date of such judgment” in s. 58 of Beng. Act VIII of 1869, should be read as if they were “from the date when the rent is adjudged to be payable.”

*Per PRINSEP, J.*—The “date of such judgment” in s. 58 of Beng. Act VIII of 1869, means the date on which the judgment was delivered.

Where the terms of an Act are clear and plain, it is the duty of the Court to give effect to it as it stands.

THIS was an application for execution of a money-decree for Rs. 100, which was passed against the defendant, under s. 30 of Beng. Act VIII of 1869, on the 24th of January 1876. The decree directed the payment of the money by seven instalments, the first, to be paid on the 12th of February 1876, and

\* Appeal from Appellate Order, No. 82 of 1880, against the order of H. Beveridge, Esq., Judge of Rungpore, dated the 15th September 1879, reversing the order of Baboo Gopee Mohun Mookerjee, Munsif of Gaibandha, dated the 5th July 1879.

the last on the 12th of August 1879. A previous application, which was made on the 10th of January 1879, was struck off on the 7th of March 1879. The present application was made on the 5th of April 1879.

The Court of first instance dismissed the suit as barred by limitation, but this decision was reversed on appeal by the Judge of Rungpore, who held, *first*, that the application of the 5th of April was not a substantive application for execution, but merely a continuation of the application of the 10th of January 1876, which had been struck off improperly; and [128] *secondly*, that, notwithstanding the terms of s. 58 of Beng. Act VIII of 1869, limitation ran from the default in payment of the instalments, and not from the date of the judgment, citing the case of *Behari Lall Mookerjee v. Mungola Nath Mookerjee* (4 C. L. R., 371).

The judgment-debtor appealed to the High Court. The appeal was heard by MORRIS and PRINSEP, JJ., who differed in opinion, in consequence of which, the case was again argued before the same learned Judges and the Chief Justice.

Baboo Bhoirub Chunder Banerjee for the Appellant.

Baboo Ishur Chunder Chuckerbutty for the Respondent.

Garth, C. J.—The Judges of the Division Bench having differed in opinion, this case has been referred to me as a third Judge, and we have heard the point in difference again argued before us.

The suit was brought under s. 30 of the Rent Law, and a decree was made in the Court of first instance by consent of the parties on the 24th January 1876, for the sum of Rs. 100, payable by instalments. The first instalment of Rs. 10 was payable in January 1876, and the remaining instalments of Rs. 15 each were payable respectively, in January and August of the years 1877, 1878, and 1879, the last becoming due in August 1879, or upwards of three years from the date of the decree. On non-payment of any one of these instalments, the whole sum decreed became due.

The two first instalments were not paid in due course, and the whole amount thus became payable.

An application for execution was made on the 10th of January 1879, which was struck off on the 7th of March following, in consequence of no one appearing in support of it. Another application was made on the 5th of April following, and an objection was then taken, that by the terms of s. 58 of the Rent Law Beng. Act VIII of 1869 no execution could legally be issued upon the judgment, inasmuch as more than three years had elapsed from the date of the decree.

[129] The answer to this objection was two-fold:—

*1st.*—That the application on the 5th of April was only a continuation of the former application of the 10th of January; and

*2nd.*—That, in a case like the present, the language of s. 58 ought not to be construed literally, but that the three years' limitation ought to be reckoned, not from the date of the judgment itself, but from the day when the sum decreed was adjudged to be payable.

It was argued, and argued truly, that if the three years' limitation was to be reckoned from the date of the judgment, any decree, although obtained by consent, by which the amount payable would become due by instalments or otherwise at a date more than three years subsequent to the judgment, would

be absolutely useless ; and consequently that it would be impossible for any Court to make a valid decree for a sum payable by instalments at a time more than three years from the making of it.

This would, of course, be materially limiting the power, which is given to the Courts by s. 210 of the Civil Procedure Code, to make any sum decreed payable by instalments.

On the other hand, it is argued that the very object of s. 58 was, in the first place, to prevent the Courts from postponing the payment of rent for more than three years ; and in the next place, to oblige decree-holders to enforce their decrees within that period, on pain of losing their money altogether. The intention was to prevent ryots being harassed and oppressed by rent decrees being kept hanging over their heads for a lengthened period.

I confess I have had great difficulty in coming to a conclusion upon the point, and I am not at all sure that I have at last arrived at the correct one.

On the one hand, the language of the section appears to be very plain, and there is no doubt much reason in the argument, that the sooner these rent claims are finally settled, the better it is for the interests of agriculture.

On the other hand, it seems hardly reasonable, that when a ryot is really unable, from poverty or otherwise, to pay the [130] whole rent within three years, a Civil Court should be positively disabled (even at the instance of the ryot himself, and out of consideration for his poverty), from making a decree payable by instalments extending over more than three years.

Most of the authorities which have been cited appear to me to render us little or no assistance ; but it was decided in the case of *Goloke Money Dabra v. Mohesh Chunder Mosa* (I. L. R., 3 Cal., 547) that the words "no process of execution shall be issued on a judgment after the 'lapse of three years' in s. 58" mean, that execution shall not issue unless a *proper application is made for it within three years*. In this the Court seems to have adopted the view taken by the majority of the Full Bench in the case of *Ridoy Krishna Ghose v. Kailas Chandra Bose* (4 B. L. R., F. B., 82).

These cases certainly serve to show no more than this, that the Court will put a reasonable construction upon Acts of the Legislature, and will not allow the strict language of a section to prevent their giving it such a construction. Authority is scarcely needed for such an elementary principle.

The question with me has been, whether we ought to extend that principle to the present case ; and I have come to the conclusion that we ought. We must, I think, read s. 58 of the Rent Law with s. 210 of the Civil Procedure Code, and it seems to me manifestly for the benefit of ryots, that full powers should be given to the Courts to make rent decrees payable by instalments.

If I am right in this, I think it almost follows as a matter of course, that it would be a great injustice to a decree-holder, whose rent is thus made payable by instalments, to give him a shorter time for executing his decree than one whose rent is made payable at once.

I therefore think, that the reasonable construction of the two sections taken together is this, that the words "from the date of such judgment" in s. 58 should be read as if they were "from the date when the rent is adjudged to be payable."

If I am wrong in putting this somewhat liberal construction upon the words of the section, I hope I may be set right either by a Full Bench or by the Legislature.

**[181]** The result of this decision will be, that the appeal will be dismissed with the costs of both hearings in this Court.

**Morris, J.**—I concur. It seems to me that, in the absence of express provision, a local Rent Law cannot, by implication only, be understood to restrict the general right possessed by Civil Courts to give decree for amounts payable by instalments over a period exceeding three years.

**Prinsep, J.**—I regret to be unable to concur in the opinion expressed by my learned colleagues in this case. In my opinion the terms of s. 58 of the Rent Law prevent the further execution of this decree.

Section 43 of the Rent Law declares, that the Code of Civil Procedure shall regulate all proceedings in suits of this description, save as in that Act is otherwise provided. The Code of Civil Procedure (Act VIII of 1859), s. 194†, declares, that in all decrees for the payment of money, the Court may, for any sufficient reason, order that the amount shall be paid by instalments; but s. 58 of the Rent Law provides, that “no process of execution of any description whatsoever shall be issued on any judgment in any suit” (for arrears of rent) “after the lapse of three years from the date of such judgment, unless the judgment be for a sum exceeding five hundred rupees.” In my opinion the date of the judgment is the date on which it is delivered\* for s. 185† of Act VIII of 1859 provides, that “the judgment shall be dated by the Judge in open Court at the time of pronouncing it;” and s. 189 adds, “the decree shall bear date the day on which the judgment was passed.” Further, I am of opinion, that the intention of the Legislature in enacting s. 58 was to insist on the early realization of all decrees for small amounts of rent, by withholding any action of the Court towards obtaining payment by means of its processes. If acting under s. 194 a Court fixes an instalment beyond the term of three years from the date of its judgment so as not to come within the terms of s. 58 of the Rent Law, in my opinion that decree is, in that respect, a bad decree, and incapable of being put into execution. With **[132]** the terms of s. 58 of the Rent Law so clearly expressed, the Court could have no sufficient reason for passing such an order. The consent of the parties would not affect the operation of the law, as has been held by PEACOCK, C. J., in the case of *Krishna Kamal Sing v. Hiru Sardar* (4 B. L. R., F. B., 105).

I am, therefore, of opinion, that we should read s. 58 of the Rent Law according to the plain sense of the words, it being our duty to expound it as it stands. I would, therefore, set aside the order of the lower Court.

*Appeal dismissed.*

#### NOTES.

[The majority of the Full Bench in (1883) 9 Cal. 711 dissented from this ruling holding that the terms should be construed strictly; Garth C. J. and Mitter J. dissented.]

\* See the judgment of Lord WESTBURY, in *In re Risca Coal and Iron Co.*, 4. D. F. and J., 466; and of BACON, J., in *Ex parte Whitton, In re Greaves*, L. R., 13 Ch. D., 881.

† [Sec. 194.—In all decrees for the payment of money, the Court may for any sufficient reason order that the amount shall be paid by instalments with or without interest.]

‡ [Sec. 185:—The judgment shall contain the point or points for determination, the decision thereupon, and the reasons for the decision, and shall be dated and signed by the Judge in open Court at the time of pronouncing it.]

Whenever the judgment is written in any other language than that which is in ordinary use in the Court, the judgment shall be translated into the language in ordinary use in the Court, and the translation shall also be signed by the Judge. (Suspended by Act XX, 1862, s. 5, as respects the High Court, Calcutta.)

Judgment to be translated.

[7 Cal. 132.]

The 13th April, 1881.

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE,  
AND MR. JUSTICE McDONELL.

Koylash Chunder Ghose and others.....Plaintiffs

versus

Sonatun Chung Barooie and others.....Defendants.\*

*Easement—Right of Way—Prescription—Effect of Illustrations—Limitation Act  
(XV of 1877), s. 26 and illus. (b).*

On the 6th of April 1878, the plaintiffs sued for obstructing a right of way for boats in the rainy season. The defendants admitted the obstruction, but denied the right of way. The plaintiffs proved that the right was peaceably and openly enjoyed, and actually used by them, claiming title thereto as an easement and as of right, without interruption, from before 1855 down to November 1875, since when no actual user of the way by the plaintiffs had taken place. The lower Appellate Court dismissed the suit, on the ground that the plaintiffs had made no actual use of the way within two years previous to the institution of the suit. *Held*, reversing the decision of the Court below, that, notwithstanding Act XV of 1877, s. 26, illus. (b), actual user within two years previous to the institution of the suit is not necessary, in order that the right claimed may be acquired under Act XV of 1877, s. 26†.

Illustrations in Acts of the Legislature ought never to be allowed to control the plain meaning of the section to which they are appended, especially when the effect would be to curtail a right which the section in its ordinary sense would confer.

THIS was a suit to establish a right of way over the defendants' land. The plaint, which was filed on the 6th April 1878, [133] stated that, for upwards of twenty years prior to the institution of the suit, the plaintiffs had enjoyed, during the rainy season, a right of way for boats, to and from their house, through certain channels cut in the defendants' land. That the defendants had, on the 1st of June 1876, obstructed the way by filling up the channels, and they claimed to have their right declared and the obstructions removed. The

\* Appeal from Appellate Decree, No 2832 of 1879, against the decree of Baboo Nobin Chunder Gangooly, Second Subordinate Judge of Dacca, dated the 13th October 1879, reversing the decree of Baboo Brojo Nath Roy, Officiating First Munsif of Moonsheegunge, dated the 28th December 1878.

† [Sec. 26.—Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, and as of right,

Acquisition of right to easements. without interruption, and for twenty years, and where any way or watercourse, or the use of any water, or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right, without interruption, and for twenty years, the right to such access and use of light or air, way, watercourse, use of water, or other easement, shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

*Explanation.*—Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant) and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.]

plaintiffs was in the rainy season of 1282 (June to November 1875), the suit was barred by s. 26<sup>†</sup> of the Limitation Act, XV of 1877. The Subordinate Judge also referred to *Gope Chund Setia v. Bhobun Mohun Sen* (23 W. R., 401) and *Baboo Luckmee Pershad Narain Singh v. Tiluckdharee Singh* (24 W. R., 295). The plaintiffs appealed to the High Court.

*Baboo Hurry Mohun Chuckerbutty* for the Appellants.

*Baboo Gurudas Banerjee* for the Respondents.

The Judgment of the Court (GARTH, C. J., and McDONELL, J.) was delivered by

**Garth, C. J.**—The plaintiffs in this suit claim a prescriptive right of passage for boats over the defendants' land, when it becomes covered with water during the rainy season.

The first Court found that the plaintiffs had enjoyed this right for upwards of twenty years; and accordingly made a decree for the removal of certain obstructions which were put up by the defendants in June 1876 for the purpose of preventing the plaintiffs from exercising their right.

The lower Appellate Court does not expressly negative the finding of the lower Court upon the facts, although it throws some doubt upon its correctness. But it has decided against the plaintiffs upon the preliminary ground, that as *no actual exercise* of the right had taken place within two years before suit, the plaintiffs are barred by limitation.

[134] From this judgment the plaintiffs have appealed; and we have, therefore, to consider the true meaning of the last clause of s. 26 of the Limitation Act, more especially when applied to the particular kind of easement with which we are now dealing. And in order to see precisely how the question arises in the present instance, it will be well to take the facts as found by the first Court.

The plaintiffs have enjoyed for upwards of twenty years this right of passage for their boats over the defendants' land, when that land is flooded in the rainy season.

The first interruption of the plaintiffs' right occurred in June 1876, before the rains had commenced; when the defendants, with a view of preventing the plaintiffs from exercising their right, put up the obstructions, which are the subject of complaint.

On the 6th of April 1878, or about one year and ten months after the interruption, this suit was brought.

Now, if the right was enjoyed by the plaintiffs for twenty years before the interruption, and the interruption itself was the first breach of enjoyment, it is obvious that the enjoyment must have continued up to a time within two years, before suit, in which case there would be no bar.

But the Subordinate Judge considers that because there was no actual exercise of the right within the two years, the suit is barred.

He relies upon two decisions of this Court,—one in the case of *Baboo Luckmee Pershad Narain Singh v. Tiluckdharee Singh* (24 W. R., 295), which does not support him at all, as there the alleged right was interrupted more than two years before suit; and the other, the case of *Goepee Chand Setia* defendants admitted the obstruction, but denied the right of way. The Court of first instance gave the plaintiffs a decree, which was reversed on appeal, the Subordinate Judge holding that, as the last instance of actual user by the



v. *Bhoobun Mohun Sen* (23 W. R., 401), which only supports him to this extent that the learned Judge in that case refers to *illus. (b)* of s. 26 as showing that there should be some actual user of the right within two years before suit. It is no doubt, upon the strength of *illus. (b)* that the Subordinate Judge has dismissed the suit, and we cannot blame him; for when the language of a section points to one view of the law, and one of the illustrations of [135] the section points to another, it is a very difficult thing for the subordinate judiciary to decide which view to adopt.

Indeed it is very difficult for the High Court, whose duty it is to construe recent Acts of the Legislature, to say what precise weight ought to be attached to these illustrations. So far as they merely serve to explain the meaning of the section, we have no doubt that they may often be found useful, especially amongst a class of judicial officers who are not very conversant with the meaning or working of the section itself.

We have already decided, however, more than once in this Court, that the illustrations ought never to be allowed to control the plain meaning of the section itself, and certainly they ought not to do so, when the effect would be to curtail a right which the section in its ordinary sense would confer.

It will be sufficient to say no more than this for our present purpose.

The 26th section of the Limitation Act only renders it necessary, as far as we can see, that the *enjoyment of the right* claimed should have continued till within two years before suit. The section says not a word as to any *actual user* or *exercise* of the right within the two years. It is obvious to us, that the enjoyment intended by the section means something very different from actual user. In order to establish the right, the *enjoyment* of it must continue for twenty years; but in the case of discontinuous easements, this does not mean that *actual user* is to continue for the whole period of twenty years. On the contrary, there may be days and weeks and months, during which the right may not be exercised at all, and yet during all those days and weeks and months, the person claiming the right may have been in full enjoyment of it.

The easement with which we have to deal in the present case affords a remarkable illustration of this.

The right which the plaintiffs claim can only be used by them during the two or three months of the year when the defendants' land is flooded; and if there were a lack of rain it is probable, that even for twenty or twenty-one months, the right might not be exercised at all; and yet, so long as the plaintiffs' right was not interfered with, whenever they had [136] occasion to use it, their enjoyment must, we conceive, be considered as continuing during all the year round.

Unless this were so, a person in the plaintiff's position, who could only use his right during a short period of the year, could never gain a prescriptive right at all.

Illustration (b), therefore, which would seem to make "enjoyment" equivalent to "actual user" must, we think, be rejected, especially as the latter clause, which follows the words "The suit shall be dismissed" is obviously quite unnecessary for the purposes of the illustration.

If the view which we take in this respect is not the right one, the only way for persons in the plaintiffs' position to establish their rights by prescription, would be to claim, not under the Limitation Act, but by immemorial user, and get the Court to presume their rights after a twenty-five or thirty years' enjoyment, unless the defendants could show anything to the contrary. Their Lordships in the Privy Council have lately held, that it is not necessary that

such rights should be claimed under the Limitation Act; see *Rajrup Koer v. Abdul Hossein* (I. L. R., 6 Cal., 394).

The case must, therefore, go back to the lower Appellate Court to try the question, whether the plaintiffs have enjoyed (in the sense which we attribute to the word "enjoy") the right which they claim for twenty years before the obstructions were put up in June 1876.

The costs in this Court and in the Court below will abide the result.

*Case remanded.*

#### NOTES.

##### [I ACTUAL USER.]

In (1899) 26 Cal. 593 it was pointed out that no rule was laid down in this case (and none could be laid down) as to what would or would not constitute a continuance of the enjoyment as of right when there was no exercise of it for any given period and that must depend upon the circumstances of each case and the nature of the right claimed, and it was laid down that when there is no user for a long time, there must be circumstances from which the Court can infer the continuance of an enjoyment as of right over the whole statutory period, and the cessation of the user must be at last consistent with such continuance.

See also Mitra on Limitation (1911) Vol I, pp. 575—576.

##### II ILLUSTRATIONS IN ENACTMENTS.

Illustration does not control the plain meaning of the section.—

See also, 6 Cal. 171, 1 All 587; 1 Bom. 147 14 M.L.J. 210; 10 C. P. L. R. 1; 20 Mad. 481; (1907) 11 C.W.N. 959=34 Cal. 941.]

[137] *The 13th April, 1881.*

PRESENT :

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE PRINSEP.

Khodabux.....Defendant

*versus*

Budree Narain Singh and another.....Plaintiffs.\*

[=8 C. L. R. 306.]

*Limitation—Minor's Right to Sue—Limitation Act (XV of 1877), s. 7.*

A suit by a guardian on behalf of a minor is that of the minor, and is governed by the law of limitation applicable to the minor.

So, where a minor had been dispossessed of his share in certain property, which had been sold in execution of a decree, and where an application under s. 268 of Act VIII of 1859 to obtain possession of the share was made by the then guardian of the minor, and disallowed, and subsequently, but beyond the period of one year from the date of the application, a suit was brought to obtain possession by another guardian of the infant, who had been duly appointed,—

*Held* that such suit was not barred by limitation, the right to sue being that of the minor, and that it might be exercised by any one duly appointed on his behalf during his minority, or by the infant himself, within the time limited by s. 7 of Act XV of 1877, after attaining his majority.

\* Appeal from Appellate Decree, No. 2344 of 1879, against the decree of F. Cowley, Esq., Officiating Judge of Purneah, dated the 15th August 1879, reversing the decree of S. Wright, Esq., Subordinate Judge of that district, dated the 16th April 1879.

† [Sec. 7 :—If a person entitled to institute a suit or make an application be, at the time from which the period of limitation is to be reckoned, a minor, or insane, or an idiot, he may institute the suit or make the application within the same period after the disability has

Legal disability.

*Sreemutty Suffuroonissa Bibee v. Moonshee Noorul Hossein* (17 W. R., 419) and *Huro Soonduree Chowdhraim v. Annund Nath Roy Chowdhry* (8 W. R., 8) followed.

IN this case the two plaintiffs, who were minors, sued the defendant, through their mother and guardian as next friend, to obtain a declaration of their title to, and for possession of, a 2-anna share in certain plots of land. It appeared that a 4-anna share in these lands had belonged to their father Bhimraj Singh Sudia, who died in 1277 M. S., corresponding with the year 1870, leaving as heirs his sons Pahulwan Singh, Zemindar Singh, and the two plaintiffs. On the 8th May 1877, the interest of Pahulwan Singh in this 4-anna share was sold in execution of a decree against him alone, and in due course the sale was confirmed on the 18th June 1877; and the defendant, who was the auction-purchaser, obtained possession of the whole 4-anna share. On the 21st September 1877 [138] Zemindar Singh made an application to the Subordinate Judge, under Act VIII of 1859, with respect to three out of the four annas share, on behalf of himself and the present plaintiffs, alleging that they had been dispossessed of their share in the property by the auction-purchaser, and praying that his possession over their 3-anna share might be set aside; but, on the 9th November 1877, this application was rejected. Subsequently the plaint in the present suit was filed on the 22nd January 1879, the mother of the two minor plaintiffs having been duly appointed their guardian. The defendant, in his written statement, contended that the suit was barred by limitation, inasmuch as it was not brought within one year of the date of the order of the 9th November 1877; and also that the debt, for which the property was attached and sold under the decree against Pahulwan Singh, was contracted for the benefit of the joint family, and that, therefore, the whole of the joint family property was liable. The Subordinate Judge dismissed the suit, holding that it was barred by limitation, and that it was, therefore, unnecessary to go into the merits. From that decree the plaintiffs appealed, and the lower Appellate Court reversed it, and remanded the case under s. 562\* of the Civil Procedure Code, for the purpose of its being disposed of on the merits.

ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed.

When he is, at the time from which the period of limitation is to be reckoned, affected by two such disabilities, or when before his disability has ceased, he is affected by another disability, he may institute the suit or make the application within the same period after both disabilities have ceased as would otherwise have been allowed from the time so prescribed.

When his disability continues up to his death, his legal representative may institute the suit or make the application within the same period after the death as would otherwise have been allowed from the time so prescribed.

Disability of representative. When such representative is at the date of the death affected by any such disability, the rules contained in the first two paragraphs of the section shall apply.

Nothing in this section applies to suits to enforce rights of pre-emption, or shall be deemed to extend, for more than three years, from the cessation of the disability or the death of the person affected thereby, the period within which any suit must be instituted or application made.]

\* [Sec. 562:—If the Court against whose decree the appeal is made has disposed of the suit upon a preliminary point so as to exclude any evidence of

Remand of case by Appellate Court. fact which appears to the Appellate Court essential to the determination of the rights of the parties, and the decree upon such preliminary point is reversed in appeal, the Appellate Court may, if it thinks fit, by order, remand the case, together with a copy of the order in appeal, to the Court against whose decree the appeal is made, with directions to re-admit the suit under its original number in the register and proceed to investigate the suit on the merits.]

The defendant then specially appealed to the High Court.

Baboo *Taruck Nath Paulit* for the Appellant,

Baboo *Ram Churn Mitter* for the Respondents.

The Judgment of the Court (CUNNINGHAM and PRINSEP, JJ.) was delivered by

**Cunningham, J.**—In execution of a decree obtained against *Pahulwan Singh*, the eldest of four brothers, Zemindar the second brother, as guardian of the two youngest, minors, intervened under s. 269, Act VIII of 1859; but his opposition was disallowed on the 9th November 1877.

On 22nd January 1879, *Pryabuttee*, the mother of these minors, who has since been appointed guardian in the place of Zemindar, instituted the present suit on their behalf to set [139] aside the order of the 9th November 1877, and to recover possession of the minors' property.

The only point for our decision in special appeal is, whether this suit is barred by limitation, inasmuch as it has been brought more than one year from the date of the order passed under s. 269. The first Court dismissed the suit as barred, but on appeal the District Judge has set aside this order, and remanded the suit for trial, holding that as the plaintiffs are still minors, no limitation would apply to this suit.

We are of opinion, that this view of the law is correct. The right to sue is that of the minors, and can, under s. 7, Act XV of 1877, be exercised by them within a certain time from their attaining majority. They are, no doubt, bound by any act lawfully done on their behalf by a properly appointed guardian, but if they have a right to sue, and that right has not been exercised on their behalf by their guardian, it exists until they are qualified to act for themselves.

The special appellant's pleader argues, that Zemindar having failed to sue within one year, any suit by him would be barred, and that, consequently, the present guardian, his successor, would also be barred, though probably the minors might themselves sue after attaining majority. The guardian, however, is no party to a suit. The parties are the minors, and he is only their representative. The law of limitation for suits only applies to the parties themselves. The law may be different as regards appeals, because a minor's rights are not specially excepted in this respect. If, therefore, the minor's right to sue is not affected by the law of limitation, it may be exercised on their behalf by any person empowered by law so to act, so long as they are incapable, by reason of minority, from acting for themselves. The cases of *Sreenuttu Sufuroonnissa Bibee v Moonshee Noorul Hossein* (17 W. R., 419) and *Huro S'onduree Chowdhram v. Annund Nath Roy Chowdhry* (3 W. R., 8) are in point.

We, therefore, dismiss this special appeal with costs.

*Appeal dismissed.*

#### NOTES.

[The same principle was applied in (1883) 7 Bom. 179 to an application for execution filed within the period prescribed under s. 7 of Act XV of 1877, but long after a similar application by the guardian during minority.]

\*[Sec. 269 —If it shall appear that the assistance or obstruction to the delivery of possession was occasioned by any person other than the defendant

Obstruction by claimants  
other than defendant.

claiming a right to the possession of the property sold as proprietor, mortgagee, lessee, or under any other title, or if in the delivery of possession to the purchaser any such person claiming as aforesaid shall be dispossessed, the Court, on the complaint of the purchaser or

## [140] ORIGINAL CIVIL.

*The 4th May, 1881.*

PRESENT:

MR. JUSTICE BROUGHTON.

Watkins

versus

Dhunnoo Baboo.

*Infant—Minor—Next friend—Costs of minor—Necessaries—Contract Act  
(IX of 1872), s. 68.*

Where a suit has been brought against a minor, the effect of which, if successful, would be to deprive the minor of his property, the costs of successfully defending that suit on his behalf may, when his property is in the hands of the Receiver of the Court, be recovered from the minor as necessaries, in an action brought against him by his attorney.

THIS was a suit brought by the plaintiff, an attorney of the High Court, for the recovery of Rs. 1,469-4 from the defendant, who is a minor, on account of work done and money paid for the defendant as his solicitor. It appeared from the plaint and the evidence in the cause, that, on the 8th of April 1876, the defendant, by his mother and next friend Champa Beebee, brought a suit against his paternal uncle, one Chunnoololl Johurry, seeking for an account and partition of the estate of his grandfather, Inder Chund Johurry. Shortly after the institution of the suit, Champa Beebee was removed, and Mr. C. F. Pittar, an attorney of the High Court, was appointed next friend of the minor in her place.

On the 28th of July 1876, a decree was made in the above suit, whereby it was ordered that the partition asked for should be carried out, and that the share of the plaintiff should be handed over to the Receiver of the Court, to be retained and managed by him for the plaintiff until the latter should attain his majority. A commission of partition was issued out, and on its return it was found that the value of the minor's share was about a lakh of rupees.

On the 20th of March 1877, one Paunch Cowrie Mull and others instituted a suit in the High Court, against Chunnoololl Johurry, Champa Beebee, and the minor, claiming that the property, the subject of the partition suit, was not the property [141] of the defendants, but belonged to Paunch Cowrie Mull and his co-plaintiffs, who claimed to be trustees thereof for the purpose of carrying out certain religious trusts. Mr. Pittar was appointed next friend of the infant in that suit also, and the plaintiff in the present case was the infant's attorney. The suit was dismissed with costs on the 20th of August, and this decree having been appealed from, the suit was finally dismissed on the 21st of March 1879. On the 25th of September 1879, a writ of attachment was issued out against Paunch Cowrie Mull and others for the recovery of the taxed costs as between party and party, but the writ was not executed, as the plaintiff could not be found. The plaintiff, Mr. Watkins, who had paid all the costs of the infant both in the Court of first instance and in the Court of Appeal, then instituted the present suit to recover them from the minor's estate.

of such person claiming as aforesaid, if made within one month from the date of such resistance or obstruction or of such dispossession, as the case may be, shall enquire into the matter of the complaint and pass such order as may be proper in the circumstances of the case. The order shall not be subject to appeal, but the party against whom it is given shall be at liberty to bring a suit to establish his right at any time within one year from the date thereof.]

Mr. *Trevelyan*, for the plaintiff, contended that the costs paid by the plaintiff, and incurred in the suit and appeal, were necessities within the meaning of s. 68 of the Contract Act: see *Collins v. Brook* (5 H. and N., 700), *Brown v. Ackroyd* (5 E. and B., 819), and *Wilson v. Ford* (L. R., 3 Exch. 63).

Mr. *T. A. Apcar*, for the defendant.—The case is covered by *Radhanauth Bose v. Suttoprosono Ghose* (2 Ind. Jur., N. S., 269) and *Denonauth Bose v. Ruggoobardial Singh* (Unreported, per WHITE, J., 8th June 1880). *Collins v. Brook* (5 H. and N., 700) has nothing to do with this case. The other cases cited have no reference to infants.

Mr. *Trevelyan*, in reply, said that the question as to whether costs are “necessaries” was not entered into in the cases cited by Mr. *Apcar*.

**Broughton, J.**—The plaintiff, an attorney of this Court, seeks to recover Rs. 1,469-4, with interest, on account of certain costs incurred by him in defending a suit for the present defendant, who was, and still is, an infant under age.

[142] He contends that these costs are “necessaries” within the meaning of the Indian Contract Act, s. 68, which enacts, that “if a person, incapable of entering into a contract, &c., is supplied by another person with necessities suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.”

The infant, on the 8th of April 1876, through his mother and next friend, sued his uncle for an account and partition of the estate of his grandfather, and a decree was made by consent, on the 28th of July 1876, for partition. It was directed that the infant's share should be delivered to the Receiver of this Court. Mr. C. F. Pittar, an attorney of this Court, was substituted for the mother as the next friend of the infant. The partition was made, and the property allotted to the defendant is now in the hands of the Receiver.

Afterwards, on the 20th of March 1877, one Paunch Cowrie Mull and others sued the infant and others, praying that the will of one Hoolassee Lall might be construed; and that the rights of the plaintiffs, as members of a certain Paunch and the other religious trusts under this will, might be ascertained, and that, if necessary, this suit might be treated as supplemental to the former suit.

In this second suit Mr. Pittar also was appointed guardian *ad litem* for the infant.

This second suit was dismissed with costs. The plaintiffs appealed, and ultimately the appeal was dismissed also with costs.

Attempts have been made to execute these decrees for costs, but the persons against whom this execution was sought cannot be found, and have no property.

If Paunch Cowrie Mull had succeeded in his suit, the property adjudged to the infant in the first suit would have been swept away.

There was, however, a good defence to the suit; and it was therefore necessary, in the ordinary acceptance of the term, that proceedings should be taken to protect the interests of the infant from this attack which was made on his property.

A proper and responsible person was appointed to act as [143] guardian to the infant, and to see that no unnecessary proceedings should be taken on his behalf; and the guardian protected himself from personal liability by an agreement with the present plaintiff, who was retained by him to act as attorney for the infant defendant.

It is contended, upon the authority of a case decided by Mr. Justice PHEAR—*Radhanauth Bose v. Suttoprosono Ghose* (2 Ind. Jur., N. S., 269), and a late case decided by Mr. Justice WHITE on the 8th of June 1880—*Dcnonauth Bose v. Ruggoobardial Singh* (Unreported), that these costs, although they have been properly incurred in defending an action which ought to have been defended, are, nevertheless, not recoverable.

In the first case Mr. Justice PHEAR held, that there was no contract by or on behalf of the infant, and the reasons are given why an infant is not permitted to enter into this particular contract, but must act vicariously under the established rules of Court. These rules are now embodied in the Code of Civil Procedure, Act X of 1877, s. 11,<sup>\*</sup> and the Contract Act, does not allow an infant to enter into any contract.

In the case decided by Mr. Justice WHITE, it appears that the guardian was also a party to the suit, and that the infant's estate was in his hands.

The notes of the judgment are very short, and, as I understand them, it was held that the decree should be against the guardian, and that he could recoup himself out of the infant's estate.

The infant in this case comes within the description of a person incapable of entering into a contract, and the question is, whether the work done for him by the plaintiff comes under the head of "necessaries."

It has been decided in the case of *Collins v. Brook* (5 H. and N., 700), cited by Mr. Trevelyan, that payment made to avoid arrest is a necessary. In *Brown v. Ackroyd* (5 E. and B., 819), a suit to protect the person from violence was considered in the same way necessary.

In *Wilson v. Ford* (L. R., 3 Exch., 63) it was contended, that *Brown v. Ackroyd* (5 E. and B., 819) went as far as the law allowed in this direction; [144] but it was considered by the Barons of the Exchequer, who were unanimous, that where a wife had been deserted by her husband, who had deprived her of her property, and when she had failed in her endeavours to persuade him to return to her, and had instituted proceedings for the restitution of conjugal rights, the costs of all reasonable proceedings incurred in this manner were necessaries, including the expenses of taking Counsel's opinion upon the construction of a settlement and expenses incurred by her to protect the husband's property from a dstraint. If an infant is liable for necessary food and raiment suitable to his condition in life, on the ground that they are necessaries, it would be strangely anomalous if the law were to hold that proceedings properly taken to preserve him from complete ruin and destitution must be taken at the risk and expense of those persons who act for his benefit, and who may, or may not, recover the money so spent, as the

<sup>\*</sup>[Sec. 11.—The Courts shall (subject to the provisions here-  
 Courts to try all Civil suits in contained) have jurisdiction to try all suits of a civil nature  
 unless specially barred. excepting suits of which their cognizance is barred by any  
 enactment for the time being in force.]

**Explanation** :—A suit in which the right to property or to an office is contested is a suit of a Civil nature, notwithstanding that such right may depend entirely on the decision of questions as to the religious rites or ceremonies.]

infant, on coming of age, may chance to approve of or repudiate the arrangements, and be willing or unwilling to repay them. I think that the case of *Wood v. Ford* (L. R. 3 Exch.) is sufficient authority for the proposition that the costs of a proper suit or defence of a suit in which property is involved are recoverable from the infant's estate, and as the costs appear to have been taxed and to be reasonable in the present instance, the plaintiff is entitled to succeed. It was, however, very right that the question should have been discussed. The costs of both parties must be paid out of the estate of the infant. (See the observations of the Master of the Rolls, Sir George Jessel, in *Steed v. Preece*, L. R., 18 Eq., 192).

Attorney for the Plaintiff: Mr. *Farr*.

Attorney for the Defendant: Mr. *M. Camell*.

#### NOTES.

#### [NECESSARIES: MINOR, SUIT AGAINST, FOR—

In the following cases it was held that a suit was maintainable against a minor as coming within the meaning of "necessaries" in Sec. 68 of the Contract Act:—

(1) Costs incurred in defending a suit on behalf of a minor in which his property was in jeopardy came within the scope of "necessaries":—(1881) 7 Cal. 140.

But in (1894) 17 Mad. 257 under similar circumstances it was held that no suit will lie.

So also is the view expressed in (1894) 21 Cal. 872 where their Lordships observe as regards the main case as follows:—

"Whether the principle which underlies that decision can be supported in its entirety, it is not necessary to discuss in this case."

(2) Costs incurred in defending a minor in a prosecution for dacoity was held to be fall under "necessaries" (1894) 21 Cal. 872.

See also (1894) 17 Mad. 306.

(3) Loan to a minor to save his property from sale in execution:—(1883) Punj. Rec. No. 185; (1888) Punj. Rec. No. 96.

(4) Money borrowed by a minor manager of a Hindu family for marriage of his sister:—(1910) 82 All. 325.

#### II DEFINITION OF—

See (1909) 36 Cal. 768 and Pollock and Mulla's Contract Act, 3rd Ed. p. 59.]



## [145] APPELLATE CIVIL. .

*The 17th March 1881.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE McDONELL.

Doorga Churn Dhur and another.....Plaintiffs

*versus*

Kally Coomar Sen.....Defendant. \*

*Easement—Right of way—Right of passage for boats in the rainy season—Water.*

A right of passage for boats in the rainy season over a channel wholly in another man's land, is, in respect of extent, analogous to an ordinary right of way; and the dominant owner cannot complain of the servient owner's narrowing the channel, so long as the latter, by so doing, does not prevent the former from passing and repassing as conveniently as he has always been accustomed to do.

A right of passage for boats in the rainy season over another person's tank must be claimed in a particular direction in order to be valid.

IN this case the plaintiffs alleged that there was a permanent passage for boats, in the rainy season, over the defendant's land, within which it was wholly included; that the way was through a *gar*, or ditch, opposite the defendant's house, and thence (after passing in various directions) through the defendant's tank. The plaintiffs claimed a right of way over this passage as an easement, and they alleged that the defendant had narrowed the *gar* and closed up the tank. The lower Appellate Court found, that though the defendant had narrowed the *gar*, he had not interfered with the plaintiffs' coming and going as they had been accustomed to do; and he dismissed this portion of the plaintiffs' claim, citing Goddard on Easements, 2nd Ed., pp. 256-7. With regard to the way claimed by the plaintiffs over the defendant's tank, the Judge said: "It appears from the evidence that there was no particular road, and that plaintiffs' boats used to pass all over defendant's pond. Such a state of things cannot give the plaintiffs a right of way over the whole or any [146] portion of the pond"—*Radha Nath Sugrachari v. Baido Nath Seal Kabiraj* (3 B. L. R., App., 118), and *Joy Doorga Dossia v. Jugger Nath Roy* (15 W. R., 295). The plaintiffs' then appealed to the High Court.

Baboo *Troylukhe Nath Mitter* and Baboo *Grish Chunder Chowdhry* for the Appellants.

Baboo *Bussunt Coomar Bose* for the Respondent.

The **Judgment** of the Court (GARTH, C.J., and McDONELL, J.) was delivered by

**Garth, C. J.**—The plaintiffs claim a prescriptive right of passage for boats over a certain water-channel belonging to the defendant; and they say that the defendant has wrongfully obstructed that passage.

The Courts below have divided the plaintiffs' claim into two portions. As to the first, the lower Appellate Court has found it to be perfectly true, that the plaintiffs have a right of passage for their boats over that part of the

\* Appeal from Appellate Decree, No. 2788 of 1879, against the decree of Baboo Nobin Chunder Ganguly, Second Subordinate Judge of Dacca, dated the 6th September 1879, affirming the decree of Baboo Sumbhoo Chunder Dey, Munsif of Munshigunge, dated the 15th August 1878.

defendant's channel; but then it has also found, that what the defendant has done has not interfered with the plaintiffs' right. The defendant has merely raised an embankment and done certain other acts which have confined the width of the channel by a few feet; but this admittedly leaves ample room for the passage for the plaintiffs' boats, even those of the largest size.

With regard to the other portion of the claim, the lower Courts find, that the plaintiffs have not proved any right of passage. Their evidence, if it proves anything, goes to show, that the plaintiffs' boats used to traverse the defendant's water in all directions, and in no particular line; and the lower Court therefore finds, that the right of passage is not proved in the particular direction indicated by the plaintiffs.

The plaintiffs complain before us of both these findings.

As regards the first part of the claim, they contend that, if they have been exercising a right of passage over a channel of a particular breadth, and that breadth is interfered with by the defendant even by a single foot, they have a right to have the whole breadth restored, though the channel that remains [147] is amply sufficient for all their requirements. We think it clear that this is not the law. A right of passage for boats over another man's channel, is analogous to a right of way claimed over another man's road. And we believe that the law upon the subject is thus correctly laid down in *Goddard on Easements* :

"It may be mentioned here, that a right of way along a private road belonging to another person does not give the dominant owner a right, that the road shall, in no respect, be altered, or the width decreased; for his right does not entitle him to the use of the whole of the road, unless the whole width of the road is necessary for his purpose; but it is merely a right to pass with the convenience to which he has been accustomed. The right, therefore, merely extends to that portion of the centre of the road, which is necessary for the due exercise of the right of passage. The only obligation upon the servient owner is, that he shall not unreasonably contract the width of the road, or render the exercise of the right of passing less easy than it was at the time of the grant."

We consider, therefore, that the lower Court has taken a correct view of this part of the case.

Then, with regard to the second point, we think it clear, that the Court below was right in holding, that the plaintiffs could not claim a right of way in *every direction* over the defendant's water. They could claim such a right only in a *particular direction*, and this they have not proved.

We think, therefore, that the judgment of the lower Court was right, and that the appeal must be dismissed with costs.

*Appeal dismissed.*

#### NOTES.

[See (1909) 14 C.W.N. 15 at 17.]

[148] *The 21st April, 1881.*

PRESENT :

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE PRINSEP.

Googlee Sahoo..... Plaintiff

versus

Premlall Sahoo and another.....Defendants.

*Rent Suit—Adding Plaintiff—Appeal—Civil Procedure Code (Act X of 1877), ss. 32, 591*

In a suit for rent, where the defendant alleged that a person not on the record, had a joint interest with the plaintiff in the property in respect of which the rent was due,—

*Held*, where the plaintiff disputed this and objected to such course being taken, that it was improper to add such person as co-plaintiff, and that if added at all, it should be as defendant, in order that the issue between him and the plaintiff might be properly tried.

*Held also*, that in such a case an appeal lies under s. 591 of the Civil Procedure Code

IN this suit the plaintiff alleged himself to be the proprietor of a 5-anna 2-pie share in a certain mouza, and sued the defendant, his tenant, for Rs. 4-5-6, being arrears of rent due by him on that share. The defendant, while admitting the rate at which the plaintiff claimed the rent to be correctly stated, pleaded payment of certain sums, and alleged that the plaintiff was not solely entitled to it by reason of his brother, Prem Sahoo, having a joint undivided share in the property. The Munsif made Prem Sahoo a co-plaintiff in the suit, although the plaintiff objected, and finding that both the plaintiff and Prem Sahoo were members of a joint Hindu family when the property was acquired, gave a decree for the amount claimed, to the plaintiff and his brother jointly. The plaintiff then appealed, on the ground that the decree should have been in his favour alone, and that the Munsif was wrong in adding his brother as a co-plaintiff, and should have left the question as between them to be decided in a separate suit. The Subordinate Judge dismissed the appeal, and consequently the [149] plaintiff now specially appealed to the High Court against these two decrees.

Mr. *Twidale* and Mr. *Sandel* for the Appellant.

Baboo *Kally Mohun Dass*, Baboo *Doorga Mohun Dass*, and Baboo *Taruck Nath Sen* for the Respondents.

The **Judgment** of the Court (CUNNINGHAM and PRINSEP, JJ.) was delivered by

**Cunningham, J.**—The plaintiff sues Raghoonath, his tenant, for the rent due on a 5-anna 2-pie share amounting to 4 rupees 5 annas. The defendant denied that the plaintiff was the proprietor of the whole of this share, and stated that the plaintiff's brother, was a co-sharer, and he asked that the brother might be made a defendant.

The Munsif, instead of making the brother a defendant, added him as a co-plaintiff, notwithstanding the protest of the original plaintiff. He has dealt with the matter in dispute between the two brothers in a very summary way,

\* Appeal from Appellate Decree, No. 496 of 1880, against the decree of Baboo Bolak Chand, Second Subordinate Judge of Bhagulpore, dated the 2nd April 1879, affirming the decree of Mouli Abdool Bari, Sudder Munsif of that district, dated the 20th September 1878.

and has refused to determine the issues which would necessarily arise between them if they complained an antagonism ; but he has, nevertheless, given the two brothers, plaintiffs, a decree.

The Subordinate Judge has affirmed this decision.

A preliminary objection is raised to the hearing of this special appeal. It is urged that the matter for our decision is really an appeal against an order passed under s. 32,\* and therefore cannot be brought before this Court on second appeal.

The present case, however, is one provided for by s. 591,† and can be dealt with in special appeal against the decree passed. The objection, therefore, is disallowed.

As regards the particular order complained of, we think that the Court, in acting under s. 32 of the Code of Civil Procedure, is bound to exercise its discretion in a reasonable manner ; and that, in a case like the present, where the original plaintiff disputes the right of any one to be joined with him in the suit, any party intervening should, if made a party at all, be more properly joined as a defendant.

[150] The effect of the brother being joined with the original plaintiff is, that the issues as between them cannot properly be tried, and must be made the subject of a separate suit. The first Court, it is true, has drawn an issue, which would determine the dispute between these two brothers, supposing them to be plaintiff and defendant ; and if the Courts had proceeded to decide this issue on the evidence offered, we should probably not feel inclined to interfere, because, then the error would be an error in form rather than in substance ; but when we find that both the lower Courts have not tried the issue as between the two brothers, we have no course left open to us but to set

Court may dismiss or add parties. \* [Sec. 32.—The Court may, on or before the first hearing, upon the application of either party, and on such terms as the Court thinks just, order that the name of any party, whether as plaintiff or as defendant, improperly joined, be struck out,

and the Court may at any time, either upon or without such application, and on such terms as the Court thinks just, order that any plaintiff be made a defendant or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

No one to be added as plaintiff or as next friend without his consent

Parties to suits instituted or defended under Section 30.

Defendants added to be served.

begun only on the service of

Conduct of suit.

No appeal, before decree, from order passed in course of suit ; but if decree appealed against, error or defect therein may be set forth.

No person shall be added as a plaintiff, or as the next friend of a plaintiff, without his own consent thereto.

Any person on whose behalf a suit is instituted or defended under Section 30 may apply to the Court to be made a party to such suit.

All parties whose names are so added as defendants shall be served with a summons in manner hereinafter mentioned, and (subject to the provisions of the Indian Limitation Act, section 22) the proceedings as against them shall be deemed to have begun only on the service of such summons.

The Court may give the conduct of the suit to such plaintiff as it deems proper.]

† [Sec. 591 :—Except as provided in this chapter, no appeal shall lie from any order passed by any Court on the exercise of its original or appellate jurisdiction ; but if any decree be appealed against, any error, defect or irregularity in any such order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.]

aside the judgment of the Court below, and to remand the case in order that it may be properly tried in the manner stated above. The brother Prem Lal must be removed from the record as a plaintiff and be made a defendant, and the case must then be tried, both as between them, and between the plaintiff and the ryot-defendant.

The case must, therefore, be remanded to the lower Appellate Court, either to try the case itself on the evidence on the record, or otherwise to deal with it in accordance with law.

Costs will follow the result.

*Case remanded.*

#### NOTES.

#### [FINAL APPEAL THOUGH ONLY ON INTERLOCUTORY ORDER.]

As regards the right of appeal, see C. P. C. 1908, sec. 104; Or. 43. See also (1887) 9 All. 447; (1889) 14 Bom. 232; (1899) U. B. R. (1897-1901) Vol II. 310; (1910) 6 I. C. 239 [final appeal allowed though only on interlocutory order].

[7 Cal. 150]

*The 28th March, 1881.*

PRESENT :

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE PRINSEP.

Jadoo Shat and others.....Defendants

*versus*

Kadumbinee Dassee.....Plaintiff.\*

*Co-Sharers of land—Suit by one for separate share of rent—Landlord and Tenant—Rent Suit.*

Where one of a number of co-sharers of certain property, the rent of which was paid by the tenants to a person acting as agent of the co-sharers, from whom they received it in proportion to their respective shares, brought a suit against the tenants for arrears of rent, and it appeared that the agent had been dismissed by the other co-sharers without the consent of the plain-[151]tiff, and contrary to her wish, and that she had given notice to the tenants to continue the payment of her share as before and not to pay any newly appointed agent, and it also appeared that the other co-sharers were colluding with the tenants, and the plaintiff made them parties defendants with the tenants —

*Held*, that such a suit would not lie, and that the proper course to pursue was that pointed out in *Tara Chunder Banerjee v. Ameer Mundle* (22 W. R., 394).

THE cases out of which these two appeals arose, were suits for arrears of rent, the plaintiff being an eight-anna shareholder in the mouzas in which the defendants were tenants. It appeared that the plaintiff had been in the habit of receiving her share of the rent through a gomastah who was employed to collect the whole rent on behalf of her and the other co-sharers. Sometime prior to these suits being instituted, this gomastah having been dismissed by the other co-sharers without her consent and against her will, the plaintiff gave notice to the tenants not to make any payments of her share of the rent to any newly-appointed gomastah, but to continue the payment of it as before, and subsequently she called upon them to pay her her share of the

\* Appeal from Appellate Decrees, Nos. 114 and 115 of 1880, against the decree of W. Cornell, Esq., Judge of Midnapore, dated the 10th September 1879, affirming the decree of Baboo Raj Chunder Sanyal, Munsif of Tumlook, dated the 25th January 1879.

rent, but they refused to do so. She thereupon instituted these suits and joined her co-sharers as parties defendants, alleging that they had colluded with the tenants in order to deprive her of the rent due to her.

The Munsif, in the first instance, holding that the facts were similar to those in the case decided by the Full Bench—*Doorga Churn Surma v. Jampa Dassee* (12 B. L. R., 289; s.c., 21 W. R., 46), and following that decision, gave the plaintiff decrees for the full amount claimed. From those decrees the defendants appealed, and urged that no suit for rent under the circumstances would lie—*Ahamudeen v. Grish Chunder Shamunt* (I. L. R., 4 Cal., 350); but the Judge, in distinguishing that case, followed the decision of the Full Bench in *Doorga Churn Surma v. Jampa Dassee* (12 B. L. R., 289; s.c., 21 W. R., 46), and dismissed the appeals. The defendants then specially appealed to the High Court.

Baboo Umakali Mookerjee for the Appellants.

Baboo Gopee Nath Mookrejee for the Respondent.

[152] The Judgment of the Court (CUNNINGHAM, and PRINSEP, JJ.) was as follows :—

**Cunningham, J.**—The plaintiff in this case, on behalf of her minor daughter-in-law, along with other co-owners, was in the habit of receiving rent jointly through a common agent. The other co-owners dismissed this agent and appointed another, and thereupon the plaintiff gave notice to the tenants not to pay her share of the rent, and she now seeks to enforce payment against them. This it appears to me is contrary to the law laid down in a series of decisions, and especially in the Full Bench decision—*Guni Mahomed v. Moran* (I. L. R., 4 Cal., 96; s.c., 2 C. L. R., 373).

I think, therefore, that the decision of the lower Court must be set aside, and the plaintiff's suit dismissed with all costs.

This judgment will govern appeal from Appellate Decree No. 115 of 1880.

**Prinsep, J.**—The decision of the lower Appellate Court on this point is clearly wrong, for, as pointed out in the Full Bench decision, *Guni Mahomed v. Moran* (I. L. R., 4 Cal., 96; s.c., 2 C. L. R., 373), "it has been constantly held in this Court, and must be considered now as well established law, that each co-sharer may bring a separate suit against the tenant for his share of the rent. But in the absence of such an arrangement (that is, an arrangement between the tenant and the co-sharers) under which the tenant agrees to pay a portion of the rent to each co-sharer in respect of this separate share, it is equally clear that no such suit can be maintained."

In the present case the plaintiff, having hitherto realized rent jointly with other co-sharers, seeks to realize it separately from the tenant on her alleged specific share without any such arrangement. She clearly could not do so, and should follow the course laid down in *Tara Chunder Banerjee v. Ameer Mundul* (22 W. R., 394).

I, therefore, agree in dismissing the plaintiff's suit with costs in all the Courts.

*Appeal allowed.*

#### NOTES.

[See also (1901) P. L. R. 68.]

\* [153] *The 13th April, 1881.*

PRESENT :

MR. JUSTICE MORRIS AND MR. JUSTICE TOTTENHAM.

Chundernath Nundi.....Plaintiff

*versus*

Hur Narain Deb.....Defendant.\*

*Partition—Butwara—Revenue-paying estate—Jurisdiction—Civil Procedure Code*  
(Act X of 1877), ss. 11, 265.

Where one of several co-sharers, owners of a piece of land defined by metes and bounds and forming part of a revenue-paying estate, brings a suit for partition, in which he does not seek to have his joint liability for the whole of the Government revenue annulled, such suit is cognizable by the Civil Courts which have jurisdiction to determine the plaintiff's right to have his share divided and to make a decree accordingly.

IN this case the plaintiff, who claimed a twelve-anna share in certain land, defined by metes and bounds, forming part of a revenue-paying estate, sued the defendant, whom he alleged to be the owner of the remaining four annas, for partition, praying for "a decree awarding him distinct possession, not by the partition of rent according to his share, but by partition of the land." The plaintiff stated that, by a solehnamah or deed of compromise, dated the 8th of July 1874, between the plaintiff and the defendant, it was agreed that the parties thereto should hold the land in question in the abovementioned shares, and that the defendant had agreed to an amicable partition, but had refused to carry it out. The defence was, that there were other parties interested in the land who were not joined as parties, and that there were other lands in joint possession, of which the plaintiff sought no partition.

The suit was dismissed in the Court of first instance, and this decision was affirmed on appeal. The plaintiff then appealed to the High Court.

Mr. *H. Bell*, Baboo *Mohiny Mohun Roy*, and Baboo *Joy Gobind Shome* for the Appellant.

[154] Baboo *Sreenath Dass* and Baboo *Aukhl Chunder Sen* for the Respondent.

Mr. *H. Bell* for the appellant.—In all cases of joint ownership, each party has a right to demand and enforce partition—*Shama Soonduree Debia v. Jardine, Skinner, & Co.* (12 W. R., 160). Partition may be had of a revenue-paying estate where, as in this case, the partition may be carried out without apportioning the revenue—*Banee Shama Soonduree Debia v. Koor Puresh Narain Roy* (20 W. R., 182). The parties themselves may make an amicable partition binding on themselves, though not on the Collector—*Tripoorah Soondoree Chowdhranee v. Kali Chunder Chowdhry* (18 W. R., 327); and what the parties may do without suit, the Civil Court may do on suit being brought. The Collector has nothing to do with such a partition—*Ajoodhia Lall v. Gumani Lall* (2 C. L. R., 134). This is a suit of a civil nature which the Civil

\* Appeal from Appellate Decree, No. 1632 of 1879, against the decree, of *H. Muspratt, Esq.*, District Judge of Sylhet, dated the 20th May 1879, modifying the decree of Baboo *Ram Coomar Pal Chowdhry*, Subordinate Judge of that district, dated the 3rd of September 1878.

Courts have jurisdiction to try—see Civil Procedure Code ss. 11 and 16\*; and when such a suit is brought and a decree given, s. 265† of the same Code shows how it is to be executed. I admit that all the persons interested should have been made parties to the suit.

**Baboo Sreenath Dass** for the respondent.—A suit will not lie for the partition of a revenue-paying estate—*Mohsun Ali v. Nuzum Ali* (6 W. R., 15), *Rutton-monee Dutt v. Brojomchun Dutt* (22 W. R., Act X Rul., 333), and *Shaw Khairuddin v. Sheikh Abdul Bakr* (3 B. L. R., A. C. 65). Section 265† of the Civil Procedure Code does not apply, for here the suit is not for partition of a revenue paying estate, but for the partition of a block of land within the estate, for which the Code makes no provision, and which, therefore, impliedly cannot be brought. [MORRIS, J.—The implication from the section is the other way. The jurisdiction of the Civil Court to carry out the partition seems to be taken away, only in case of a co-sharer in the whole of a revenue-paying estate who requires partition of it.] The plaintiff is seeking [155] possession of a portion only of the lands held in joint possession. Such a suit will not lie.—Special Appeal, No. 2134 of 1879, decided by PRINSEP and CUNNINGHAM, JJ., March 11th, 1881.

Mr. Bell in reply.

The following **Judgments** were delivered :—

**Tottenham, J.**—It appears to me that the reasons given by the lower Courts for entirely dismissing the plaintiff's suit are not sound in law. It may be that, as observed by the District Judge, the power to make partition of lands paying revenue to Government (that is, as between persons by whom the revenue is payable) is restricted to the Collector, but that restriction does not exclude the Civil Court from determining the right of one of such persons to have his share divided, and from making a decree accordingly, in a suit in which the plaintiff does not seek to have his joint liability for the whole of the Government revenue annulled. In the present case Mr. Bell or the appellant has expressly deprecated any partition of the Government revenue, and points to the sixth paragraph of the plaint as showing that plaintiff never intended to demand it.

Suits to be instituted where subject-matter situate.

\*[Sec. 16 :—Subject to the pecuniary or other limitations prescribed by any law, suits

- (a) for the recovery of immoveable property,
- (b) for the partition of immoveable property,
- (c) for the foreclosure or redemption of a mortgage of immoveable property,
- (d) for the determination of any other right to or interest in immoveable property,
- (e) for compensation for wrong to immoveable property,
- (f) for the recovery of moveable property actually under distraint or attachment,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate.

Provided that suits to obtain relief respecting, or compensation for wrong to, immoveable property held by or on behalf of the defendant may, when the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court, within the local limits of whose jurisdiction he actually and voluntarily resides, or carries on business, or personally works for gain.

**Explanation.**—In this Section 'property' means property situate in British India.]

†[Sec. 265 :—If the decree be for the partition or for the Partition of estate or separate possession of a share of an undivided estate paying revenue to Government, the partition of the estate or the separation of the share shall be made by the Collector.]



There can be no doubt that a right to partition is inherent in owners of joint property; and s. 11 of the Code of Civil Procedure provides that the Courts shall, subject to certain provisions, which do not apply to the present case, have jurisdiction to try all suits of a civil nature, excepting suits of which their cognizance is barred by any enactment for the time being in force.

Thus it appears to me impossible to say, that the present suit will not lie in the Civil Court, and the fact noticed by the lower Courts that the plaintiff's share in the estate exists only in a portion of it, and not in all the lands comprised in it, seems to me to afford no reason why he should be barred from obtaining a partition of his share such as it is. The Court might hesitate to allow him a decree for the severance of a portion only of his share, or of his proportionate shares of particular [156] plots; but if he claims to have his whole share divided, as Mr. *Bell* states that he does, and disclaims any share in lands not included in this suit, I see no reason why he should not obtain what he claims: and it appears from the written statement of the defendant that he has no real objection to a partition of the plaintiff's just share. As to certain partitions of the lands of which a share is claimed, the Courts have found as a fact, that the plaintiff has no right in them. This will not prevent his obtaining his share of what does really belong to him.

As to the alleged misjoinder and nonjoinder of proper parties, the suit cannot fail on that account. If the lower Appellate Court thinks it necessary that other parties be joined in the suit, it is open to it to so order.

The decree of the lower Court must be set aside with costs, and the case must go back for a fresh trial with reference to the observations above made.

**Morris, J.**—I understand the plaintiff to be a fractional shareholder of a revenue-paying estate called Chota Hissa, No. 24, and to possess an interest in only one village, by name Kharki, of this estate. The lands of this village, so far as they appertain to this estate, are held in joint tenancy by the plaintiff and the defendant in the proportion of twelve annas and four annas respectively, under a certain deed of solehnamah.

By the present suit the plaintiff asks the Court to direct partition by metes and bounds of the lands constituting his twelve annas share. To this, two objections are raised: *first*, that the plaintiff has not asked for the partition of all the lands which formed the subject of the solehnamah, and *second*, that, on the principle laid down in the case of *Ruttonmonee Dutt v. Brojomohun Dutt* (22 W. R., Act X Rul., 333), the Civil Court cannot direct the partition of a block or small quantity of revenue-paying land of a joint estate. On the first point, however, it is clear that the plaintiff disclaims possession or ownership of the plots referred to, and only asks for partition of those lands which are held by him jointly with the defendant. In connection with this estate he denies that he is in possession of any other lands.

[157] This being so, his case appears to come entirely within the provisions of s. 265 of the Civil Procedure Code, and the second objection fails. The plaintiff, by this suit, substantially asks for the partition of his entire share in this undivided estate. I agree, therefore, in thinking that the Civil Court has jurisdiction to give him the relief he seeks, and, setting aside the order of the District Judge, direct that the case be returned to him to be dealt with on the merits. Appellant is entitled to the costs of this appeal.

*Case remanded.*

#### NOTES.

#### [PARTITION OF REVENUE-PAYING ESTATE—

See (1904) 1 C. L. J. 40; (1897) 24 Cal. 725; (1884) 10 Cal. 485; 11 M. L. J. 393.]

[7 Cal. 157]

The 17th March, 1881.

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Prosad Doss Mullick and others.....Plaintiffs

versus

Russick Lall Mullick and another.....Defendants.\*

Prosad Doss Mullick and others.....Plaintiffs

versus

Kedar Nath Mullick and others.....Defendants.\*

*Jurisdiction—Winding up partnership—Subordinate Court—District Court—Contract Act (IX of 1872), s. 265—Civil Courts Act (Act VI of 1871), s. 11.*

The Court of a Subordinate Judge is inferior to the Court of a District Judge within the meaning of s. 11 of the Civil Courts Act.

The word "may" in s. 265 of the Contract Act has a somewhat similar force to the word "it shall be lawful" in a Statute, which merely make that legal and possible which there would otherwise be no right or authority to do. And the words "may apply" in the section create a new jurisdiction, which must be exercised strictly in accordance with the Statute which creates it,—that is to say, the jurisdiction created by the section must be exercised exclusively by a Court not inferior to the Court of a District Judge, within the local limits of whose jurisdiction the place or principal place of business of the firm which it is sought to wind up is situated.

It was the intention of the Legislature, in enacting s. 265 of the Contract Act, to create a new jurisdiction to be exercised exclusively by the Court of the District Judge; and in the absence of a contract to the contrary, the members of a partnership, or their representatives, cannot obtain the relief mentioned in the section except by resorting to that Court.

[158] The presumption that the existing jurisdiction of a Court is not intended to be taken away unless express words have been used for that purpose, usually applies only to the jurisdiction of the superior Courts. Unless the jurisdiction of a superior Court is expressly and clearly taken away, such jurisdiction will be presumed to continue.

THESE two cases were connected and were argued together, and disposed of by a single judgment. In the first case it was alleged in the plaint, that the plaintiffs and the defendants carried on business in rice at Chandbally, Hooghly, and other places from Joysti 1276 (1869) to 22nd Falgoon 1284 (5th March 1878); and that the plaintiffs and the defendant No. 3, Kali Doss Mullick, had an eight-anna share in this business, the other moiety or eight-anna share belonging to the defendants Nos. 1 and 2, Kedar Nath Mullick and Russick Lall Mullick; that, on the 5th March 1878, the defendant No. 3,

\* Appeal from Original Decree, No. 269 of 1879 and No. 14 of 1880, against the decree of Baboo Srinath Roy, Subordinate Judge of Hooghly, dated the 26th July 1879.

Kali Doss Mullick, went out of the business, and the partnership was therefore dissolved; and that the plaintiffs and the defendant No. 3, Kali Doss Mullick, as between themselves, were entitled to a six-anna and a two-anna share respectively. The plaint prayed that the accounts might be adjusted and the partnership wound up, and that Rs. 5,500, or whatever larger sum might be found to be their share of the profits, might be awarded to them by the Court. They further prayed for a sum of Rs. 1,000 as damages incurred in consequence of the defendants having withdrawn the sum of Rs. 13,000 from the business and so crippled it.

The second case related to the second business conducted by the same persons. It was alleged that this business was commenced on the 23rd Falgun 1284 (6th March 1878); that the plaintiffs and the defendants were partners therein, and that the plaintiffs had an eight-anna share, and the defendants, Kedar Nath Mullick and Russick Lall Mullick, the other eight-anna share. It was not distinctly alleged that this second business had been closed, but the cause of action was dated from Bysack 1285, when certain arbitrators were appointed to settle disputes between the parties, and it appeared that this was a virtual dissolution of the partnership. The plaintiffs prayed, *first*, that the accounts might be settled and the partnership [159] wound up; and *secondly*, that Rs. 1,100, or whatever larger sum might be found to be their share of the profits, might be awarded to them by the Court. To this case also belonged the further claim for Rs. 1,000 as damages incurred in consequence of the withdrawal of Rs. 13,000 from the business, and these damages were claimed as compensation for the probable profits which the plaintiffs would have obtained from the continued employment of this amount of capital. The Subordinate Judge held that he had no jurisdiction to entertain and decide these suits, and that, with reference to s. 265 of the Contract Act, the Court of the District Judge had exclusive jurisdiction to deal with the questions raised. The plaintiffs appealed to the High Court.

Baboo *Troylokho Nath Mitter* and Baboo *Saroda Prosunno Roy* for the Appellants.

Baboo *Hem Chunder Banerjee* and Baboo *Gurudas Banerjee* for the Respondents.

The **Judgment** of the Court (McDONELL and FIELD, JJ.) was delivered by

**Field, J.** (who, after stating the facts of the case as above, continued):—Section 265 of the Contract Act is as follows: "In the absence of any contract to the contrary, after the termination of a partnership, each partner or his representatives may apply to the Court to wind up the business of the firm, to provide for the payment of its debts, and to distribute the surplus according to the shares of the partners respectively." Then comes the following explanation:—"The 'Court' in this section means a Court not inferior to the Court of a District Judge within the local limits of whose jurisdiction the place or principal place of business of the firm is situated."

Now, the first question which has been argued before us is, that the Court of the Subordinate Judge is not a Court inferior to the Court of the District Judge; but we think, with reference to the Bengal Civil Courts Act, VI of 1871, that this contention is wholly untenable. The Court of a Subordinate Judge is inferior to the Court of a District Judge, at least in two [160] important particulars. So far as regards suits of a certain value, that is suits not exceeding Rs. 5,000, the Court of the District Judge has an appellate

jurisdiction over the Court of the Subordinate Judge. Then by the express provisions of the Civil Courts Act, s. 11, all the Civil Courts in the District, and therefore the Court of the Subordinate Judge, are subject to the control of the District Judge. We are, therefore, of opinion that the Court of a Subordinate Judge is inferior to that Court of a District Judge within the meaning of the above explanation.

Then it is argued, that the words "may apply" are permissive only, and that their effect is to give to the District Judge a concurrent jurisdiction merely; but this argument assumes that, before the passing of the Contract Act, the jurisdiction provided by s. 265 of that Act existed, and could be exercised by some other Court or Courts than that of the District Judge; but we think that this was not the case.

Undoubtedly the reports of cases decided before the passing of the Contract Act do show many instances in which members of business partnerships resorted to the Civil Courts, in order to have accounts and other matters settled between them by judicial decision; and in this, as in other matters, the selection of the Court was regulated by the pecuniary value of the subject-matter of dispute; but we apprehend, that no tribunal existed out of the Presidency-towns which was capable of exercising the exact jurisdiction conferred by s. 265 of the Contract Act; capable, in other words, of dealing with partnership matters for all purposes contemplated by this section. In the case of *Julius v. The Lord Bishop of Oxford* (L. R., 5 App. Cas., 214), it was held, that the words in a Statute "it shall be lawful," of themselves merely make that legal and possible which there would otherwise be no right or authority to do; that there natural meaning is permissive and enabling only; a somewhat similar force may be given to the word "may;" and in this view the words "may apply" in s. 265 of the Contract Act create a new jurisdiction; and if this is so, according to the usual rule, that jurisdiction must be exercised strictly in [161] accordance with the provisions of the Statute which creates it. In other words, the jurisdiction created by the section must be exercised exclusively by a Court not inferior to the Court of a District Judge within the local limits of whose jurisdiction the place or principal place of business of the firm is situated. Let us then see what is the jurisdiction conferred by s. 265. It is a jurisdiction, *first*, to wind up the business of the firm, *secondly*, to provide for the payments of its debts; and *thirdly*, to distribute the surplus according to the shares of the partners respectively.

The next question which arises is this. If, before the passing of the Contract Act, the Civil Courts other than the Courts of the District Judge had jurisdiction to deal with any one of these matters, has that jurisdiction been taken away in those cases in which the parties, who seek the assistance of the Courts, do not desire a settlement of all these matters?

In the present cases there are distinct prayers that the first and third of the above objects may be carried out by the Court; and it is argued, that inasmuch as the plaintiffs do not ask that any provision be made for the payment of debts, the case does not require the exercise of the jurisdiction conferred by the Act; and there is, therefore, nothing to prevent the ordinary Courts, according to their respective limits of pecuniary jurisdiction, from entertaining and dealing with questions of accounts or other questions, arising between partners, for the settlement of which it is not necessary to carry out the whole of the three objects contemplated by the section of the Contract Act.

Now, in the first place, it is a settled principle that a separate action by one partner against another partner will not lie unless the cause of action is so distinct from the partnership accounts as not to involve their consideration. In the present cases it is clear that the plaintiffs can have no relief without an adjustment of the accounts. Whether the plaintiffs are entitled to the sum of money claimed by them as a share of the profits or to any sum of money as profits, cannot be known until the whole of the partnership concerns and accounts have been fully examined. Even if there are no debts to be paid, it is necessary to consider the agreement under which the partnership was entered into, the amount of capital contributed by each partner, the share of the profits to which each is entitled, the sums which he has received, the losses and expenses, and other matters, before it can be settled what any member is entitled to have from the surplus. Then suppose that there are debts, it is true that the plaintiffs have not expressly asked that the debts of the firm may be discharged; but until those debts have been paid it is impossible to say that any portion of the money which may be found to be to the credit of the firm can be handed over to the partners as profits. It may well have been the intention of the Legislature that any remedy which the members of a dissolved partnership are entitled to claim through the medium of the Courts of Justice, should be subject to this condition, that all persons having just claims upon the partnership should have those claims fairly discharged.

With respect to the claim for damages, which is a very unusual claim, until the partnership accounts have been settled, it is impossible to know whether the Rs. 13,000, alleged to have been withdrawn from the business, was an unreasonably large sum to take in the shape of profits at the time when the amounts which make up this sum were withdrawn.

After the best consideration that we can give the subject, it appears to us, that it was the intention of the Legislature, in enacting s. 265 of the Contract Act, to create a new jurisdiction, to be exercised exclusively by the Court of the District Judge, and that, in the absence of a contract to the contrary, the members of a partnership, or their representatives, can have no remedy such as is asked in the present case, except by resorting to that Court, which is by the section of the Act authorized to deal fully and finally with all questions, the settlement of which is necessary in order to the complete winding up of the business of the firm.

We may observe in conclusion, that the presumption that the existing jurisdiction of a Court is not intended to be taken away unless express words have been used for that purpose usually applies only to the jurisdiction of the superior Courts. Unless the jurisdiction of a superior Court is expressly and clearly taken away, such jurisdiction will be presumed to continue. In the present case, the jurisdiction, which will be ousted if the Court of the District Judge is held to have exclusive jurisdiction in partnership matters, is the jurisdiction of Courts inferior to that of the District Judge; and, as far as we are aware, the presumption to which we have above referred, is not usually applied in the case of such inferior Court.

Having regard to all the circumstances of this case, and to the fact that the provisions of the section of the Contract Act are new, and of not unmistakably clear meaning, we think that the plaints in these cases should be returned for the purpose of being presented to the District Judge. The Subordinate

Judge will follow the provisions of s. 57\* of the Code of Civil Procedure in carrying out this order. The plaintiffs must pay the costs of the defendants in this and the Subordinate Courts.

*Cases remanded.*

# NOTES.

## [PARTNERSHIP SUIT—DISTRICT COURT—

Owing to the conflict of decisions between the several High Courts, the explanation to sec. 265 as it originally stood in the Contract Act of 1872 was repealed by Act IV of 1886.

These cases were prior thereto:—1 Mad. 340; 5 Mad. 256; 5 Bom. 65; 6 Bom. 148; 4 All. 437; 5 All. 500; 6 Cal. 521; 7 Cal. 157; 428; 8 Cal. 1011; 10 Cal. 669; 13 Cal. 669. See also (1895) 22 Cal. 692.]

[7 Cal. 163]

*The 18th March, 1881.*

PRESENT

MR. JUSTICE PONTIFEX AND MR. JUSTICE FIELD.

Azizoonnessa Khatoon.....Judgment-debtor

*versus*

Gora Chand Dass and others.....Decree-holders.\*

*Sale of Undertenure—Setting aside Sale—Material Irregularities—Civil Procedure Code (Act X of 1877), chap. xix, ss. 311, 647—Beng. Act VIII of 1869.*

The procedure to be followed upon the sale of an undertenure is that prescribed by the Civil Procedure Code. Section 311 does not apply only to sales made under chap. xix of the Code, and the sale of an undertenure may be set aside upon any of the grounds mentioned in that section.

IN this case the appellant, a judgment-debtor, sought to set aside the sale of certain undertenures in execution of a decree, on the ground of material irregularity in publishing and conducting the sale, and of resulting substantial injury.

\* Appeal from Original Orders, Nos. 328 to 330 of 1880, against the order of Baboo Krishna Chunder Chatterjee, First Subordinate Judge of Backergunge, dated the 2nd September 1880.

When the plaint shall be returned to be presented to the proper Court.

†[Sec. 57.—The plaint shall be returned to be presented to the proper Court in the following cases:—

- (a) If a suit has been instituted in a Court whose grade is lower or higher than that of the Court competent to try it, where such Court exists, or where no option as to the selection of the Court is allowed by law.
- (b) If, in a suit relating to immoveable property, but not coming under the proviso to section 16, it appear that no part of such property is situate within the local limits of the jurisdiction of the Court to which the plaint is presented.
- (c) If, in any other case, it appear that the cause of action did not arise, and that none of the defendants are dwelling or carrying on business, or personally working for gain, within such local limits.

On returning a plaint, the Judge shall, with his own hand endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reason for returning it.]

Procedure on returning plaint.

[164] The Subordinate Judge dismissed the application, holding that the provisions of s. 311\* of the Civil Procedure Code do not apply to the sale of an undertenure, and that the Rent Act does not contain any procedure for setting aside sales of this kind.

The judgment-debtor appealed to the High Court.

Baboo *Baikant Nath Dass* for the Appellant.

Moonshee *Serajul-ul-Islam* for the Respondents.

The Judgment of the Court (PONTIFEX and FIELD, JJ.) was delivered by

**Pontifex, J.**—We think that the order of the Subordinate Judge in these three cases is an erroneous one. It appears that a certain undertenure was sold in execution of a decree for rent, and after this sale, an application was made to the Subordinate Judge under s. 311 of the Code of Civil Procedure to have the sale set aside on the ground of material irregularity in publishing or conducting it, together with substantial injury caused by reason of such irregularity.

The Subordinate Judge was of opinion that the provisions of s. 311 of the Code of Civil Procedure did not apply to the sale of an undertenure, to a sale held, as he puts it, under the provisions of ss. 59 and 60 of the Rent Act. He says, that s. 511 of the Code of Civil Procedure can only apply to sales made under chap. XIX of the same Code, and that, inasmuch as the sale of the undertenure was made under the provisions of the Rent Law, it was not a sale made under the provisions of chap. XIX of the Code of Civil Procedure.

Now ss. 59 and 60 of Beng. Act VIII of 1869 do not contain any sale procedure. Section 59 provides that, when an undertenure is ordered to be sold, a notice of such sale shall be hung up in certain places and shall otherwise be notified in a particular manner. This mode of notification differs in some respects from the provisions of the Code of Civil Procedure on the same subject. Section 60 contains instructions as to the contents of such notice, and here also there is a difference between these provisions, and the corresponding provisions of the Code of Civil [165] Procedure. These two sections or any other portions of the Rent Act of 1869 do not, however, contain any provisions as to the manner in which the sale is to be conducted, the person by whom the property is to be sold, the manner in which the biddings are to be made, the amount to be deposited by the purchaser, and all those other matters which taken together constitute the sale procedure? The question then is, where are we to look for this sale procedure? Before the passing of Beng. Act VIII of 1869, this sale procedure was contained in the Beng. Council's Act VIII of 1865. That Act has not been incorporated in Beng. Act VIII of 1869, and it appears to us that there can be no doubt that the sale procedure in the case of an under tenure must be sought for in the Code of Civil Procedure. This seems to follow from the provisions of s. 34 of Beng. Act VIII of 1869, which directs that, "save as in this Act is otherwise provided, suits of every description brought for any cause of action arising under this Act, and all proceedings thereon,

Sale of land not set aside on ground of irregularity unless in case of substantial injury.

\*[Sec. 311.—The decree-holder or any person whose immoveable property has been sold under this Chapter may apply to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting it;

But no sale shall be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity.]

shall be regulated by the Code of Civil Procedure." If there can be any possible doubt as to these words being sufficiently wide to include proceedings such as those in the case now before us, that doubt is removed by the provisions of s. 647 of the Code of Civil Procedure, which enacts, that "the procedure herein prescribed shall be followed in all proceedings in any Court of Civil jurisdiction other than suits and appeals." It is, therefore, clear that the sale procedure, under which an under tenure is sold, is to be sought for in the Code of Civil Procedure, and it follows with reference to the special language of s. 311, that an undertenure is really sold under chap. XIX, that is, in accordance with those provisions as made applicable to rent suits by the sections above quoted. We think, therefore, that the order of the Subordinate Judge in these cases must be set aside, and that he must be directed to entertain and proceed with the petition of objection made under s. 311. Costs will abide the ultimate result of the proceedings.

*Case remanded.*

[166] *The 12th March, 1881.*

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Wazir Mahton and another.....Defendants

*versus*

Lulit Singh and another.....Plaintiffs.\*

*Arbitration—Award—Finality of Decree—Civil Procedure Code (Act VIII of 1859), ss. 318, 323, 324, 325.*

A case was referred by consent to arbitration, and after having been recalled into Court was again referred. An award was made by the arbitrator and filed in Court. The defendants then objected, on the ground that they had no notice after the second reference, and that they were not heard, and that the arbitrator had otherwise misconducted himself. These objections, were disallowed by the Subordinate Judge, who gave a decree in the terms of the award. This decree was upheld by the Judge on appeal, who, however, found that the arbitrator had been guilty of misconduct.

*Held*, that if the decree of the first Court was not final under s. 325, Act VIII of 1859, all that the lower Appellate Court could do, was to remand the case to be dealt with on its merits; but inasmuch as there had been an award and a decree thereon, which was final within the terms of that section, the lower Appellate Court had no jurisdiction to hear the appeal or to express any opinion on what had passed in the first Court.

THIS was a suit to recover Rs. 1,811-4-9, the value, with interest, of the product of 49 bigas 12 cottas of land, appropriated by the defendants from the commencement of the year 1281 to the end of the year 1283 F., corresponding with the years 1873 to 1875, after deducting the ryot's share.

The case was referred to arbitration at the request of both parties, on the 17th September 1877, the arbitrator being selected by them, and the Subordinate

\* Appeal from Appellate Decree, No. 1614 of 1879, against the decree of Moulvie Syed Muazem Hossain, Additional Judge of Patna, dated the 10th May 1879, affirming the decree of Baboo Aubinash Chunder Mitter, Subordinate Judge of that District, dated the 19th December 1877.



From that decree the defendants appealed to the Judge, who found as a fact that the arbitrator had not given notice to the defendants on the record being sent back to him ; that they were not present at the proceedings ; and that so far from confirming the award, the Subordinate Judge should have held that the arbitrator had been guilty of gross misconduct and partiality. Inasmuch, however, as the judgment of the lower Court was in conformity with the award, he held, that it was final under s. 325, Act VIII of 1859, and the faults to be found in the award not being amongst the grounds under which such a judgment could be disturbed, he felt compelled to dismiss the appeal, but did so without costs.

Mr. C. Gregory and Mr. M. L. Sandel for the Appellants.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by

It has been strenuously contended before us, that the proceedings in the first Court were such as to make it incumbent on the lower Court to hear the appeal on the merits. This objection, we may say at once, cannot be supported. If the decision of the first Court, for any reason, was not final, the second Court could do no more than remand the case to that Court for disposal on the merits.

It has been contended that there was no award at all, on the ground that the Court in which the suit was pending superseded the award and recalled the

suit under s. 318, Act VIII of 1859. Apparently such an order was made on the 26th September 1877, but it did not take effect, because, as we understand the proceedings, the case was again returned to the arbitrator at the request of the parties expressed through their pleaders on the 28th September. Moreover, this objection, if it was taken, was not one of those urged before the first Court, and although it was taken in the second Court, no opinion seems to have been given upon it.

We must, we think, take it that the case was duly left in the hands of the arbitrator, who made an award on the 12th November 1877.

Objections were urged to the award, which, in the opinion of the Court, did not justify it in remitting it under s. 323, or in setting it aside under s. 324,\* Act VIII of 1859. Judgment was, therefore, given according to the award.

A number of cases have been referred to, as supporting the appellant's contention that an appeal will lie, notwithstanding the provision of s. 325† that a judgment according to an award shall be final. But the only cases in which an appeal has been [169] allowed are *Maharaja Jaimangal Singh v. Mohanram Marwari* (8 B.L.R., 319 N.S.C., 23 W.R., 429), *Ganga Narain Ghose v. Ram Chand Ghose* (12 B.L.R., 48), and *Boonjad Mathoor v. Nathoo Shahoo* (J.L.R., 3 Cal., 375). In the first of these cases *Moharaja Jaimangal Sing v. Mohanram Marwar* (8 B. L. R., 319N; s.c., 23 W. R., 429), the decree on the award had, on previous occasions, been set aside on account of an informality in the proceedings of the arbitrators, and then on rectification of the informality the second decree was held to be final.

In the other two cases there were such irregularities patent on the face of the proceedings in the case, that the judgments were held not to be judgments under s. 325.

In the present case we are not able to say that there are any grounds for holding that there has not been an award and a judgment in conformity therewith. We, therefore, think that no appeal lay to the second Court and we dismiss this appeal with costs.

*Appeal dismissed.*

#### NOTES.

[See the provisions of the C. P. C. 1908, which has made several statutory changes.]

Award not to be set aside except on ground of corruption.

\*[Sec. 324.—No award shall be liable to be set aside except on the ground of corruption or misconduct of the arbitrators or umpire. Any application to set aside an award shall be made within ten days after the same has been submitted to the Court.]

†[Sec. 325 :—If the Court shall not see cause to remit the award or any of the matters referred to arbitration for re-consideration in manner aforesaid, and if no application shall have been made to set aside the award, or if the Court shall have refused such application, the Court shall proceed to pass Judgment according to the award or

according to its own opinion on the special case if the award shall have been submitted to in the form of a special case; and upon the judgment which shall be so given decree shall follow and be carried into execution in the same manner as other decrees of the Court. In every case in which Judgment shall be given according to the award, the Judgment shall be final.]

[7 Cal. 169]

The 10th March, 1881.

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE  
MCDONELL.

Gobind Mohun Chuckerbutty.....Defendant

versus

Sheriff.....Plaintiff.\*

*\*Res judicata—Limitation—Account—Principal and Agent.*

In the mofussil, if a principal in a suit against his agent prays merely that the defendant be ordered to render accounts to the plaintiff, a second suit brought by him for the recovery of the money found due by the defendant on examining the accounts will not be barred as *res judicata*.

Discussion as to form of plaint in suits for an account.

IN this case the plaintiff, who had been manager of an indigo factory at Balleakandi, in the District of Furriddpore, employed the defendant, in January 1873, to collect certain debts due to the [170] firm, which debts had been assigned to the plaintiff by the proprietors of the indigo concern. The defendant's term of service terminated in November 1874 and as he refused to render any accounts, the plaintiff, in 1875, brought a suit against the defendant for the delivery over of the account papers, and obtained a decree. In execution of this decree, the plaintiff obtained the account papers on the 11th of June 1877, and after examining them, he, in July 1877, found that the defendant had misappropriated a sum of Rs. 500, for which he instituted the present suit in the month of September 1877. The plaintiff also prayed for a decree for whatever sum might be found due on taking the accounts, undertaking to affix the proper additional stamp on his plaint.

The defendant contended that the suit was barred by ss. 2\* and 7† of Act VIII of 1859. because the plaintiff had prayed for the same relief, and a commissioner, appointed by the Court, had found to be due to the plaintiff only Rs. 83. He also contended the suit was barred by limitation. The Court of first instance gave plaintiff a decree, and this decision was affirmed on appeal. The defendant then appealed to the High Court.

Baboo Sreenath Dass and Baboo Shoshee Bhosun Dutt for the Appellant.

Baboo Bussunt Coomar Bose for the Respondent.

The **Judgment** of the Court (GARTH, C. J., and MCDONELL, J.) was delivered by

\* Appeal from Appellate Decree, No. 2628 of 1879, against the decree of Baboo Promotho Nath Mookerjee, Subordinate Judge of Furriddpore, dated the 16th June 1879, affirming the decree of Moulvi Mohabut Ali, Munsif of that district, dated the 3rd July 1878.

Unless suits previously heard and determined. any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim.]

†[Sec. 7:—Every suit shall include the whole of the claim arising out of the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. If a plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted, shall not afterwards be entertained.]

**Garth, C.J.**—We think that this appeal must be dismissed. [The learned Judge here stated the facts and continued.]

The only ground of defence which has been relied upon is that in the former suit, which was brought in 1275, although the decree of the Court was merely for rendering an account, a commissioner was appointed to adjust the accounts between the parties, and to ascertain what sum was due from the defendant; that the commissioner found Rs. 82-3-11 only to be due; and that the plaintiff in this suit is bound by that finding.

Now although it certainly does appear, that, in the former [171] suit, a commissioner was appointed for some purpose or other we do not find that he had any authority to go into the account, or to ascertain what was due. The decree merely orders the defendant to render proper accounts to the plaintiff; and it has not been proved how or why the commissioner was appointed, nor that the report of the commissioner was in any way confirmed by the Court.

It was, therefore, competent for the plaintiff, after the accounts had been filed by the defendant, and adjusted by the commissioner, either to accept the money found by the commissioner to be due to him, or to sue the defendant in a fresh suit for the sums which he now claims.

We have been referred to *Luchmееput Singh Bahadoor v. Nund Coomar Goopto* (22 W. R., 388), a case decided by KEMP and AINSLIE, JJ., in which those learned Judges considered that in that suit the lower Courts did not do their duty by merely ordering that accounts should be rendered; that the proper order was that the accounts should be examined and adjusted; and that it should be ascertained what was due from the defendant to the plaintiff; and as this had not been done, the case was remanded.

It may be that the nature of the suit perfectly justified the learned Judges in making the remand; but in the generality of suits in the mofussil, the plaintiff merely prays for an account. I remember a case in this Court (though I cannot say whether it was reported) in which MARKBY, J., explained very clearly the usual difference in the procedure between suits for an account brought on the Original Side of this Court, and similar suits brought in the mofussil.

On the Original Side the prayer of the plaint is not only for an account, but to have the account adjusted, and the balance ordered to be paid to the party entitled to it. The case is referred to the Registrar for this purpose; and after the account has been taken and the balance ascertained by the Registrar, the case comes again before the Court, and a final decree is made. Both parties have a full opportunity, if they please, of going into evidence before the Registrar, and afterwards objecting to [172] the Registrar's findings; and the whole matter is thus adjusted finally in one suit.

In the mofussil, however, this is generally done by means of two suits. The first is brought to compel the rendering of an account, and then, when the account has been rendered, and the plaintiff has had an opportunity of examining it and testing its correctness, he may sue in a second suit for the amount which he considers to be now due.

Of course, it is far more convenient, and a saving of time and expense, to have the whole matter settled in one suit instead of two; but the reason why two suits are generally brought in the mofussil is, because the Courts there have no officer like the Registrar to whom the account can be referred for adjustment.

In this particular case the plaintiff was of course unwilling to be bound by any account furnished by the defendant, considering the dishonest manner in which the latter had dealt with him. His claim in this suit embraces several sums which were not entered in the account rendered by the defendant, and we see no reason for saying that the plaintiff's claim is barred by anything that occurred in the former suit.

Another point raised here, (I can scarcely say that it has been argued), is, that the defendant is wrongly found to be indebted to the plaintiff in a sum of Rs. 333-7-9, which was said to be due to the plaintiff on certain decrees. It does not very clearly appear how or why this sum is found due from the defendant; but we rather gather that the defendant must have received that sum, and did not pay it over. This is quite immaterial, however, for the purpose of the suit, because the plaintiff is found to be entitled to Rs. 837 altogether, and the decree is only for 500 rupees; so that the sum due for rents received is amply sufficient to support the decree, quite irrespective of the Rs. 333-7-9 said to be due as the amount of the decrees.

The appeal is dismissed with costs.

*Appeal dismissed.*

[173] *The 4th March 1881.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE McDONELL.

Surnomoye Dassya and another.....Defendants

*versus*

The Land Mortgage Bank of India, Limited.....Plaintiffs.\*

*Reg. VIII of 1819, s. 17, cl. 5—Patni Talook—Sale for Arrears of Rent—Attachment—Priority—Mortgage.*

The patnidar of a talook granted a durpatni to the defendants on the 10th of February 1869. The same patnidar afterwards mortgaged the patni talook to the plaintiffs, who obtained a decree on their mortgage on the 28th September 1874. The patni was sold for its own arrears on the 17th November 1876; and after payment of rent and all expenses, there remained a surplus in the hands of the Collector, which was attached by the plaintiffs in execution of their decree on the 9th of November 1876. On the 12th January 1877, the defendants instituted a suit against the patnidar, under cl. 5, s. 17, Reg. VIII of 1819; for compensation for the loss of the durpatni, and obtained a decree, which the Court directed should be satisfied out of the surplus sale-proceeds; and the Collector, notwithstanding the plaintiffs' attachment, allowed the defendants to obtain the amount decreed out of the surplus sale-proceeds.

In a suit by the plaintiffs to recover the amount paid for compensation, on the ground that the plaintiffs' attachment was prior to the defendants' suit—*Held*, that the defendants' decree must, notwithstanding the plaintiffs' attachment, be satisfied out of the surplus sale-proceeds in priority to the plaintiffs' decree.

\* Appeal from Appellate Decree, No. 1790 of 1879, against the decree of A. C. Brett, Esq., Judge of Jessore, dated the 12th May 1879, modifying the decree of Baboo Kedaressur Roy, Subordinate Judge of that district, dated the 6th of June 1878.

THIS suit was brought by the Land Mortgage Bank against the defendants to establish their right to a sum of Rs. 865-5-9, which had been obtained by the defendants, Nos. 1 and 2, under these circumstances.

The patnidar of a talook had granted a durpatni of it to the defendant No. 1 on the 10th of February 1869.

The same patnidar then mortgaged to the Land Mortgage Bank this talook and other properties on the 8th of March 1872, for a sum of Rs. 45,000. On the 28th September 1874, the Bank obtained a decree for the sum due to them upon this mortgage, and declaring their rights under it.

[174] The patnidar having then made default in payment of his rent, the talook was put up and sold by auction for its own arrears on the 17th of November 1876; and after paying the rent and all expenses, there remained a surplus of the sale-proceeds in the hands of the Collector of Rs. 2,138-1-5.

By means of this sale the durpatnidar, the defendant No. 1, lost his durpatni; and, therefore, on the 12th of January 1877, the defendants Nos. 1 and 2 (the latter being the wife of the defendant No. 1) brought a suit against the patnidar (under the provisions of cl. 5 of s. 17 of Reg. VIII of 1819) to recover compensation for the loss of the durpatni, and to have the amount of the compensation paid to them out of the surplus proceeds, it being alleged that the durpatni was purchased with the money of the defendant No. 2.

In this suit the defendants Nos. 1 and 2 obtained a decree for the sum of Rs. 865-5-9, by way of compensation, and the Munsif ordered that sum to be paid to them out of the surplus proceeds.

Meanwhile, immediately after the sale of the patni, the Land Mortgage Bank, on the 9th of December 1876, placed an attachment upon the sum of Rs. 2,133-1-5, the surplus proceeds; but the Collector, notwithstanding this attachment, allowed the defendants Nos. 1 and 2 to obtain the Rs. 865-5-9 out of the surplus proceeds, in accordance with the Munsif's order.

This suit was then brought, on the 28th of March 1878, by the Bank, for the purpose of recovering the Rs. 865-5-9 from the defendants Nos. 1 and 2; and they contended, that as their attachment was prior to the suit of the defendants Nos. 1 and 2, they were entitled to the whole surplus proceeds to the exclusion of the defendants' claim.

The view of the Subordinate Judge was, that the two defendants had a right to bring their suit for the sum which they obtained, and that it was properly paid over to them out of the surplus proceeds. He, therefore, dismissed the plaintiffs' suit.

The District Judge took a different view. He considered that the case came within the provisions of s. 17 of the Regulation; but he thought that the plaintiffs had an equal right with the defendants Nos. 1 and 2 to the surplus proceeds, as being assignees [175] of a valuable interest in the talook; but that as the sum was not sufficient to satisfy both, he decided that the surplus proceeds ought to be divided between the parties rateably in proportion to the value of their respective interests in it. Putting, therefore, the value of the plaintiffs' interest at Rs. 2,000, and that of the defendants at Rs. 865-5-9, he held that the defendants were entitled to Rs. 550 out of the surplus, and the plaintiffs to the residue. He therefore gave the plaintiffs a decree for Rs. 315, and ordered each of the parties to pay their own costs.

*Baboo Mutty Lall Mookerjee* for the Appellants.

*Baboo Kashi Kant Sen* for the Respondents.

The Judgment of the Court (GARTH, C. J., and McDONELL, J.) was delivered by

**Garth, C.J.**—We think that the District Judge has taken an erroneous view of this case. [His Lordship then stated the facts as above and continued.]

Both parties complain of this decision, the plaintiffs (by way of appeal), on the ground, that the defendants were not entitled to any part of the surplus proceeds; and the defendants (by way of cross objection) on the ground, that they are entitled to the whole of the Rs. 865-5-9, and that the Court below was wrong in directing them to restore Rs. 315 to the plaintiffs.

It is strange that, during the whole of the argument in this Court, we have been allowed to remain under a wrong impression as to a point upon which, as it seems to us, the whole case turns. We were led to suppose, that the suit brought by the defendants, in which they recovered the Rs. 865-5-9, was not brought *within two months from the time of the sale of the palm*; and if that had been so, we think that the Munsif would have had no power to order that sum to be paid out of the surplus proceeds.

The words of cl. 5 of s. 17 are: "It shall be competent to any one conceiving himself to possess such an interest, etc., to bring forward his claim to the price he may have paid for the same, or for a just compensation for the loss sustained by him in con-[176]sequence of the sale, *by instituting a regular suit at any time within two months from the date of sale.*"

If, therefore, the suit of the defendants had not been brought within two months from the date of sale, the Munsif, although he might have given them a decree enforceable in the ordinary way, could not have decreed the amount out of the surplus proceeds.

It now turns out, however, that the suit was brought duly within the two months, and that, therefore, the Munsif's decree was quite regular.

That being so, the only question is, whether the plaintiffs, who had placed an attachment upon the surplus proceeds immediately after the sale, are entitled to recover from the defendants the whole or any part of the sum which has been awarded them out of those surplus proceeds by the Munsif.

It has been suggested to us, that although the plaintiffs did not bring any suit under cl. 5 of s. 17, yet they must be considered as having made a claim to the surplus proceeds by placing an attachment upon them. But that is a course, which appears to us not to be warranted by cl. 5. The only claim which can be made under cl. 5 is *by a regular suit*, and the decree which is to be made in that suit is of a special nature, *enforceable only as against the sale-proceeds*; and if the plaintiffs in this suit had intended to proceed against those proceeds under cl. 5, they could only have done so by instituting a regular suit.

This they have not done; and as the defendants have taken the proper course, and have obtained a judgment, we think, that they have secured a right to the sale-proceeds to the amount of their judgment prior to any right of the plaintiffs.

It may be that the plaintiffs may enforce their attachment as against the residue of the sale-proceeds; but that question does not arise in this suit.

The result is, that the judgment of the District Judge must be reversed, and that of the Subordinate Judge restored; and that the plaintiffs must pay the costs in all the Courts.

*Appeal allowed.*

## [177] ORIGINAL CIVIL.

*The 19th May, 1881.*

PRESENT:

MR. JUSTICE WILSON.

Shanks and others

*versus*

Savage.

*Practice—Failure to procure sufficient Evidence—Adjournment—Costs.*

A plaintiff failed in an *ex parte* suit to bring forward sufficient evidence to entitle him to a decree, and asked for an adjournment in order to obtain further evidence; the Court granted an adjournment on the terms that the plaintiff should bear the whole costs of the hearing.

THIS was an *ex parte* action brought for work and labour done, in which the plaintiffs failed to give sufficient proof as to certain work done to a steam-boiler.

Mr. T. A. Apcar for the Plaintiffs.—After partly proving his case, and on finding that the evidence given was not sufficient to entitle him to a decree, asked the Court for an adjournment in order to procure the attendance of other witnesses, he agreeing to bear the costs of the day.

Wilson, J.—Such adjournments are most inconvenient, and would not be listened to for a moment in England. I will grant an adjournment for a fortnight, on condition that the plaintiffs bear the whole costs of the hearing.

Attorney for the Plaintiffs : *Harris & Co.*

## [178] APPELLATE CIVIL.

*The 25th March, 1881.*

PRESENT:

MR. JUSTICE MORRIS AND MR. JUSTICE TOTTENHAM.

Nilcomul Lahuri.....Defendant

*versus*

Jotendro Mohun Lahuri.....Plaintiff.\*

*Adoption—Fraud—Adoptive Son claiming Share in Estates already vested in another before the Date of the Adoption.*

Shortly before his death in 1862, A, by his will, gave his widow power to adopt a son. In consequence of fraud on the part of B, the son of a brother of A, in suppressing this will and setting up another, the will was not proved until 1874, when the widow exercised the power. C, the widow of another brother, had died in 1867, and B had succeeded to her estate. The adopted son now sued by his mother to recover a half share in C's estate, alleging that his adoptive mother, in consequence of the fraudulent act of B in suppressing the

\* Appeal from Original Decree, No. 282 of 1879, against the decrees of Baboo Bhugwan Chunder Chuckerbutty, Subordinate Judge of Rungpore, dated 30th April 1879.



will under which the power of adoption was given, and by setting up a false one, was unable to exercise the power of adoption before the death of C, and that thus he had been deprived of the opportunity of succeeding to C's estate.

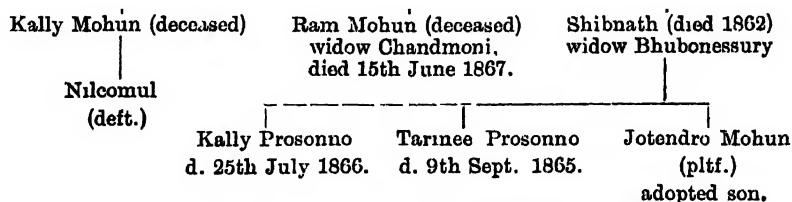
*Held*, that although B had committed fraud in suppressing the will and setting up a false one, and had so placed obstacles in the way of the adoptive mother of the plaintiff taking a son in adoption earlier, yet that, as the plaintiff was not in existence at the time the fraud was committed, such fraud was too remote so far as it affected him, and that the Court as a Court of Equity could not disturb the estate which had already vested in B.

The right to succession is a right which vests immediately on the death of the owner of the property, and cannot, under any circumstances, remain in abeyance in expectation of the birth of a preferable heir not conceived at the time of the owner's death.

*Keshub Chunder Ghose v. Bishnu Pershad Bose* (S.D. A. for 1860, p. 340) and *Bhoobun Moyee Debia v. Ram Kishore Acharji* (10 Moore's I. A., 279) followed.

THIS was a suit brought by one Bhubonessury Dabia, as adoptive mother and guardian (leave to bring the suit having been granted her by the Court) of her adopted son, Jotendro [179] Mohun Lahuri, to recover an eight-anna share in one Chandmoni's husband's estate, to which the defendant had succeeded.

The following is the genealogical tree of the family :—



The plaintiff, Jotendro Mohun, stated, that Shibnath, by his will, dated 22nd May 1862, gave to Bhubonessury power to adopt, and that, after Shibnath's death, Nilcomul managed Bhubonessury's estate; that, during such management, he obtained Shibnath's will, suppressed it, and set up another, which contained no such power of adoption; that a suit had been brought on the second will, but the Privy Council, in March 1874, eventually held, that the will containing the power of adoption was the genuine one; that, in 1865 and 1866, Shibnath's two sons died; that, since the latter date, Bhubonessury had repeatedly endeavoured to adopt a son, but had always been prevented, because she was unable to produce the original will giving her power to adopt, and that although she possessed copies of the will, people always refused to give their sons in adoption without the production of the original, more especially pending the litigation which was being carried on concerning the two wills; that, in 1867, Chandmoni, the widow of Ram Mohun, died, and Nilcomul, the son of Kally Mohun, succeeded to Chandmoni's estate; that, subsequently in January 1874, Bhubonessury adopted him (Jotendro Mohun, the plaintiff, and infant of the age of five years at the time), and on the 29th September 1877, his adoptive mother brought this present suit on his behalf, claiming a half share with the defendant in Chandmoni's husband's estate, on the ground that the defendant Nilcomul had, by suppressing Shibnath's will containing the power of adoption, fraudulently prevented Bhubonessury from adopting a son, who would, if the adoption had been made in time, have succeeded to a half share in the estate of Chandmoni's husband; and that,

[180] notwithstanding the fact that he had been adopted subsequently to the defendant's succession, he was entitled to a share in Chandmoni's husband's estate. The defendant contended that the suit was barred, it not having been brought within three years either from the time the alleged fraud became known, or from the time of the adoption; that the estate once having vested in him could not be divested by reason of the subsequent adoption; that he had not fraudulently prevented the widow from the adopting; that he had committed no fraud, inasmuch as Chandmoni was alive at the time when fraud was alleged.

The Subordinate Judge held that the suit was not barred, that the defendant had through fraud prevented the adoption from taking place during the lifetime of Chandmoni, and that the plaintiff was, therefore, entitled to recover

The defendant appealed to the High Court.

Mr. Jackson (with him Mr. M. Ghose and Baboo Isen Chunder Chuckerbutty) for the appellant.—As regards limitation.—Supposing the decision of the Privy Council in 1874 were taken to be the starting point of limitation, the suit is barred, as only three years is allowed from the time when the fraud is discovered. The widow does not say, it does not matter when I adopted, I have still a right to adopt, but says, the original will was suppressed, and that she was prevented through the defendant's fraud from adopting before, and that, in consequence of that fraud, he is estopped from disputing the adoption. As to whether the estate could divest.—An adoption cannot operate to open out the estate after it has once vested in any person. *Kally Prosonno Ghose v. Gocool Chunder Mitter* (I.L.R., 2 Cal., 295). This case is supported by Mayne, 2nd ed., s. 176, p. 166.

Mr. M. Ghose on the same side.—An estate once vested cannot be divested, see *Gobind Chandra Sarma Mazoomdar v. Anand Mohan Sarma Mazoomdar* (2 B.L.R., A.C., 313), and *Moniram Kolita v. Ker Kolitani* (I.L.R., 5 Cal., 776). The plaintiff, in order to say that he has a right of suit because he was not adopted earlier through the [181] defendant's fraud, must, inasmuch as an adopted son is in the same position as a natural son, go so far as to say that a natural son would have a right of suit against a person who had fraudulently prevented his (the plaintiff's) father and mother from living together for a long period, and so prevented the plaintiff from being born during the time of such separation, at which time the person, so fraudulently acting, had succeeded to an estate to which, had the plaintiff been born, he would have been entitled to succeed. Such a suit has never been attempted, and would not lie, the fraud alleged being too remote. The adoption in this case took place six years after Chandmoni's death. Fraud is not a sufficient reason for a suit to recover property which has already vested in somebody else. On whom does the plaintiff allege the fraud to have been practised, if it is against himself, he was not alive at the time, and no fraud can be perpetrated against a person not in existence. The rule of equity that a person cannot take advantage of his own wrong, does not extend to cases of this kind. The lower Court has given a decree to the plaintiff for half of the property claimed, at all events he can only claim a fourth. The defendant cannot be considered to have held as trustee for the plaintiff, and the suit is therefore barred—*Kherodemoney Dossee v. Doorgamoney Dossee* (I.L.R., 4 Cal. 455).

Mr. H. Bell (with him Mr. Doss, Baboo Sreenath Doss, and Baboo Bungshee Dhur Sen) for the Respondent.—There can be no question of limitation in

this case. The plaintiff claims as the adopted son of Shibnath, to succeed to a moiety of the estate of his uncle Ram Mohun. Ram Mohun's widow died on the 15th June 1867, and the plaintiff has twelve years to sue in from that date. The main fact of the defendant having committed a fraud cannot reduce the period of limitation to three years—*Chunder Nath Chowdhry v. Tirthanund Thakoor* (I. L. R., 3 Cal., 504).

On the merits there are two main points for consideration :—*First*,—Is the plaintiff, as the adopted son of Shibnath, entitled to a share of Ram Mohan's estate, his adoption having taken place after the death of Chandmoni, the widow of Ram Mohun, [182] and after the defendant had succeeded to the inheritance? *Secondly*,—Can the judgment of the lower Court be supported on the ground of the defendant's fraud? Upon the first point it is contended that we are concluded by the case of *Kally Prosonno Ghose v. Gocool Chunder Mitter* (I. L. R. 2 Cal., 295). This case will be found to rest entirely on previous decisions, none of which, when examined, will be found to support the proposition there broadly laid down, that "an estate once vested cannot be divested." The Privy Council case of *Sri Raghunada v. Sri Brozo Kishoro* (L. R., 3 I. A., 154), which was referred to in the decision, is directly to the contrary. In that case an undivided brother succeeded to an impartible zemindari to the exclusion of the widow of the last owner, but after some two years, the widow adopted a son, and the brother's estate was divested. This case, therefore, so far from supporting the decision in *Kally Prosonno's case* (I. L. R., 2 Cal., 295) is distinctly opposed to it. The other cases referred to are, *Bamundoss Mookerjee v. Mussamut Tarnee* (7 Moore's I. A., 169), which merely decides that a widow with a power of adoption can sue in her own name to recover property belonging to the estate of her late husband. The next case—*Dukhina Dossee v. Rash Beharee Mojomdar* (6 W. R., 226)—is so obscurely reported, that it is impossible to say what the facts were. *Gobind Chandra Sarma v. Anand Mohun Sarma* (2 B. L. R., A. C., 313) merely decides that, in litigation, a widow represents the estate. The Full Bench case of *Kali Das Das v. Krishan Chandra Das* (2 B. L. R., F. B. 103) turned upon the doctrine of Hindu Law with regard to persons excluded from inheritance. The case of *Bhoobum Moyce Debia v. Ram Kishore Acharji* (10 Moore's I. A., 279) merely decided that an adopted son was in no better position than a natural son, and as a natural son could not in that case have succeeded as heir, so neither could an adopted son. See remarks on this case in Mayne's Hindu Law, p. 170—*Rakmabar v. Radhabai* (5 Bom. H. C., A. C., 114). The case of *Gobindo Nath Roy v. Ram Kanay Chowdhry* (24 W. R., 183) (alluded to in [183] I. L. R., 2 Cal., 307) stands alone, and is questioned in Mayne's Hindu Law, p. 178, and is opposed to the case of *Bamundoss Mookerjee v. M. S. Tarnee* (7 Moore's I. A., 169), and was not followed in the recent case of *Prosononath Roy Chowdhry v. Afzolonnessa Begum* (I. L. R., 4 Cal., 523). The right of a preferential heir to divest an estate which had already vested was never questioned until recent years. When a preferential heir came into existence, he was allowed as of right his inheritance. Take the case of a sister. A sister is not an heir by Hindu Law but a sister's son is an heir; and there is of necessity a suspension of the inheritance until his birth.—Macnaughten's Hindu Law, Vol. II, p. 98, Prec. xiv., Inheritance: *Mussamut Solukhna v. Ram Dolal Pande* (1 Sel. Rep., 324), *Karuna Mai v. Jai Chandra Ghose* (5 Sel. Rep., 42), and *Lakhi Priya v. Bhairab Chandra Chaudhuri* (5 Sel. Rep., 315, with Suth. Notes). The case of a posthumous or of an adopted son is far stronger. Where the father's inheritance has been distributed among the heirs, if a posthumous son is born, a redistribution has to be made: Dayabhaga,

Chap. I, sec. 45; Dyvakrama Sangraha, VI., 21-24. The whole question was most fully considered by the late Supreme Court in *Gourbullab v. Juggernath Pershad Mitter* (Mac. Cons. of Hin. Law, p. 159). In that case *A* was adopted by the widow of *B*, who had predeceased his father *C*. On the death of *C*, *C*'s estate passed to his sister's son. Some two years after *C*'s death *A* was adopted, and it was held that he was entitled to the estate of *C* to the exclusion of the nephews who had already succeeded. In *Shamchunder v. Rooderchunder* (1 Sel. Rep., 2nd Ed. 209; upheld in appeal, 3 Knapps' P. C. C. 55), *A* left two widows, one of whom adopted a son *B*, and died after the death of the adopted son *B*. The estate passed to *A*'s brother's sons; when the second widow adopted *C*, and it was held that *C* was entitled to succeed to his brother *B*'s estate to the exclusion of *A*'s nephews. This, therefore, is an instance of an estate being divested in favour of a collateral.

With regard to the question of fraud, it was contended that there was no fraud practised on the present adopted son, [184] that, on the contrary, if there had been no fraud, some one else would have been adopted; and, therefore, if there was fraud, the present adopted son has been the gainer by it. But the fraud was against Shibnath's heir. It is not necessary that it should have been against any particular person. Suppose that a child had been ready for the adoption before Chandmoni's death, and the defendant, knowing that she could not survive, had forcibly carried off the son to be adopted, and kept him in confinement till Chandmoni's death,—it cannot be contended that such son when adopted would not have been entitled to his share in his uncle's estate; or suppose that, instead of carrying off the boy, he had hired assassins to kill him,—can it be contended that the next adopted son would not be entitled to all the rights to which the first boy would have succeeded, if his adoption had not been fraudulently frustrated? So far, therefore, as the defendant is concerned, the adoption must be considered to have taken place at the time the defendant prevented it.—Story's Equity Jurisprudence, p. 256; Phillimore on Jurisprudence, p. 226; *Mestaer v. Gillespie* (11 Ves., 621), *Luttrell v. Lord Waltham* (14, 290) cited, *Huguenin v. Baseley* (14, Ves. 289), *Middleton v. Middleton* (1 Jac. and W., 94), *Burkley v. Wilford* (2 C. and F., 102), *Segrave v. Kirwan* (1 Beatty, 157); where the fraud was not against any particular person, but against the next-of-kin. With regard to the share to which an adopted son is entitled, Mayne's Hindu Law, ss. 148 and 49 and *Tara Mohun Bhattacharjee v. Kripa Moyee Debia* (9 W. R., 423) were referred to.

Mr. M. Ghose in reply.—The case of *Kally Prosonno Ghose* is not opposed to the decision of the Privy Council in *Sri Raghunada v. Sri Brozo Kishoro* (L. R. 3 I. A., 154). No doubt, as pointed out by Mr. Mayne (Note c. art. 170, Hindu Law), Mr. Justice MITTER was in error in supposing that, in the case before the Privy Council, the property was not joint family property; but that error does not in any way affect the [185] soundness of his decision. We do not go the length of saying that in no case will a subsequent adoption divest an estate once vested, for it is a well-known rule of Hindu Law that the widow herself divests her own estate by adopting a son. But that is an exception, and persons who are in the position of the widow, by operation of the Hindu Law, will also come within the exception. The Madras case before the Privy Council referred to an impartible zemindari, and the widow could not possibly have succeeded. Hence the adoption by the widow had the effect of divesting an estate which, under the Bengal school, the widow would ordinarily have taken. It was

also a case of lineal succession. This probably accounts for the question not having been raised in the Privy Council case. Mr. Mayne himself, while pointing out the error abovementioned, approves of the principle laid down in *Kally Prosonno Ghose's* case (S. D. A. for 1860, ii, p. 340). The distinction between lineal and collateral successions in the case of an adopted son is a distinction founded upon reason and Hindu Law. The case in 7 Moore decides in the negative the question as to whether a woman, having power to adopt, is in the position of a woman *enceinte*. *Keshub Chunder Ghose v. Bishnu Pershad Bose* (S. D. A. for 1860, ii, p. 340,) overrules all the cases in the Select Reports cited by the respondents. The same principle has been laid down in the case of *Rash Beharee Roy v. Nimaye Churn* (W. R. for 1864, p. 223). The case further says, that *Sumboo Chunder Roy v. Gunga Churn Sein* (6 Sel., 291) has been overruled, and further shows that a Hindu widow is not a trustee for unborn children. The case of *Gourbullab v. Juggernath Pershad Mitter* (Mac. Cons. of Hindu Law, 159) was a case of lineal and not collateral succession; the question of vesting and divesting was not touched upon. The defendants there were sister's sons, and therefore, we may take the principle, that sister's sons should have preference to grandsons, to be overruled by the latter cases; the case was not even opposed by the sister's sons, and it comes within the exception quoted by Mayne in art. 176. The case of *Dukhina Dossee v. Rash Beharee Mozoomdar* (6 W. R., 221), [186] directly decides the question whether succession could be suspended until the adoption. The Judges there do not mean that a widow loses all right to property after twelve years, but that if a widow is dispossessed and chooses to adopt after twelve years have passed, her power to adopt is lost. I say that if the widow is in possession, she can adopt at any time during possession. *Kali Das Das v. Krishan Chundra Das* (2 B. L. R., F. B., 103) supports my argument, that a widow having a power to adopt does not hold as trustee for the son who might be adopted. The case of *Gobindonath Roy v. Ram Kanay Chowdhry* (24 W. R. 183), alluded to in I. L. R. 2 Cal., 307, was referred to as an authority, that a Hindu widow succeeds, and not as trustee for anybody. The allegation of fraud has no bearing on the case; the fraud alleged is against Shibnath's estate in the lifetime of Chandmoni. Fraud must be committed against a person and not an estate, and the person must be in existence at the time; but even allowing it to be possible to commit fraud against an estate, Shibnath had no estate during the lifetime of Chandmoni. The distinction between the English cases and the present is, that (i) those cases refer to fraud against individuals in existence, (ii) that such individuals were deceived by the fraud, and with the immediate view of obtaining the object required, the fraud must lead to a deception; but here the widow knew she had power to adopt, therefore it could not be fraud as against her. Before it can be said that we cannot take advantage of our own wrong, it must be shown, that this was a fraud against Chandmoni, and that Chandmoni was prevented from doing a particular act by our fraud, which otherwise she would have done. It cannot be a fraud against the widow, as the widow's estate remained intact; and it could not be a fraud against the adopted son, as he was not at the time in existence. Even if there was fraud, it is too remote.

The Judgment of the Court (MORRIS and TOTTENHAM, JJ.) was delivered by

**MORRIS, J.**—We understand the real plaintiff in this suit to be a minor, one Jotendro Mohun Lahuri, represented by [187] his mother and guardian, Bhubonessury Dabia—otherwise the suit would not lie. The plaintiff then lays

claim to the share of the estate left by Chandmoni Dabia, widow of Ram Mohun Lahuri, the uterine brother of his adoptive father, late Shibnath Lahuri.

Chandmoni Dabia died on the 2nd Assar 1274, which corresponds with the 15th June 1867. The plaintiff was adopted on the 10th Magh 1280, which corresponds with 27th January 1874, by Bhubonessury Dabia, under permission granted to her under the will of her late husband; and though the defendant was the sole heir, at the time of her death, to the entire estate left by Chandmoni Dabia, his succession to one-half thereof is contested by the plaintiff in this suit on the ground that his adoptive mother was unable, in consequence of the fraudulent acts of the defendant, to exercise, before the death of Chandmoni Dabia, the power of adoption which was granted to her by her husband.

The Subordinate Judge of the Court below has given the plaintiff a decree. In his judgment he recites certain facts, which he says are "sufficient in themselves to bring home to the conviction of the Court that plaintiff exerted all her available means to adopt a child while Chandmoni was living, but that the intrigues played by the defendant stood in the way and prevented the adoption taking place till after the death of Chandmoni, in Magh 1280, when she succeeded in adopting the minor Jotendro Mohun." He holds that the principles of equity should interfere in such a case to deprive the wrong-doer of the rights which he has acquired by the wrongful acts committed by him, and that the effect of the fraud perpetrated by the defendant entitles the plaintiff in equity to obtain the relief which he seeks. Against this decision the defendant appeals. He contends, *first*, that no such act of fraud on his part has been established in evidence as goes to show that Bhubonessury Dabia was prevented from adopting any boy, much less the present plaintiff, prior to the death of Chandmoni Dabia; and *secondly*, that even if it be held that he committed a fraud on Bhubonessury Dabia in suppressing the will of her husband, that fraud is too remote [188] to enable the Court to divest in favour of the plaintiff an estate which has already vested for a long time past in him, the natural heir.

Before entering into the question of fraud, it is necessary to notice an argument which has been much insisted on by the respondent's counsel, to the effect that fraud or no fraud, the plaintiff, as adopted son of Shibnath Lahuri, is entitled to his share of the family estate left by Chandmoni Dabia; in other words, the plaintiff, as heir of Shibnath Lahuri, is entitled to succeed both lineally and collaterally to any estate to which Shibnath Lahuri, if alive, could lay claim. This argument has been noticed by the lower Courts, and overruled by it on the authority of the case of *Kally Prosonno Ghose v. Gocool Chunder Mitter* (I. L. R., 2 Cal., 295), in which it was decided that a subsequent adoption, after the succession has opened out, cannot confer on the adopted son the right to succeed collaterally and to divest the person in whom the property has already vested as heir to the deceased. Several cases have been cited to us as authority to the contrary, but no single instance has been adduced in which, in a case of collateral succession, an estate once vested has been divested by reason of a person being brought into existence subsequently, who, if he had been in existence at the time when the succession opened out, would have been a preferable heir. The general rule, that the right to succession is a right which vests immediately on the death of the owner of the property, and cannot, under any circumstances, remain in abeyance in expectation of the birth of a preferable heir not conceived at the time of the owner's death, was declared by the late Sudder Dewani Adawlut in the case of *Keshub Chunder Ghose v.*

*Bishnu Pershad Bose* (S. D. A. for 1860, ii, p. 240) and since that date this ruling has been universally followed. The Privy Council recognize it in the case of *Bhoobum Moyee Dabia v. Ram Kishore Acharj* (10 Moo. I. A., 279), and declare the ordinary rule to be, that in no case can the estate of the heir of a deceased person vested in possession be defeated and divested in favour of a subsequently adopted son, unless the [189] adoption is effected by the direct agency of the former heir with his or her express consent. The cases of *Gourbullab v. Juggernath Pershad Mitter* (Macnaghten's Cons. of Hin. Law, p. 159), and *Sri Raghunada v. Sri Brozo Kishoro* (L. R., 3 I. A., 154) cannot be said to be in opposition to this rule. In the one case a grandson, and in the other case a son, took by adoption lineally the estate of the grandfather and of the father, as against a nephew and a half-brother. These cases are no authority for holding that if succession to an estate collaterally had opened out before the adoption, either the nephew or the half-brother could have been divested in favour of the subsequently adopted grandson or son. The only ground, therefore, on which it seems to us the plaintiff can lay claim to the property in suit, is by asking the Court as a Court of Equity to place him as heir of Shibnath Lahuri in the position which, but for the fraud of the defendant, he would have obtained. That a fraud was committed by the defendant on Bhbonessury Dabia in suppressing the will of Shibnath Lahuri and setting up a false will, and thereby putting obstacles in the way of her taking a son in adoption, cannot, we think, be doubted. On this head we are disposed to agree with the finding of the lower Court. The only question is whether the present plaintiff, standing as he does in the position of heir to Shibnath Lahuri, is entitled to say that the defendant is estopped by his fraud from relying on the adoption of the plaintiff being of a date subsequent to the death of Chandmoni Dabia. Various cases, such as *Luttrell v. Lord Waltham* (14 Ves. 290), *Middleton v. Middleton* (1 Jac. and W., 94), *Segrave v. Kirwan* (1 Beatty, 157), *Bulkley v. Wilford* (2 C. & F., 102), have been cited to us as authority in support of the proposition that Courts of Equity will, on proof of fraud, divest property once vested in favour of the rightful heir. But none of these seems to us to meet a case like the present, where, as we judge from the evidence, the heir, that is the present plaintiff, was not even in existence when the fraud was [190] committed by the defendant. So far as the plaintiff himself is concerned, it may be said that, but for the opposition made by the defendant to the will of Shibnath, which his widow set up, the present plaintiff would never have inherited his estate at all. If the evidence is to be believed, Bhbonessury Dabia was foiled by this opposition of the defendant from adopting in the interval between the death of her last surviving son, and the death of Chandmoni, some boy other than the plaintiff. It is also apparent that the fraud of the defendant was not concealed in any way from Bhbonessury Dabia; she was from the first, that is from the time of the death of her husband, aware of the existence of the will in her favour, which empowered her to adopt a son, and it may, with some justice, be said, that between Srabun 1273, or July 1866, the date of the death of Kally Prosonno Lahuri, her last surviving son, and Assar 1274, or June 1867, the date of the death of Chandmoni, Bhbonessury had ample opportunity to adopt a son; and that the mere circumstance of persons, who were applied to, being unwilling to give their sons in adoption by reason of the counter-will set up by the defendant, is not a sufficient ground for holding that Bhbonessury Dabia could not adopt a son. The difficulties which stood in her way were no more than natural difficulties, such as might be encountered by anyone whose right to adopt was disputed *bond fide*, and therefore, the defendant, as sole heir of Chandmoni at the time of her death, became legally



vested in her estate. It seems to us, therefore, that the fraud, committed by the defendant so far as it affects the plaintiff, is of too remote a character for this Court, as a Court of Equity to disturb the estate which naturally vested in the defendant as sole heir of Chandmoni at the time of her death.

We, therefore, set aside the decree of the lower Court, and dismiss the suit of the plaintiff, Jotendro Mohun Lahuri, with costs in both Courts.

*Appeal allowed.*

#### NOTES.

[This case was affirmed by the Privy Council in (1885) 12 Cal. 18 P. C.

For Notes, see the Notes to that case in the Law Reports Reprints.]

### [191] ORIGINAL CIVIL.

*The 3rd May, 1881.*

PRESENT :

MR. JUSTICE WILSON.

Sibbosoondery Dabia

*versus*

Bussoomutty Dabia and others.

*Hindu Law—Partition—Grandchildren—Right of grandmother to share.*

In a suit for partition among the members of a joint Hindu family, consisting of the heirs in different degrees of five brothers, a decree for partition according to certain proportions was made, subject, so far as the decree affected property derived through the eldest brother, to maintenance for his widow *A*. Among other parties to the suit were *B*, the granddaughter by the eldest son of *A*, and *C*, her second son. *C* died in 1880, leaving a widow *D* and four infant sons.

*A*, who was not party to the partition suit, now sued *B* and *D* and the infant sons of *C* for a declaration that she, as such widow and mother, was entitled to a share in the partitioned properties equal to those of her granddaughter *B*, and her grandsons, the infant sons of *C*.

*Held*, that such a suit would lie, it not being a suit for partition exclusively among grandsons, and that *A* was entitled to an equal share with her granddaughter and grandsons in the properties which, under the partition decree, had been allotted to the representatives of her husband, and to a life-interest in the income of the property remaining unpartitioned.

THIS was a suit for a declaration that the plaintiff was entitled to share in the property of her deceased husband, which had been partitioned in a suit to which she was not a party.

The plaintiff stated that she was the sole widow of one Cowar Suttia Prosunno Ghosal, who died on the 15th July 1851, intestate, leaving him surviving the plaintiff, and two sons by her, Suttia Runjun Ghosal and Suttia Krishna Ghosal, both of whom had since died.

At the time of his death, Cowar Suttia Prosunno Ghosal was entitled to a fifth share in certain properties. His brothers, Suttia Churn Ghosal and Suttia Shurn Ghosal, his nephew Suttia Jeebun Ghosal, and his sister-in-law Sreemutty Tarrasoondery Dabia, the widow of a brother Suttia Bhuckto Ghosal, were



each entitled to a fifth share in these properties. [192] Suttia Churn Ghosal died on the 21st January 1855, intestate, leaving a widow, Rani Bissomoyee Dabia, and two sons by her, Suttia Nundo Ghosal and Suttia Suttia Ghosal, his heirs and representatives.

The plaintiff's eldest son, Suttia Runjun Ghosal, died intestate on the 15th of November 1857, without male issue, but leaving a widow, Sreemutty Soorocondery Dabia, who subsequently gave birth to a daughter, Sreemutty Busboomutty Dabia, and died shortly afterwards. Suttia Jeebun Ghosal died on the 29th July 1856, intestate, and without issue, leaving a widow Sreemutty Surbomungola Dabia, his sole heiress. Suttia Churn Ghosal died on the 16th August 1869, intestate, without issue, leaving his nephews Suttia Nundo Ghosal, Suttia Suttia Ghosal, and Suttia Krishna Ghosal his heirs and representatives.

In 1871, Suttia Suttia Ghosal instituted a suit for partition against Suttia Nundo Ghosal, Suttia Krishna Ghosal, Sreemutty Surbomungola Dabia, Sreemutty Tarrasoondery Dabia, and Sreemutty Busboomutty Dabia, and from that time the family separated in food. In 1872 a decree for partition was made, and it was (among other things) declared that Suttia Krishna Ghosal was (subject to the right of the present plaintiff as the widow of Suttia Prosunno Ghosal, to maintenance out of such portion of his share as was derived from Suttia Prosunno Ghosal) entitled to five equal thirtieth parts or shares of the property to be partitioned, and that Sreemutty Busboomutty Dabia, as the only daughter and sole heiress of Suttia Runjun Ghosal, was (subject to the rights of the present plaintiff as such widow to maintenance out of such portion of the share of Sreemutty Busboomutty Dabia as was derived from Suttia Prosunno Ghosal) entitled to three equal thirtieth parts or shares. The decree directed a partition to be made, subject to the rights of the present plaintiff to maintenance, and a Receiver was appointed. The plaintiff's younger son, Suttia Krishna Ghosal, died on the 20th August 1880, intestate, leaving him surviving his widow, Sreemutty Soudamini Dabia, and four infant sons, Suttia Bhoosun Ghosal, Suttessur Ghosal, Suttia Nundo Ghosal, and Suttiajeet Ghosal. The plaintiff now instituted a suit against Sreemutty Busboomutty Dabia, and [193] the infant sons of Suttia Krishna Ghosal, and Sreemutty Soudamini Dabia, and the Receiver, praying that it might be declared that, upon the events which had happened, the plaintiff, as such widow and mother, was entitled to a share equal to that which was allotted to the infant defendants, and a moiety of that property which was allotted to Busboomutty, and also a one-fifth share in the properties which remained unpartitioned, for partition; and that the Receiver might be restrained from parting with the property in his hands.

Busboomutty, in her written statement, contended that the plaintiff was not entitled to participate in the property left by her father and uncle; that the plaintiff had notice of the partition suit, and had been maintained as therein was provided; that not having intervened and having accepted maintenance, she was precluded from questioning the validity of the decree, or from reopening the same. Soudaminee and the Receiver also put in written statements.

Mr. Bonnerjee (with whom was Mr. Branson), for the plaintiff, cited the case of *Bilaso v. Dina Nath* (I. L. R., 3 All., 88), and the unreported case of *Sreemutty Dossee v. Kumall Deb* (Suit No. 235 of 1877), in support of the claims put forward by his client.

Mr. Sale (with whom was Mr. Jackson) for the defendant Busroomutty contended, that the frame of the suit was improper. It was a suit wherein it was sought by an outsider to vary a decree made in a former suit to which she was not a party. The proper remedy was, either to be made a party in the original suit, or to wait until the partition proceedings already directed had been fully carried out, and then to bring separate suits against the parties against whom she claimed partition. Whatever right a widow might have to partition her husband's estate, so long as it remained joint and undivided, there was nothing to show that the right to partition remained when that estate had been divided and the shares allotted separately to the sons. It is submitted that the widow's right to maintenance alone remains. But in this case a grandmother claims partition as [194] against her grandchildren, and it is submitted that it is concluded by authority that she has no such right. See *Puddum Mookke Dossee v. Rayee Monee Dossee* (12 W. R., 409) ; same case considered on review (13 W. R., 66) ; Mayne's *Hindu Law*, 417; 2nd edition. The grandmother only takes a grandchild's share.

Mr. Stokoe and Mr. Henderson for Soudaminee and the infants.

Mr. J. G. Apar for the Receiver contended that he was not a necessary party, and cited *Hem Chunder Chunder v. Prankristo Chunder* (I. L. R., 1 Cal., 403).

**Wilson, J.**—This is a suit by a widow to enforce her claim to a share in certain properties of her deceased husband, which are being partitioned between her husband's descendants. The husband was one of five brothers, and those five brothers and their descendants continued to live jointly till the partition in question ; he died leaving a widow (the plaintiff) and two sons. The first son was Suttia Runjun, who died before the partition decree, leaving his daughter Busroomutty (the first defendant) his only daughter and heiress. The second son, Suttia Krishna, was alive at the date of the passing of the partition decree ; he has since died, leaving four sons, the infant defendants, his heirs, Suttia Bhoosun, Suttessur, Suttia Nundo and Suttiajeet. The partition suit was instituted some years ago for the partition of the whole family property, and the decree in that suit was made on the 28th November 1872. That decree gave Suttia Krishna, the son of Suttia Prosunno, five-thirtieths, and Busroomutty Dabia three-thirtieths, of the family property in their character as heirs to Suttia Prosunno. Suttia Krishna also took a share in some property of another member of the family, but that is not in question in this suit. The partition decree having been made, the partition was proceeded with ; but by a certain order made in the suit, a particular portion of the immoveable property was directed to remain unpartitioned, and these properties are now in the hands of the Receiver. Under [195] these circumstances, the plaintiff claims a share in the partitioned property equal to that which was allotted to the infant defendants, and a moiety of that property which was allotted to Busroomutty, and also a one-fifth share in the properties which remain unpartitioned. The suit came on for settlement of issues, and the only question which arises is, whether such a suit will lie under the circumstances. It appears to me that the whole weight of authority is in favour of the plaintiff. The earlier cases cited in Mayne, s. 404, and in I. L. R., 3 All., 88, and an unreported case, No. 235 of 1877, *Sreemutty Dossee v. Kumall Deb*, delivered by PONTIFEX, J., are on all fours with the present case ; whilst, on the other hand, there are the cases reported in 12 and 13 W. R., pp. 409 and 66, of *Puddum Mookke Dossee v. Rayee Monee Dossee*. It is not necessary to say, whether this can or cannot be reconciled with the other authorities,—it is sufficient to say that it is distinguishable : in that case the partition was exclusively

amongst the grandsons, and the grandmother was not entitled to a share. the present case, as also the case before PONTIFEX, J., is not a partition amongst grandsons. The decree will, therefore, direct that the plaintiff is entitled to an equal share with the defendant Bussoomutty and the infant defendants, in the properties which, under the partition decree, have been allotted to the representatives of Suttia Prosunno, and to a life-interest in the income of the property remaining unpartitioned. The Receiver's costs will come out of the estate.

*Decree granted.*

Attorneys for the Plaintiff : Messrs. W. C. Bonnerjee and Sons.

Attorney for the Defendant Bussoomutty : Baboo Gonash Chunder Chunder.

Attorneys for the Receiver : Messrs. Swinhoe & Co.

Attorney for the Defendant Soudaminee : Mr. Gillanders.

**NOTES.**

**[GRANDMOTHER'S RIGHT AT PARTITION—**

The right of the grandmother was again affirmed in (1882) 8 Cal. 649 ; (1887) 15 Cal. 292 at 306 ; (1904) 31 Cal. 1065.]

**[196] APPELLATE CIVIL.**

*The 30th March, 1881.*

PRESENT :

MR. JUSTICE PONTIFEX AND MR. JUSTICE FIELD.

Najibulla Mulla.....Defendant

*versus*

Nusir Mistri.....Plaintiff.\*

*Bond—Description of property—General words—Registration.*

In consideration of a loan, A gave a bond, by which he covenanted "not to alienate the property of himself and his daughter or the rest of his own property, until the loan secured by the bond was paid." The bond was recorded under the Registration Act in the book numbered "four" required to be kept by the Act. A subsequently sold his immoveable property, and the conveyance was recorded in the book numbered "one," in which documents relating to immoveable property have to be recorded. In a suit by the bond-creditor against the purchaser seeking to establish a lien on A's immoveable property by virtue of the bond,—

*Held*, that the general words used in the bond were not sufficient to give a lien upon any specific property, and that the fact that the bond had been recorded in book "four" showed that it was not the intention of the parties that the immoveable property of the debtor should be charged.

*Doss Money Dossee v. Jonmenjoy Mullick* (I. L. R., 3 Cal., 363) followed.

*Rajkumar Ramgopal Narayan Singh v. Ram Dutt Chowdhry* (5 B. L. R., 264) distinguished.

THE plaintiff in this case was a bond-creditor of one Kamaruddi Sheikh. The defendant, subsequently to the date of the bond, purchased certain property from Kamaruddi Sheikh. The plaintiff having obtained a money-decree

\* Appeal from Appellate Decree, No. 2951 of 1879, against the decree of A. T. Maclean, Esq., Judge of the 24-Pargannas, dated the 22nd September 1879, affirming the decree of Baboo Jogesh Chunder Mitter, First Munsif of Alipore, dated the 30th December 1878.

against Kamaruddi Sheikh, instituted the present suit against the defendant in order to establish a lien on what he claimed to be his mortgage-bond against the land purchased by the defendant. The defendant denied that the plaintiff's bond gave him any lien whatever, and insisted that it was a mere money-bond, and that his purchase, therefore, was not affected by the bond. [197] The words of the bond were, "Kamaruddi Sheikh engaged not to alienate the property of himself and his daughter for which he was about to sue or the rest of his own property, until the loan secured by the bond was paid off." The plaintiff insisted that these words gave him a charge or a lien on the whole of Sheikh Kamaruddi's property, as also the property which he might recover in the suit referred to in the bond.

Both the lower Courts decided in favour of the plaintiff, that, under these words in the bond, he had a lien on Sheikh Kamaruddi's property, and on the specific property which had been purchased by the defendant.

The defendant appealed to the High Court.

Baboo *Rash Behary Ghose* for the Appellant.

Baboo *Gurudas Banerjee* for the Respondent.

The **Judgment** of the Court (PONTIFEX and FIELD, JJ.) was delivered by

**Pontifex, J.** (who, after stating the facts of the case as above, continued):—Before the District Judge two authorities were cited; one of them—*Doss Money Dosee v. Jonmenjoy Mullick* (J. L. R., 3 Cal., 363)—is an authority to show that general words like those used in this bond would be insufficient to give a creditor a lien upon any specific property. The other is a Full Bench case, *Rajkumar Ramgopal Narayan Sing v. Ram Dutt Chowdhry* (5 B. L. R., 264), and is relied upon by the plaintiff to show that, in this particular case, there was sufficient mention of property in the bond to give him a lien. Now the construction that ought to be put upon documents of this nature is stated very plainly in Sugden on "Vendors and Purchasers," page 711, 14th edition. It is there laid down that it is a general rule, although it may not hold universally true, that "a covenant to convey and settle lands will not be a specific lien on the lands of the covenantor, but the covenantee will be a creditor by specialty." That accords with the decision in *Doss Money Dosee v. Jonmenjoy Mullick* (J. L. R., 3 Cal., 363), to which I have referred, and it also accords with common sense and reason.

[198] Even without these authorities, we should be of opinion that the words used in this bond are too vague and uncertain to pass any lien. In fact, no specific property whatever is mentioned by situation. In the case of *Rajkumar Ramgopal Narayan Sing v. Ram Dutt Chowdhry* (5 B. L. R., 264), referred to, property situate in certain specific mouzas is mentioned, and therefore that case is distinguishable from the case now before us.

On the ground, therefore, that the words of this bond are too vague and general to give any specific lien, we think that the decisions of the Courts below should be reversed; and in addition to the authorities above referred to, we find it laid down in Macpherson's book on Mortgages, page 64, that "the property intended to be mortgaged should be described, so that it may be readily recognized and identified, and so as to meet the requirements of the Registration Act."

Now we find from section 21 of the Registration Act, that "no non-testamentary document relating to immoveable property shall be accepted for registration, unless it contains a description of such property sufficient to identify the same." We also find that this particular bond was recorded under

the Registration Act in the book numbered "four" required to be kept by the Act; but by the provisions of the Registration Act, all documents which relate to immoveable property, and which are not wills, are to be recorded in book "one," while in book "four" are to be entered documents which do not relate to immoveable property. We think, therefore, that this bond having been entered in book "four," shows pretty plainly what the intention of the parties themselves was, when this instrument was registered. If they had supposed that it gave a lien upon specific immoveable property, it would have been their duty to have it recorded in book "one," and unless it was recorded in book "one," there would be no protection for a purchaser buying from a bond-debtor, for no search of the indexes required to be kept by the Act would give him notice that land belonging to the bond-debtor had been hypothecated. Putting it at the highest, the parties before us stand in precisely the same position. Even if the plaintiff intended to obtain a lien on his debtor's land, [199] he would only be in the same position as the defendant, *viz.*, a purchaser for valuable consideration. But the defendant, being in this position, has taken the precaution to register his conveyance as a conveyance of immoveable property, whereas the plaintiff has only taken under a bond in these vague and uncertain words, and has failed to register it properly as a document relating to immoveable property.

We think that the decision of the Courts below must be reversed, and this appeal decreed with costs.

*Appeal allowed.*

#### NOTES.

#### [I. COVENANT NOT TO ALIENATE—WHEN A CHARGE—

In (1886) 9 All. 158 a different rule was laid down, though specific property was not mentioned: (1890) 12 All. 175. **Dr. Rash Behary Ghose** in his *Mortgage* Vol. I (1911) p. 172 observes with reference to the dictum in this case as to specific property, that it is based upon a misapprehension of the passage quoted from Sugden, but that "the decision itself may perhaps be supported on the ground that there was no intention on the part of the grantor to create any charge whatever on his property cf *Omrao v. Secretary of State etc.* (1892) 19 I. A. 95 = 19 Cal. 584."

#### II. NATURE OF INSTRUMENT AND MODE OF REGISTRATION—

See also (1895) 18 Mad. 364; (1905) O. C. 227, (1906) 33 Cal. 1133 = 10 C. W. N. 1010 = 4 C. L. J. 121; (1907) 35 Cal. 845 = 12 C. W. N. 316 = 7 C. L. J. 149.]

[7 Cal. 199

*The 20th April, 1881.*

PRESENT :

MR. JUSTICE PONTIFEX AND MR. JUSTICE FIELD.

Doorga Narain Sen..... ..Plaintiff

*versus*

Banay Madhub Mozoomdar.....Defendant.\*

*Constructive notice—Principal and Agent—Fraud by Agent—Liability to third persons.*

When a person is proved to have had a knowledge of certain facts, or to have been in a position, the reasonable consequence of which knowledge or position would be, that he would

\* Appeal from Appellate Decree, No. 1631 of 1880, against the decree of J. P. Grant, Esq., Judge of Hooghly, dated the 28th of June 1880, reversing the decree of Baboo Sri Nath Roy, Subordinate Judge of that District, dated the 30th November 1878.

have been led to make further enquiry, which would have disclosed a particular fact, the law fixes him with having himself had notice of that particular fact. There may be such wilful negligence in abstaining from enquiry into facts which would convey actual notice, as may properly be held to have the consequences of notice actually obtained. But if there is not actual notice, and no wilful or fraudulent turning away from an enquiry into, and consequent knowledge of, facts which the circumstances would suggest to a prudent mind, then the doctrine of constructive notice ought not to be applied.

Constructive notice may apply as against third persons from a neglect to call for deeds and documents of title ; but not to the same extent where a Registration Act is in operation, as it would where no Registration Act prevails.

*Agra Bank v. Barry* (L. R., 7 H. L., 185) followed.

[200] If an agent, authorized to sell property, commits a fraud against his principal, the principal is the person who ought to suffer, and not a stranger.

*Hunter v. Walters* (L.R., 7 Ch. App., 85) and *Ram oomar Koondoo v. McQueen* (11 B.L.R., 58) followed.

THIS was a suit to recover possession of certain property known as Chur Guptiparra. It appeared that the defendant Baney Madhub Mozoomdar was convicted of an offence under the Penal Code, and was imprisoned. At the date of his conviction, he was the owner of Chur Guptiparra under two leases from the two zemindars, who were proprietors of the Chur. One of these leases was in his own name, and the other was in the name of his cousin, named Bara Rakhal Das Mozoomdar. On the 29th October 1869, upon his imprisonment, Baney Madhub gave a power-of-attorney to Bara Rakhal Das Mozoomdar and to Dindyal Mozoomdar and Radha Gobind Mullick, which power contained an authority to any two of the attorneys to sell his property "if occasion arose." Previous to his conviction and imprisonment, the zemindar, under whom the second of these leases was held, had instituted a suit for arrears of rent. That suit was pending when Baney Madhub was convicted. A decree was made in the suit, and a sale of the tenure created by that lease was directed ; and on the 5th November 1869, it was purchased in execution of that decree in the name of Baney Madhub's cousin, Gopal Das. Subsequently in August 1870, two of the persons named in the power-of-attorney, viz., Bara Rakhal Das and Radha Gobind Mullick, conveyed the other lease of eight annas to Gopal Das and Chota Rakhal Das, Baney Madhub's brother, ostensibly for valuable consideration. Afterwards, about Christmas 1875, the plaintiff purchased both these leases. They were conveyed to him by a kobala executed by Gopal Das and Chota Rakhal Das. When Baney Madhub was discharged from prison, he took proceedings under the Criminal Procedure Code to obtain possession of these properties ; and an order was passed in his favour, whereupon the plaintiff instituted this suit to recover possession, as a purchaser for value without notice, of the two properties from Gopal Das Mozoomdar and Chota Rakhal Das Mozoomdar. The lower Courts holding [201] that the transactions were benami, dismissed the suit. The plaintiff appealed to the High Court.

Mr. Branson and Baboo Rashbehary Ghose and Baboo Uma Kali Mookerjee for the Appellant.

Mr. Bell and Baboo Gurudas Banerjee, Baboo Srish Chunder Chowdhry and Baboo Saroda Prosonno Roy for the Respondent.

The Judgment of the Court (PONTIFEX and FIELD, JJ.) was delivered by

**Pontifex, J.**—We are of opinion that the judgment of the lower Appellate Court must be reversed, as we think that the learned District Judge has unduly

stretched the doctrine of constructive notice against the plaintiff, appellant. That doctrine, so far as we have to consider it in this case, may be stated as follows : When a person is proved to have had a knowledge of certain facts, or to have been in a position, the reasonable consequence of which knowledge or position would be that he would have been led to make further enquiry which would have disclosed a particular fact, the law fixes him with having himself had notice of that particular fact. For there may be such wilful negligence in abstaining from enquiring into facts which would convey actual notice as may properly be held to have the consequences of notice actually obtained. But if there is not actual notice, and no wilful or fraudulent turning away from an enquiry into, and consequent knowledge of, facts which the circumstances would suggest to a prudent mind, then the doctrine of constructive notice ought not to be applied. Constructive notice may apply as against third persons from a neglect to call for deeds and documents of title ; but not to anything like the same extent where a Registration Act is in operation, as it would where no Registration Act prevails—*Agra Bank v. Barry* (L. R., 7 H. L., 195). Even in England, where conveyancing is a science, and title is deduced by an abstract and production of deeds, it has been considered that the doctrine of constructive notice has been pushed to its extreme limit, and with the much laxer *prae-[202]*tice in this country it requires even more careful application against a purchaser for value. (His Lordship then stated the facts of the case as above, and continued.) Both of the Courts below have held, that the sales or conveyances to Gopal Das under the zemindar's decree, and to Gopal Das and Chota Rakhai Das from the two attorneys, were benami transactions for Baney Madhub ; and that finding binds us on this appeal. Perhaps the evidence as it now stands may be sufficient to support such finding that these two sales or conveyances were actually benami ; but speaking for myself, I must say that I am by no means fully satisfied that they were benami. But whether they were benami or not, does not appear to us to affect the present question. The question which we have to decide is, whether the plaintiff in this case is a purchaser for value without notice. In dealing with that question the District Judge has considered that the plaintiff had notice, at the time of his purchase, of all the circumstances which have been subsequently proved in evidence in this case—of all the circumstances which led both the Courts below to hold that the two original transactions were merely benami transactions. Now, what are these circumstances ? *Firstly*, with regard to the first sale under the zemindar's decree, the learned District Judge has expressed his opinion that the rent was purposely allowed to fall into arrears. But he was hardly justified in pressing that against the plaintiff, because the rent-suit instituted by the zemindar was instituted previously to Baney Madhub's conviction, and therefore, if rent had been allowed to fall into arrears, it had been so allowed by Baney Madhub himself. *Secondly*, the learned Judge next relies upon the fact, as found by him, that Gopal Das, the ostensible purchaser at that sale, had no funds with which he could make the purchase. But though that may have been proved in this suit, it does not necessarily follow that the plaintiff was aware of it at the date of his purchase. Indeed, Gopal Das was entitled to a share in family property ; and, from the circumstance that the plaintiff, on his purchase, took from Gopal Das a guarantee to which I shall refer presently, it might be inferred, that the plaintiff considered Gopal Das as a person not without means. *Thirdly*, the learned Judge relied on the fact proved [203] in this suit, that, after the purchase by Gopal Das, the rents of the property were paid out of the funds of Baney Madhub, and not out of the funds of Gopal Das ; but the knowledge of this fact does not appear to have been brought home to the



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no enquiry. Now it is difficult to understand how the learned Judge came to that conclusion, because he afterwards finds that "the only enquiry, plaintiff says he made, was a question to Dindyal, one of defendant's attorneys, whether there was any harm in buying—a question which Dindyal admits he answered in the negative." Now [205] Dindyal was the attorney who did not join in the conveyance of August 1870. But he admits that this enquiry was made of him, and that he made that answer; and it further appears that another of the attorneys was an attesting witness to the plaintiff's conveyance. We think, therefore, that the learned Judge was not justified in finding that the plaintiff made no enquiry; and it is difficult for us to say how he could make any other or more satisfactory enquiry than he actually did, from the authorized agents of the defendant. The defendant was himself in jail; and it was scarcely to be expected that the plaintiff would go and enquire of the defendant himself in the jail; the plaintiff, in fact, did the next best thing. He went to the authorized and trusted agents of the defendant and made enquiry of them, and the result of that enquiry was to the effect, that "there was no harm in buying," in other words, that he would be safe in purchasing from the ostensible vendors. Then the learned Judge further finds that the plaintiff must be fixed with constructive notice, because he did not ask for the accounts or zemindary papers, and did not obtain the deeds; but with respect to the papers, we understand that the zemindary papers were given up to the plaintiff on his purchase, and with respect to not obtaining the deeds, such negligence might be important as against a third person with whom they might have been deposited for value; but is of comparative unimportance as against Baney Madhub, who had placed his affair in the hands of attorneys, one at least of whom had assured the plaintiff that he was safe in purchasing. Moreover, the neglect to ask for deeds, in a country where registration prevails, applies with but slight force as already explained. But what the learned Judge seems principally to have relied upon, is the fact, that, in the conveyance to the purchaser from the ostensible vendors, there is a covenant or guarantee of title from them to him, to this effect, that they undertake or guarantee, that there is no other person having any right in the property. Now, the same observation applies to this guarantee as applies to the kistbundi, viz., it is certainly unusual, and not to be expected that mere benamidars who have no interest whatever in the property, should take upon themselves the personal liabilities [206] and responsibilities of a guarantee; and, if it is an unusual thing to have such guarantee in a deed of conveyance, the reason for its insertion may have been, that the plaintiff did make enquiries for the deeds, and with respect to the title, before he completed his purchase. He, in fact, made enquiries of the agents of the defendant. The agents of the defendant allowed him to believe that the sale was a proper one, and upon that he completed his purchase. We, therefore, think that there is no ground in this case for fixing the plaintiff with constructive notice of any of the circumstances, which, as the Courts below have held, prove that the conveyances to the ostensible vendors of the plaintiff were benami transactions; and this being so, and the first Court having held that he paid full value on his purchase, and the District Judge not having come to any contrary finding, we think he must be treated as a purchaser for value without notice, and that therefore his title is good, and that he is entitled to recover as against the defendant. It may be that there has been a fraud committed against the defendant by his agents, but if that is so, the principal is the person who ought to suffer for the fraud of the agent, and not a stranger—*Hunter v. Walters* (L. R. 7 Ch. App., 85), which case also shows how the doctrine of constructive notice may be attempted to be pushed to an almost absurd extent. This case in fact falls within the language of the Privy Council in the case of *Ram Commar Koon-*

*doo v. McQueen* (11 B. L. R., 53), which case no doubt was very much stronger in its circumstances than the present case. But the language which I am about to quote is appropriate to the present case: "It is a principle of natural equity which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner, in the belief that he is the real owner, the man who so allows the other to hold himself out, shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing, either that he had direct notice, or something which amounts to constructive notice of the real title, or that there existed circumstances which ought to have put him upon an enquiry that, if prosecuted, would have led to a discovery of it." Now neither of the Courts below in this case have held that there was actual notice; and we are of opinion that the circumstances stated in the judgment of the lower Appellate Court are not sufficient to fix the plaintiff with constructive notice, or ought to have put him upon an enquiry which, if prosecuted, would have led to the discovery that his ostensible vendors were benamidars.

One other question has arisen in this case which was not raised at the bar, and which certainly did not arise in the Courts below. No certificate having been granted in the sale to Gopal Das of the eight annas under the zemindar's decree, whether even an ostensible title would pass to Gopal Das which he could convey to the plaintiff. That question, as I have said, was not raised in the Courts below; and, in fact, it was admitted by the defendant in the pleadings that there was a sale under the zemindar's decree to Gopal Das. We think, therefore, it is too late now to raise any objection on that point. Upon the question being started by the Court, it was pointed out, that s. 259 of the former Code of Civil Procedure directs that, after the sale of immoveable property shall have become absolute, the Court shall grant a certificate, which is to be taken and deemed to be a valid transfer of such right, title, and interest. Even if any objection could now be taken on this point, we do not think these words contemplate that nothing would pass to a purchaser unless a certificate were issued; for we are of opinion, that the order affirming the sale would be sufficient to pass a title to the purchaser; and the certificate, which might afterwards be obtained by him, would be merely evidence that the property so passed. The appellant will be entitled to his costs of this appeal and of the Courts below.

After this decision, no order will be necessary in Rule No. 1943 of 1880, which will drop of itself.

*Appeal allowed.*

#### NOTES.

#### [WHETHER REGISTRATION IS CONSTRUCTIVE NOTICE—

That registration is not constructive notice is the view of the Calcutta High Court:— 7 Cal. 199; 22 Cal. 185; 23 Cal. 790; 27 Cal. 358; 30 Cal. 599; also of the Madras High Court, 15 Mad. 268. In the following cases it was held that registration would be constructive notice, by the Bombay and the Allahabad High Courts:—

6 Bom. 168; 9 Bom. 127; 14 Bom. 506; 17 Bom. 741; 26 Bom. 56; 6 Bom. L. R. 1043; see also 27 Bom. 452; 29 Bom. 199. 13 All. 482; 16 All. 478; 30 All. 82.

#### SALE CERTIFICATE:—

The same view was taken in (1888) 9 Cal. 842; (1887) 1 Mad. 296; (1888) 5 All. 305.

There have been many changes in the law and conflict of decisions on the subject; a succinct account of these is given by Woodroffe and Ameer Ali in their notes to G. P. C. 1906, sec. 65.]

[209] APPELLATE CRIMINAL.

The 6th April, 1881.

PRESENT:

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE PRINSEP.

In the matter of Gyan Chunder Roy and others.....Petitioners

versus

Protap Chunder Dass.....Opposite Party.\*

*False charge—Dismissal of Complaint—Prosecution under s. 211 of Penal Code (Act XLV of 1860)—Criminal Procedure Code (Act X of 1872), ss. 144, 147, 468, 470 and 471.*

Where a charge had been preferred against a person, and the Magistrate, before whom it was heard, after hearing the statement of the complainant, but not those of his witnesses, dismissed the complaint, and subsequently, on the application of the person charged, granted him leave under s. 470 to prosecute the complainant for bringing a false charge:

*Held*, that the proceedings were not irregular, and that the Magistrate was justified in acting as he had done.

*Held also*, that there is a distinction in the proceedings to be adopted when a sanction is given under s. 470, and the institution by the Court of its own motion of proceeding under s. 471.

*Syed Nissar Hossein v. Ramgolam Singh* (25 W. R. Cr. Rul., 10) dissented from (See however, *In the matter of Sokhina Bibee*, ante, p. 87).

IN this case the petitioner, Gyan Chunder Roy, made a complaint to the police, which, after investigation, was reported to the Magistrate as false. Gyan Chunder then repeated his complaint before the Magistrate, who examined him under s. 144 of the Code of Criminal Procedure, and dismissed the complaint under s. 147. A fortnight later, the person accused applied to the Magistrate, and obtained sanction to prosecute the complainant for having falsely charged him. Proceedings were thereupon commenced before another Magistrate, who, on the 20th December, committed the petitioner to the Court of Session. The petitioner then applied to the High Court to have the order, dismissing his complaint, set aside, and the order sanctioning the criminal prosecution and the proceedings [209] taken thereunder, quashed, on the ground that the Magistrate was not competent to dismiss the complaint or to sanction the prosecution [under s. 211 of the Indian Penal Code] without first examining all the witnesses offered to prove it.

A rule was accordingly issued, calling on the opposite party to show cause why these orders should not be set aside.

Mr. M. Ghose, Mr. Evans, Baboo Doorga Mohun Dass, and Baboo Lall Mohun Dass, in support of the rule.

The Advocate-General (Mr. Paul), Mr. Branson and Baboo Baikunt Nath Dass showed cause.

The Judgments of the Court (CUNNINGHAM and PRINSEP, JJ.) were as follows:—

**Cunningham, J.**—The question raised in this case is the competence of a Magistrate, under s. 147 of the Criminal Procedure Code, to dismiss a complaint; and, under s. 468 of the Code, to sanction the prosecution of the complainant

\* Criminal Motion, No. 2 of 1881, against the order of T. E. Coxhead, Esq., Officiating Magistrate of Dacca, dated 18th November 1880.

for making a false charge, without hearing the complainant's evidence. I see no reason to question the legality of the Magistrate's proceeding. Section 147 empowers the Magistrate to dismiss the complaint, if, after examining the complainant, there is, in his judgment, no sufficient ground for proceeding; and there is nothing in s. 468 to indicate that any particular proceeding on the part of the Court giving the sanction is essential to its validity,—such as, for instance, is necessary in the case of a Court committing a case or sending it for inquiry under s. 471. I am unable to concur in the opinion expressed on this point in *Syed Nissar Hossein v. Ramgolam Singh* (25 W. R., Cr. Rul., 10). The application must be rejected.

**Prinsep, J.** (after stating the facts as above continued):—Several cases decided by this Court have been cited by Mr. M. Ghose in support of his contention; but it appears to me that, with the exception of one case, *Syed Nissar Hossein v. Ramgolam Singh* (25 W. R., Cr. Rul., 10), none of them are precisely in point.

There is clearly a distinction between a sanction given under [210] s. 470\* of the Criminal Procedure Code and the institution of proceedings by a Court of its own motion, which is provided for by s. 471. The case now before us is one coming under s. 470, which refers to private prosecutions, under leave obtained, for certain offences specified in ss. 467, 468, and 469. Before sanction to prosecute can properly be given, it is necessary that the proceedings on the original complaint should have terminated in a regular manner. The Court should then consider, as has been pointed out in the cases of *The Queen v. Mahomed Hossain* (16 W. R., Cr. Rul., 37), and *Radha Nauth Banerjee v. Kengalee Mollah* (Marsh., 407), whether there are good grounds for the application made to it, or whether it has been made solely for the purpose of oppressing and harassing an adversary and preventing him from taking any further legal steps to which he may be entitled, as has been pointed out also in the case of *The Queen v. Baijoo Lall* (I. L. R., 1 Cal., 450; see p. 455): "It is by no means, in every instance in which a party fails to prove his case, that the Judge, who has decided against such party, is justified in exercising the power given him by this section. So long as it is a case as to which there is any possible doubt, or in which it is not perfectly certain that the Judge's decision must be upheld in the event of there being an appeal in the civil suit, the Judge acts indiscreetly and wrongly, if, the moment he has given his judgment in the civil suit, he exercises the power given him by this section. At the same time if, in the course of the civil trial, the Judge has before him clear and unmistakable proof of a criminal offence, and if, after the trial is over, he on consideration, thinks it necessary to proceed at once, of course it may be right to do so. Judges should, however, bear in mind that criminal prosecutions are frequently suggested by successful litigants merely to prevent an appeal in the civil suit; and they should be careful not to lend themselves to such suggestions too readily. They should also recollect that

\* [Sec. 470:—The sanction referred to in sections four hundred and sixty-seven, four hundred and sixty-eight, and four hundred and sixty-nine, may be expressed in general terms, and need not name the accused person.

Such sanction may be given at any time, and a sanction under any one of the three last preceding sections shall be deemed sufficient authority for the Court to amend the charge to one of an offence coming within either of the two remaining sections, if the facts disclose such offence.

*Explanation.*—In cases under this chapter, the report or application of the public servant or Court shall be deemed sufficient complaint.]

when they proceed under s. 471, the responsibility for the prosecution rests upon the Judge entirely; such a prosecution being a very different thing from a prosecution [211] instituted on the complaint of a private party and merely sanctioned by the Court under s. 468." In the cases cited before us,—that is to say, *The Queen v. Gour Mohun Singh* (16 W. R. Cr. Rul., 44), *Ashrof Ali v. The Empress* (I. L. R. 5 Cal., 281), and *In re Russick Lall Mullick* (7 C. L. R., 382),—prosecutions were ordered simply on the report of the police that the complaints made had, on investigation, been found to be false. In all these cases, and also in the case of *The Empress v. Karimdad* (I. L. R., 6. Cal., 496), recently decided by GARTH, C. J., and FIELD, J., on the 9th December 1880, the Court has pointed out the impropriety of acting solely on the report of the police, and without having considered the statement of the complainant or the evidence tendered by him. In the cases of *The Queen v. Heera Lall Ghose* (13 W. R. Cr. Rul., 37) and *In re Gangoo Singh* (2 C. L. R., 389), the Magistrate had commenced to hear the evidence tendered by the complainant and closed the proceedings summarily without hearing all the witnesses cited, so as to make the order of discharge an improper order within the terms of s. 215, expl. iii of the Code of Criminal Procedure. These are cases very different from the case now before us, in which, after hearing the complainant, the Magistrate was fully competent to dismiss the complaint, and so put an end to all proceedings before him.

In *In re Choolhase Telee* (2 C. L. R., 315), the Magistrate ordered a prosecution for a false complaint after he had passed an order of dismissal under s. 147, but in that case he took upon himself to direct the institution of a prosecution acting under s. 471, and he was, therefore, under the terms of that section, bound to make such preliminary enquiry as might be necessary before directing a prosecution to be instituted; and the Court there held that he was bound to give the complainant an opportunity of showing that there were no grounds for instituting such a prosecution. That, however, is a very different case from the present one, in which the responsibility of instituting a criminal prosecution was accepted by a private party, [212] the proceedings on the original complaint had regularly terminated, and from what had already taken place before him, the Magistrate was satisfied that the leave asked for should be granted.

I concur in the view of the law expressed by JACKSON, J., in *In re Biyogi Bhagut* (4 Cal., 134). In that case, however, the order was set aside on the ground that the order of dismissal under s. 147 had not been properly passed, because the complainant had not been examined.

It was certainly open to the complainant in the case now before us, if he thought proper, to apply for an order under s. 298, that a further inquiry into his complaint might be made, notwithstanding the order of dismissal; but he did not think it proper to do so, nor has he at any time, until the lapse of some six weeks, and after, on proceedings taken against him, he has been committed to the Court of Session for making a false complaint, thought proper to take any steps to have his complaint retried, or to have any witnesses examined.

The fact that he has taken no action in the matter seems to me to distinguish the present case from *Syed Nissar Hossein v. Ramgolam Singh* (25 W. R., Cr. Rul., 10). But even if this were not so, I am not disposed to concur in the view laid down by the learned Judges in that case when they say that it was "clearly illegal on the part of the Assistant Magistrate and Magistrate to give sanction under s. 211 of the Penal Code without giving the petitioner an opportunity of adducing evidence to prove that the charge which he made was a true one."

On these grounds I am unable to find anything illegal in the proceedings which have already taken place; and I accordingly concur in discharging this rule.

*Rule discharged.*

**NOTES.**

[See also (1888) 13 Bom. 109; (1886) 10 Mad. 232, F. R.; (1887) 14 Cal. 707.]

**[213] APPELLATE CIVIL.**

*The 21st March, 1881.*

**PRESENT:**

**MR. JUSTICE MORRIS AND MR. JUSTICE TOTTENHAM.**

Miller, Official Assignee and Assignee of the Estate of Gobind Chand Dugur, and another, Insolvents.....Judgment-Debtors

*versus*

Mon Mohun Roy.....Decree-Holder.\*

*Insolvency—Vesting Order—Attachment before judgment after vesting Order.*

An attachment before judgment has no effect against the Official Assignee, who holds the property of the judgment-debtors under a vesting order of Court, made before the order for attachment was passed.

*Anand Chandra Pal v. Panchilal Sarma* (5 B. L. R., 691) distinguished.

*Baboo Nil Madhub Bose and Baboo Sahgram Singh* for the Appellant.

*Baboo Gurudas Banerjee and Baboo Rashbehary Ghose* for the Respondent.

THE facts of the case appear from the **Judgment** of the Court (MORRIS and TOTTENHAM, JJ.), which was delivered by

**Morris, J.**—We think that an attachment before judgment cannot have effect against the Official Assignee who holds the property of the judgment-debtors under a vesting order of Court made before the order for attachment in question was passed. The District Judge comes to the opposite conclusion on the authority of the case of *Anand Chandra Pal v. Panchilal Sarma* (5 B. L. R., 691). But that case differs in two material respects from the present case. In it the question was, whether attachment after judgment shall have priority over the vesting order, and not, as here, attachment before judgment; and *secondly*, that case was governed by the procedure prescribed in Act VIII of 1859, under which the first attaching-creditor had priority over other [214] judgment-creditors. But no such priority is allowed under the present Procedure Code, Act X of 1877. It seems to us that this point, *viz.*, that attachment before judgment does not take priority over the vesting order, has been distinctly ruled in *In the matter of Gocool Doss Soonderjee, an Insolvent* (1 Ind. Jur., N. S. 327) *Bank of Bengal v. Newton* (12 B. L. R., App. 1) and *Gamble v. Bholagiri* (2 Bom. H. C., 146). In the last case Sir RICHARD COUCH says distinctly, that an attachment before judgment "cannot be regarded as the inception of an execution, or as binding the goods in such a manner as to exclude the right of the Official Assignee accruing after such attachment, but before judgment and warrant for execution."

\* Appeal from Order, No. 828 of 1880, against the order of T. T. Allen, Esq., Judge of Rajshahye, dated the 30th August 1880, reversing the order of Baboo Gonesh Chunder Chowdhry, Subordinate Judge of that district, dated the 3rd May 1880.

We, therefore, set aside the judgment of the District Judge and direct that the execution be stayed as against Gobind Chand Dugur and Sitab Chand Dugur with costs.

*Appeal allowed.*

**NOTES.**

[See *Jitmal v. Ramchand* (1905) 7 Bom. L. R. 488. See also (1885) 7 All. 752.]

[7 Cal. 215]

*The 7th April, 1881.*

PRESENT :

MR. JUSTICE PONTIFEX AND MR. JUSTICE FIELD.

Roghoonath Mundul and another.....Plaintiffs

*versus*

Juggut Bundhoo Bose.....Defendant.\*

*Res judicata—Suit for rent—suit for measurement—Civil Procedure Code  
(Act X of 1877), s. 13.*

"In a suit by ryots against their zamindar, praying for measurement of certain land, and for a declaration of the amount of yearly rental, it appeared that, in a previous suit for rent by the zamindar against the ryots, the ryots had alleged that the amount of rent and the extent of land had been overstated by the zamindar, but the Court decided that the ryots were bound by a jumma bundi signed by them, and refused to try whether the extent of land had been overstated.

*Held*, that the present suit was not barred as *res judicata*.

THE facts of this case sufficiently appear from the judgments.

[215] Baboo Boikantnath Doss for the Appellants.

Baboo Chunder Madhab Ghose and Baboo Bussunt Coomar Bose for the Respondent.—

The following Judgments of the Court (PONTIFEX and FIELD, JJ.) were delivered :—

**Pontifex, J.**—We think the decision of the lower Appellate Court in this case must be reversed. It appears that the defendant in the present suit instituted a suit, No. 43 of 1877, against the present plaintiffs, claiming that rent to the amount of Rs. 27-2-3-2-2 was due to him, in respect of former years on account of a certain quantity of land. The present plaintiffs, who were defendants in that suit, alleged that the amount of rent and the extent of land had both been overstated by the plaintiffs. In deciding that suit the Subordinate Judge held, that the present plaintiffs, who were defendants in that case, were bound by a jumma bundi which they had signed, and which stated the amount of rent as claimed in that plaint, and being so bound, the Subordinate Judge refused to try whether the extent of land had been overstated or not by the then plaintiffs. After the decision of that case the present suit was instituted, in which the plaintiffs pray, notwithstanding the former decision, that their land may be measured, and that their rent may be charged according to the strict measurement of the land.

\* Appeal from Appellate Decree, No. 244 of 1880, against the decree of Baboo Gungachurn Sircar, Subordinate Judge of Dacca, dated the 24th of September 1879, affirming the decree of Baboo P. N. Banerjee, First Munsif of Moonsheegunge, dated the 15th August 1878.



Both the Courts below have held that this suit is barred, the previous decision being *res judicata*. Now, if a measurement had been ordered in the former suit, and if upon such measurement it had been found that the present plaintiffs held the quantity of land which they were alleged to have held in the former suit, that would have been a *res judicata*, unless the plaintiffs proved subsequent relinquishment of part of the land. Speaking for myself I think it doubtful whether, in the former suit, which was for *arrears* of rent, the present plaintiffs, as defendants, were entitled to insist that a measurement of land should be had. They, it seems to me, were bound to pay, for the past years, the rent which they were accustomed to pay until [216] they took proceedings to get the rent adjusted according to the actual quantity of land in their holding. But whether that is so or not, we think, according to the proper construction of s. 13 of the new Procedure Code, that the former decree cannot be treated as *res judicata*, for, admitting for the sake of argument that the measurement of the land had been a matter directly and substantially in issue in that suit under explanation 2, yet it cannot be said that such matter was heard and finally decided by the Judge in the former suit, and not having been heard and finally decided, the decree in the former suit would not affect this suit as *res judicata* under s. 13. I think, therefore, that the case should go back to the Court of first instance to proceed with the case. The costs in this appeal will be costs in the cause.

**Field, J.**—I am of the same opinion. The question of the quantity of land in the ryots possession was determined in the former suit upon a jummaundi signed by the ryots. The entry in this jummaundi so signed by them, had merely the effect of an admission of the quantity of land in their possession at that particular time. It seems clear to my mind, that that admission as to the quantity of land then in their possession, cannot estop them from showing in the present case the quantity of land which they now occupy. The former suit was brought to recover rent which had fallen due before its institution. The present suit (although the plaint contains much that might well have been omitted) is substantially a suit for abatement. It is a suit which has no concern with rent which has already fallen due; but seeks to have it determined, for the purposes of the future, what rent the ryot is bound to pay to his landlord. Section 19 of the Rent Law provides, that a ryot having a right of occupancy shall be entitled to claim an abatement of the rent previously paid by him, if the quantity of land held by the ryot has been proved by measurement to be less than the quantity for which rent has been previously paid by him. The provisions of this section are peculiarly applicable to a case in which rent is paid at so much per bigha, kani, or other local unit of measurement. Where rent is computed and paid in this manner, the ryot is entitled to have a measurement at any time; and if the result [217] of such measurement shows that he holds less land than he has been paying rent for, he is entitled to an order for abatement, which will have prospective effect. In the present case the jummaundi signed by the ryots, and upon which the previous suit for rent was decreed, contains the dachs comprising the ryot's jumma and the rent of each particular dagh. The ryots called upon their landlord to produce another jummaundi, which contains further the area of each dagh, and the rate of rent payable therefor. I think that these two jummaundis may fairly be taken together; and, taking them together, it is clear, that the ryots pay their rent in this case at a certain rate per kani, and this being so, it is clear that the quantity of land in each dagh, and the total quantity of land in the occupation of the ryots, is an essential factor in determining the rent to be paid by them; in other words, that the rent



previously paid by them has been adjusted with reference to the quantity of land held by them. They now seek to show, for the purpose of future years, and the rent to be paid by them hereafter, that the quantity of land held by them can be proved by measurement to be less than the quantity for which rent has been previously paid by them. Section 19 of the Rent Act clearly gives them the right to have this question determined; and seeking to have this question determined, they are not attempting to adjudicate over again the question determined in the former rent suit which was concerned only with the quantity of land in their possession during the years for the rent of which that suit was brought.

*Appeal allowed.*

#### NOTES.

#### [RES JUDICATA—ISSUE NOT DECIDED IN PREVIOUS SUIT—

A decision may be *res judicata* though it might have been *uncontested* or might have proceeded on *admissions*:—7 Cal. 298; 11 C. L. R. 483; 19 Cal. 656, 20 Cal. 505; 1 C. W. N. 120.

This case is explained by *Hukm Chand* in his *Civil Procedure*, vol. I. (1900), p. 187, as having turned on the ground that the question of the extent of the land for which the defendant had been paying rent for the land claimed, even if relevant in the earlier suit, had not been heard or determined in it. The decision of (1893) 21 Cal. 296 is similarly explained.

See also (1886) 8 All. 282, which deals with disposal on technical grounds; (1893) 3 O. C. 273.]

### [218] ORIGINAL CIVIL.

*The 3rd May, 1881.*

PRESENT :

MR. JUSTICE WILSON.

BALLIN

*versus*

BALLIN and others.

#### *Will—Gift to children on their attaining twenty-one—Contingent gift.*

Where words of contingency form part of the description of the class of persons to take, as in the case of a gift to those "who shall attain the age of twenty-one," the words must receive their natural construction, and no estate vests in any one till he attains the prescribed age. In such a case there must be something in the context pointing to a different construction, or something in the will inconsistent with the literal construction, to justify a Court in adopting any but the literal construction.

In the case of words of contingency occurring in the description of the class of persons to take, a mere gift over is not sufficient to change their meaning.

THIS was a suit brought on the 17th February 1879 for the construction of the will of one Anna Maria Ballin.

It appeared from the plaint that the testatrix died on the 18th July 1863, having made a will bearing date the 19th May 1863, and that her will was proved by the Administrator-General of Bengal, and contained, amongst other directions, the following clause providing for setting apart a portion of the rents of No. 33,

theatre Road, towards satisfying a mortgage, and "after satisfaction thereof upon trust to pay the rents to my daughter Mary Margaret for life, with remainder to the use of the children of my said daughter, who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, in equal shares in fee-simple. But in the event of there being no child of my said daughter Mary Margaret, or no such child being a son or sons who shall attain the said age, or being a daughter or daughters who shall attain that age or marry and leave issue, to the use of the children of my daughter Esther Handley Eliza, the wife of William Hamilton Bartlett, hereinafter named; and the children of my son John James Graham Ballin, who being a son or sons shall attain the age of twenty-one years, or being [219] a daughter or daughters shall attain that age or marry, in equal shares in fee-simple." Mary Margaret Ballin, the tenant-for-life, died unmarried on the 13th March 1867, leaving the defendant Samuel H. G. Ballin (a lunatic), the plaintiff, and the defendant E. H. E. Bartlett, then the wife of the said William H. Bartlett, her next-of-kin, her surviving. At the time of the death of the tenant-for-life, the plaintiff had one child alive. Two others were born subsequently, and these children represented three of the infant defendants. Esther Handley Eliza Bartlett had two children, both alive on the date of the death of the tenant-for-life, viz., the two remaining infant defendants.

Since the death of the tenant-for-life the Administrator-General had received the rents of the house No. 30, Theatre Road, and applied part of such rents to the maintenance of the children of the plaintiff and of Mrs. Bartlett, leaving the remaining portion to accumulate.

The plaintiff then brought this present suit against S. H. G. Ballin (the lunatic), Esther H. E. Bartlett and her infant children, one of whom had married in 1881, and his own infant children and the Administrator-General of Bengal, for the construction of the will, alleging an intestacy in respect of the rents of the said house between the date of the death of the testatrix and the date at which it might be held that the house became vested in any of the devisees under the will.

The lunatic defendant, by his guardian *ad litem*, alleged the intestacy before mentioned, and submitted his rights to the Court.

The defendant E. H. E. Bartlett, for herself and her children, alleged that, on the death of the tenant-for-life, all the infant defendants took vested interests under the will, subject to their interests being divested, should they or neither of them being a son attain the age of twenty-one, or being a daughter attain that age or marry, and submitted that there was no such intestacy as alleged.

The children of the plaintiff, by their next friend, submitted their rights to the Court. The Administrator-General stated that his predecessor in office had applied the rents to the maintenance of the infant children as alleged, and that no other [220] claim had been advanced, and submitted the construction of the will to the Court.

Mr. Trevelyan for the plaintiff stated that the plaintiff was only interested as far as his children were concerned, and cited the following case—*Festing v. Allen* (5 Hare, 573)—to show that the gift was contingent. [WILSON, J.—The Judgment in *Festing v. Allen* (5 Hare, 573)—does not mean that the children must attain twenty-one during the lifetime of the tenant-for-life.] He further cited *Browne v. Browne* (3 Sm. & G., 568), *Brackenbury v. Gibbons* (L. R., 2 Ch. D., 417), *Muskett v. Eaton* (L. R., 1 Ch. D., 435), and *Newman v. Newman*, (10 Sim., 51).

Mr. Allen for the lunatic, the heir-at-law.—The gift is to a contingent class, and is very near to *Festing v. Allen* (5 Hare, 573). Where the time of payment is the essence of the gift, the bequest is contingent; he also cited *Hanson v. Graham* (6 Ves. 239), *Lloyd v. Lloyd* (3 K. & J., 20), and 2 Jarman, pages 149, 157, as showing the construction to be given where the period of vesting is the period of distribution; and *Haughton v. Harrison* (2 Atk., 329), as to the disposition of income before the contingent legacy vests; and *Showe v. Cunliffe* (4 Bro. Ch. Cases, 142), as showing that where a legacy depends on a contingency, the intermediate interest between the death of the tenant-for-life and the contingency happening, does not follow the principal, but falls into the residue, and if there is no residuary legatee as in the present case, then the heir-at-law will take.

Mr. T. A. Apcar for Mr. Bartlett and children.—These children were all born during the lifetime of the tenant-for-life; the class was therefore ascertained at the death of the tenant-for-life; but the distribution was postponed. *Festing v. Allen* (5 Hare, 573) is now no authority; it has been disapproved of in *Jull v. [221] Jacobs* (L. R., 3 Ch. D., 703) and in *Browne v. Browne* (3 Sm. & G., 568). In *Riley v. Garnett* (3 De G. & Sm., 629), the children were held to take vested equitable estates subject to be divested. This was long after *Festing v. Allen* (5 Hare, 573). See also *Phipps v. Ackers* (9 Cl. & F., 583), and 2 Jarman, page 143, to show that children born before period of distribution are let in; and page 148, as to children born after that period. I submit that the interests were vested at the time of the death of the tenant-for-life.

Mr. Sale for the children of the plaintiff.—One of my clients was born before the death of the tenant-for-life, the other two after. I rely on the rule laid down in *Maszyk v. Fergusson* (I. L. R., 4 Cal., 670). That case was decided under the Succession Act; but PONTIFEX, J., held, that the Succession Act was nothing but English law modified. He further cited *Leake v. Robinson* (2 Mer., 363), *Whitbread v. Lord St. John* (10 Ves., 152), *Hoste v. Pratt* (3 Ves., 730), *Gilmore v. Severn* (I B. C. C., 581), as showing that all the children were entitled.

Mr. Stokoe (with him Mr. Collinson), for the Administrator-General, cited *Bullock v. Stones* (2 Ves., 521), *Glanvill v. Glanvill* (2 Mer., 38; 1 Jarman, 617, 618) as to whether a future general devise carries income—*Gibson v. Montfort* (1 Ves., 485), and contended that the implied trust was in favour of the children.

Wilson, J.—This is a suit brought to determine the construction of the will of Mrs. Anna Maria Ballin.

The will is prior to the Succession Act; and has, therefore, to be construed according to the rules of English law without reference to that Act.

The will is somewhat informally framed. It commences by [222] certain specific bequests and devises. It proceeds:—"I bequeath the residue of my personal estate to the Administrator-General, upon trust, to stand possessed of my dwelling-house and premises situate No. 30, Theatre Road," and another dwelling-house, and the residue of the personal estate, upon trust, till a mortgage-debt was paid off, to pay a monthly sum to the testatrix's daughter Mary Margaret, and subject to that payment to apply the rents and profits in satisfaction of the mortgage. "And after satisfaction of the said mortgage-debt as to my said house and premises situate No. 30, Theatre Road, upon trust, to pay the rents and profits thereof to my said daughter Mary Margaret during her life, with remainder to the use of the children of my said daughter Mary Margaret, who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, in equal shares

in-fee-simple. But in the event of there being no child of my said daughter Mary Margaret, or no such child being a son or sons who shall attain that age, or being a daughter or daughters who shall attain that age or marry and have issue, to the use of the children of my daughter Esther Handley Eliza, the wife of William Hamilton Bartlett, and the children of my son John Graham Ballin, who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, in equal shares in-fee-simple." Mary Margaret, the testatrix's daughter, died about 1860; unmarried. Mrs. Bartlett has had two children, both still living: William Pigott, born the 8th of February 1860; and Maud Mary, born the 23rd February 1862, and married the 26th January 1881.

John Ballin has had three children who are still living: Florence, born the 5th December 1865; Herbert Askin, born the 1st June 1867; and Cecil James, born the 18th October 1868.

The heir-at-law of the testatrix was her eldest son, the defendant Samuel Ballin, a lunatic. The plaint in this suit was filed on the 17th of February 1879.

The points for decision are, whether the gifts to the children of Mrs. Bartlett and John Ballin were vested or contingent [223] upon their attaining twenty-one; and in the latter case, who is entitled to the rents and profits in the meantime.

A number of cases were referred to, in which words apparently importing a contingency have been held not to prevent the vesting of the estate; cases of gifts to a class of persons "on their attaining twenty-one," or "when they shall attain twenty-one," or "if they shall attain 21," in which, by reason of the context, the words, apparently of contingency, have been held only to apply to the period of enjoyment, not to the vesting, or else to create a condition subsequent, divesting the estate if the age be not reached. The earliest of these was *Boraston's case* (3 Rep., 19). Among the latest are *Andrew v. Andrew* (L. R., 1 Ch. D., 410, and *Muskett v. Eaton* (L. R., 1 Ch. Div. 435).

On the other hand, a series of cases have decided that where the words of contingency form part of the description of the class of persons to take, where, as in this case, the gift is to those "who shall attain the age of twenty-one," the words must receive their natural construction, and no estate vests in any one till he attains the prescribed age. Of this class of cases, *Festing v. Allen* (5 Hare, 573) and *Bull v. Pritchard* (5 Hare, 567), are leading cases. It is true that in *Browne v. Browne* (3 Sm. and G., 568), Stuart, V. C., refused to follow *Festing v. Allen* (5 Hare, 573); and in *Jull v. Jacobs* (L. R., 3 Ch. D. 703), Malins, V. C., expresses disapproval of the same case. I think it clear, however, upon all the authorities, that in such cases there must, at any rate, be something, in the context pointing to a different construction, or something in the will inconsistent with the literal construction, to justify a Court in adopting any but the literal construction. This seems to be the view taken by Lord Hatherley in interpreting analogous words in *Williams v. Haythorne* (L. R., 6 Ch., 782). In the present case, looking only at the actual devise in question, that to the children of Mrs. Bartlett and of John Ballin, there is no gift over, and nothing in the context which can in any way control the natural meaning of the words of contingency.

The only doubt I felt during the argument arose in this way. [224] The prior gift to the children of Mary Margaret Ballin is in the same terms. And in the case of that devise there is a gift which, it was argued on the authority of *Browne v. Browne* (3 Sm. and G., 568), is sufficient to vest the prior gift. And

it was argued that the testatrix, using the same words twice in her will, must be presumed to use them in the same sense. I do not think this reasoning sound. If words acquire a special meaning by reason of their context, I do not think that meaning can safely be given them when used in a different context. Moreover, in my judgment the foundation of the reasoning fails. For I think the weight of authority is strongly in favour of the proposition, that in the case of words of contingency occurring in the description of the persons to take, a mere gift over is not sufficient to change their meaning.

I hold, therefore, that the gift to the children of Mrs. Bartlett and John Ballin was contingent, and that no son takes any interest till he attains twenty-one, and no daughter till she attains that age or marries. That being so, it is clear that, after the death of Mary Margaret Ballin, and so long as no child had reached twenty-one and no daughter was married, the rents and profits of the house in question belonged to the heir-at-law by reason of intestacy. The rule is clearly laid down by the House of Lords in *Countess of Bective v. Hodgson* (10 H. L. C., 656). Upon Mr. Bartlett's daughter marrying, she became entitled to the rents. On the son attaining twenty-one, he became entitled to an equal share, and each of the children of John Ballin who reaches twenty-one, or in the case of a daughter, who marries, will become entitled to share equally with those already in enjoyment.

The costs of all parties will come out of the estate; and may be paid out of the estate which has been accumulated.

Attorney for the plaintiff: Mr. Orr.

Attorneys for the defendants, the Administrator-General: Messrs. Sanderson & Co.

Attorney for the defendant Mrs. Bartlett: Mr. Harris.

Attorney for the infant defendants: Mr. Simmons.

#### NOTES.

#### [GIFT TO A CLASS STATING QUALIFICATION VESTED OR CONTINGENT—

"There is an important distinction between a devise to definite persons or to a class at twenty-one, and a devise to such of a class as attain twenty-one or those who attain twenty-one. In the latter case the finding or not finding the legatee depends on his attaining a particular qualification, and till the contingency happens, there is no one to whom the doctrine laid down in *Phipps v. Ackers* can apply'. Such a devise therefore will not be vested by a gift over."—Theobald on Wills 6th Edn. (1905) p. 552.

To a similar effect are the decisions in *In re Edwards, Jones v. Jones* (1906) 1 Ch. 570; *In re Mary Whiter, Windsor v. Jones* 105 L. T. 749.]

#### [225] APPELLATE CIVIL.

The 10th February, 1881.

PRESENT :

MR. JUSTICE WILSON AND MR. JUSTICE FIELD

Mano Mohun Ghose and others.....Plaintiffs  
versus.

Mothura Mohun Roy and others.....Defendants.\*

*Limitation—Possession—Onus of Proof—Alluvion—Dispossession—Acts of Ownership.*

In a suit for declaration of title to and recovery of possession of, alluvial lands, which had been diluviated more than twelve years before the institution of the suit, the plaintiffs

\* Appeal from Original Decree, No. 135 of 1879, against the decree of Babu Gunga Churn Sircar, Subordinate Judge of Dacca, dated the 28th December 1878.

proved their title and possession up to the time of diluviation, and alleged that the lands had re-formed within twelve years, without alleging or proving possession during that period. The defendants, on the other hand, alleged, that the re-formation had taken place more than twelve years before suit, and that they had acquired a title to the lands by adverse possession for that period.

*Held*, that in such a case the submergence of the lands after diluvion ought to be presumed until the contrary was shown, and that the onus of proving re-formation before twelve years and adverse possession, was shifted to the defendants.

*Per Wilson, J.*—As a general rule, where a plaintiff claims land from which he alleges he has been dispossessed, the burden is upon him to show possession and dispossession within twelve years.

Proof of possession within twelve years does not necessarily mean proof of acts of ownership within that time. The nature of the proof of possession must depend on the nature of the case.

There are many cases in which the party on whom the burden of proof in the first instance lies, may shift the burden to the other side by proving facts giving rise to a presumption in his favour

In the case of lands gradually diluviated and gradually re-formed, if the diluviation has been more than twelve years before suit, the claimant, unless he can show possession since the re-formation, must at least show that he was in possession down to the date of the diluviation.

Where the true owner is in possession at the time of diluviation, his possession is presumed to continue as long as the land continues submerged. probably also afterwards, until he is dispossessed.

[226] *Per Field, J.*—Although, according to the general rule, it lies upon the plaintiff, who is met with the plea of limitation, to show his own possession within twelve years before the institution of the suit, when the property in dispute is capable of actual and visible possession, yet, in the case of property which is not susceptible of actual and visible possession, an exception from the nature of the thing must be made to the general rule. In such cases, when the title and possession have been proved to be in a certain person up to a certain point of time,—when there has been no transfer of the title to any third person,—and there is no evidence that possession was exercised by a person other than the person having the title, so long as actual visible possession was possible, the possession of the person having the title will be presumed to continue until the property has again become susceptible of actual visible possession. Proof of possession is presumptive proof of ownership, because men generally own the property which they possess. And if the ownership of property is proved, and there is nothing to show that the possession of such property is with any other person other than the owner, it may fairly be presumed to be with the owner. Such a presumption then takes the place of evidence to show the plaintiff's possession within twelve years before suit, of a property in which, from the nature of the thing evidence of actual possession is impossible.

THIS was a suit for declaration of title to, and recovery of possession of, 3,250 bighas of land formed by alluvion on the original site of, and by accretion to, among others, a certain chur known as Chur Rajapore. During the lifetime of the plaintiffs' tather, the lands commenced to be diluviated; and, in the rainy season of the year 1866, were wholly submerged. Subsequently, when the rainy season of the year 1871 was over, the disputed land again began to form by alluvion on the original site of the mouzas, and almost all the land had re-appeared. The plaintiffs continued to pay the fixed sadr jama, although the land was submerged. On attempting to take possession of the newly-formed lands, the plaintiffs were resisted by the defendants, and proceedings were commenced under s. 530 of the Criminal Procedure Code; and on the 30th June 1875, the Magistrate attached the lands under s. 531.\* The defendants contended that the boundaries were not correctly stated; that the

If previous possession cannot be ascertained, Magistrate may attach subject of dispute.

\*[Sec. 531 :—If such Magistrate decides that neither of the parties is in possession, or is unable to satisfy himself as to which person is in possession of the subject of dispute, he may attach it, until a competent Civil Court shall have determined the rights of the parties, or who ought to be in possession.]

plaintiffs had sued not only for the attached land, but also for lands which were not included in the attachment; that the suit was bad by reason of misjoinder; and that it was barred by limitation. The Civil Court Amin made [227] a local investigation, and prepared a map, on which the land claimed by the plaintiffs was marked A and B. The subordinate Judge gave the plaintiffs a decree for the land marked A, but dismissed the suit as to the land marked B on the ground of limitation, holding that, although the plot was a part of the re-formed land of which the plaintiffs' father held possession until it was diluviated, it was incumbent on the plaintiffs to prove that the land was thrown up by the river within twelve years preceding the date of the suit, or that they held possession at any time within that period.

From this decision the plaintiffs appealed.

Mr. *Evans* and Baboo *Sreenath Doss*, Baboo *Doorga Mohun Doss*, and Baboo *Boido Nath Dutt* for the Appellants.

Mr. *Branson* and Baboo *Kali Mohun Doss*, Baboo *Hem Chunder Banerjee*, Baboo *Mohiny Mohun Roy*, Baboo *Boykant Nath Dass*, Baboo *Bussunto Coommar Bose*, and Baboo *Kashi Kant Sen*, for the Respondents.

The following **Judgments** were delivered :—

**Wilson, J.**—This is an appeal from a decree of the Subordinate Judge of Dacca. The suit was brought by the appellants to recover certain chur lands, as being a re-formation on the site of their Chur Rajapore. There is no question that the plaintiffs' father (whose heirs they are) was the owner and in possession of Chur Rajapore until it was diluviated, that the various defendants, or their predecessors in title, were interested in various churs adjacent to Chur Rajapore, that Rajapore and other adjacent churs were, at dates which are disputed diluviated; that re-formations have subsequently taken place; that, from time to time, as re-formation took place, attempts have been made by the parties interested to show that portions of the re-formations were on the site of their own churs; and that, in 1875, disputes having arisen about some re-formed land, the Deputy Magistrate attached certain lands, the extent of which is disputed, leaving the parties interested to sue in a Civil Court. The plaintiffs, therefore, brought this suit, joining as parties all the parties to the attachment-proceedings.

[228] The land claimed in the suit consisted of two plots, marked in the Amin's map A and B. As to plot A, the plaintiffs have obtained a decree, and that decree is not appealed against. As to plot B, two principal groups of defendants resisted the plaintiffs' claim. The defendants Nos. 4, 17, and 18, as interested in a chur known as Adma Munirabad, claimed so much of plot B as lies to the south of a *dune*, indicated in the Amin's map as No. 1.

The defendants Nos. 1 and 2 claimed so much of plot B as lies to the north of that *dune* as belonging to the chur Baboo Chur. The main defences were the same in both cases :

1st. It was denied that the lands in question were re-formation on the site of Rajapore.

2nd. It was alleged that, in the year 1869, the present plaintiffs had, in a summary proceeding under s. 318 of the former Criminal Procedure Code, claimed these same lands, and their claim had been disallowed. And it was said that as they had not brought a suit within three years, their right was barred.

3rd. Each of these groups of defendants set up a title by adverse possession for more than twelve years under the ordinary law of limitation.



The lower Court held in favour of the plaintiffs upon each of the first two questions; but, upon the third question, held in each case in favour of the defendants; and accordingly dismissed the suit so far as it related to plot B.

The appellants dispute the finding of the lower Court upon the third question. The respondents support that finding. They also seek to support the decree of the Court below, on the ground that its findings upon the first and second questions were wrong.

The main questions for our decision are, whether the findings of the lower Court upon these questions are correct. Some other minor points have been raised which I shall notice subsequently.

Upon the first question, whether the lands in dispute are a re-formation on the site of Rajapore, I agree with the Court below. The survey map of 1859-60 shows at once that the plaintiffs' view of the position of Rajapore is approximately [229] correct. And the report and map of the Amin place the matter beyond doubt, if they can be trusted. But it is said that they are not to be trusted. I agree that the reports and maps of Amins in such cases should be examined with caution. In the present case, the work of the Amin bears marks of care and intelligence. He had with him the thak maps of the several thaks in question. He began his work, quite rightly, on the undiluviated lands of Shibsen on the east and north-east of Rajapore, where there were permanent marks easily ascertainable. Having thus obtained trustworthy starting points, he says:—"I have accordingly duly ascertained the distance between the land and the chur from the aforesaid stations, and having successively ascertained the original site of the mouzas mentioned by the parties according to the measurement and bearing of the thak from that place, I have correctly put down the same in the proper place in the map made by me, and demarcated the different mouzas with different colours." His map is before us, and he has annexed his field-book. It is said that his field-book is defective in not giving with sufficient clearness all the details of his measurement. It may be that some points in that field-book might be the better for further explanation. If so, that would have been a good reason for applying in the Court below to have the Amin called and examined. It is no reason why we should upset the finding of the Court below, in the absence of any circumstances throwing doubt upon the correctness of the Amin's method or the accuracy of his results.

The next question is, whether the suit is barred by reason of its not having been brought within three years of the order of the Magistrate in 1869. As to this I agree with the Court below, that the identity of the land then in dispute with that now in dispute has not been established. All that appears is that among the attempts made by various persons to identify parts of the land gradually re-forming, one was made by persons acting for the present plaintiffs to identify some land as Rajapore. The attempt failed, and the claim was dismissed. There is no reason to think that the land then claimed, was or could be, the same as that now in dispute.

[230] The next question is, with regard to each portion of plot B, whether this suit is barred by reason of twelve years' adverse possession. As to this the plaintiffs' case is, that the diluviation of their lands began about 1860, and was completed about 1865; that the re-formation began in 1871, and was completed about 1875. The defendants throw back both events to much earlier dates, and say that they have been in actual occupation of the lands in dispute for far over twelve years.



We have first to enquire upon which side the burden of proof lies. The Subordinate Judge cast the burden upon the plaintiffs, and held that it lay upon them to show, either that the lands were re-formed within twelve years, or that they had been in actual possession within that period. In this I think that the Subordinate Judge was in error.

As it has been contended that the authorities upon this subject are in conflict, it is necessary to consider the matter both from the point of view of principle and from that of authority.

Certain propositions of law upon the subject are undoubted.

It is not disputed that, as a general rule, where a plaintiff claims land from which he alleges he has been dispossessed, the burden is upon him to show possession and dispossession within twelve years—*Maharajah Koowur v. Baboo Nund Lott Singh* (8 Moore's I. A., 199, 220).

Proof of possession within twelve years does not necessarily mean proof of acts of ownership within that time. The nature of the proof of possession must depend on the nature of the case. In the case of a house actually occupied, or land under cultivation, or yielding a rent, proof of possession is easy. In many cases, as of lands incapable of cultivation, jungle or waste lands, uninclosed plots of various kinds, all the proof that can commonly be given is to show possession taken, or acts of ownership done, at some time, which possession will, in law, continue until the possessor by his conduct shows that he means to relinquish his possession, or he is excluded by some one else. These considerations, however, affect the mode of proof, not the burden of proof. The general rule still is, that the plaintiff must prove that he has been dispossessed within twelve years; see *Pandurang Govind v. Balkrishna Hari* (6 Bomb. H. C., 125).

[231] But there are many cases in which the party on whom the burden of proof in the first instance lies, may shift the burden to the other side by proving facts giving rise to a presumption in his favour. We have to consider whether the present plaintiffs have succeeded in doing so, and for that purpose it is necessary to examine the decisions as to the burden of proof in the case of lands gradually diluviated and gradually re-formed.

As to such cases, a second proposition is, I think, beyond question, that when the diluviation has been more than twelve years before suit, the claimant, unless he can show possession since the re-formation, must at least show that he was in possession down to the date of the diluviation.

A third proposition is also, I think, beyond dispute, that where the true owner is in possession at the time of diluviation, his possession is presumed to continue as long as the land continues submerged: probably also afterwards until he is dispossessed.

This proposition, however, would not be sufficient to shift the burden of proof. It would leave it upon the plaintiff; but would enable him to prove his case either by showing the dispossession to have been in fact within twelve years, or that the submergence has continued down to within twelve years, so that his possession cannot have been interfered with more than twelve years ago.

But then arises the question, whether we ought not to presume something further in favour of the plaintiffs, whether, when they have proved their possession down to the period of diluviation, and have shown the diluviation to have occurred at such a date and under such circumstances as in this case, we ought not to presume the submergence and with it the plaintiffs' possession to have continued until the contrary is shown. If this presumption can properly

be made, then the burden is shifted to the defendants of showing adverse possession for twelve years.

Upon principle, I think, such a presumption may properly be made. The well-known presumption in favour of the continuance of a physical condition, in the ordinary course of things likely to continue, until the contrary is shown, is embodied ins. 114\* of the Evidence Act, which section is followed by illustrations [232] and explanations. In the present case it appears, that the total area diluviated was very large, and the process of diluviation and re-formation gradual; that, at the date of the thak map of 1859, the river had not touched Rajapore; and from the survey map of 1859-60, that at the date it had affected a portion of that estate. The evidence shows beyond doubt that the process of diluviation went on afterwards. Under these circumstances, it seems to me, on principle, reasonable to presume that the lands in question continued submerged in march 1865 (which is the material date) until the contrary is shown.

The weight of authority seems to me in favour of the same view.

In the case of *Mohunt Chattoorbhoj Bharti v. The Government of India* (Reg. App., No. 185 of 1877, unreported) the plaintiffs proved that they were in possession of the lands in question in 1846, and that the lands were soon after that time diluviated. This suit was brought in 1869, and the Court (GARTH, C.J., and TOTTENHAM, J.) held, that the burden lay upon the defendants of proving that the suit was barred by limitation. In another case (Reg. App. No. 280 of 1877) it appeared, that the plaintiffs were in possession of the land in dispute up to the diluviation, which took place some time after 1858. The suit was brought in 1876. PONTIFEX AND McDONELL, JJ, held, that the burden lay on the defendant to show that the claim was barred.

In *Radha Gobind Roy v. Inglis* (7 C. L. R., 364) the suit was in respect of soil which had been part of the bed of a lake, but which, by the gradual drying of the lake, had become cultivable land. The defendants relied, amongst other defences, upon limitation. The Privy Council having held first, that the property in the soil, and not a mere right of fishing, was in the plaintiffs, went on to hold further that it lay upon the defendants to show an adverse title by limitation. It does not appear to me that the Privy Council intended in this case to reverse its earlier ruling in the case to which I have already referred. But that Court does appear to me to have laid down a rule applicable to cases analogous to the case before it, which we are bound to follow in the present case, if it is properly within the analogy. And [233] I am unable to see any reasonable distinction between the case of land formed by the gradual drying up of a lake and that of land diluviated and then reformed by the gradual action of a river.

The same rule was followed in a very recent case—*Kally Churn Sahoo v. The Secretary of State* (I. L. R., 6 Cal., 725)—before GARTH, C. J., and WHITE and MACLEAN, JJ.

Two cases have been referred to as authorities to a contrary effect. In *Koomar Runjit Singh v. Schoene, Kilburn* (4 C. L. R., 390), the plaintiffs claimed 700 bighas of land, a re-formation on their site. They alleged diluviation between 1263 and 1270; re-formation between 1270 and 1273; that they had been in actual possession in 1273, and been dispossessed in 1274. The suit

\*[Sec. 114 :—The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case.]

was brought in 1876, corresponding to 1283. The Court (JACKSON and McDONELL, JJ.) held, that the burden of proof was governed by the ordinary rule as laid down in the case referred to in 8 Moore's P. C. And looking at the case as put forward by the plaintiffs themselves, a case of actual possession and dis-possession of cultivable lands after their re-formation, this ruling does not seem to me inconsistent with the others to which I have referred. In this case further it was found, that the plaintiffs had not been in possession since re-formation, and that the bulk of the land had been re-formed for more than twelve years. But a point was raised as to some 200 bighas (the exact amount and its situation not being ascertained) which the Court below was inclined to think might probably have been re-formed within twelve years. The learned Judges in this Court held, that it lay upon the plaintiffs to show which, if any, of the lands in dispute had so re-formed within twelve years. I am not satisfied that there is necessarily any inconsistency with the authorities. I have considered, in holding that where the plaintiffs made their claims upon one ground, and having failed in establishing that case, sought to recover a portion of their claim on a wholly different ground, it lay upon them to show how much they could apply the latter ground to.

In *Mahomed Ibrahim v. Morrison* (I. L. R., 5 Cal. 36), before BIRCH and MITTER, JJ., the plaintiffs claimed land formed by the recession [234] of a river, and at the time of suit under cultivation, as appertaining to their patni. The Court held, the burden of proving that the land formed within twelve years, to lie on the plaintiffs. There is nothing in the report to show whether the plaintiffs claimed the land as a re-formation or as an accretion. If it was accretion, then the case has no bearing upon the present, for the presumption under consideration presupposes prior possession. Whether these two cases are, or are not, in harmony with the other authorities which have been examined, I think we are bound to follow those authorities and to hold that, in this case, the burden of proving the plaintiffs' suit to be barred by limitation lay on the defendants. [His Lordship then proceeded to consider the evidence, and reversed the decree of the Subordinate Judge so far as it related to the plot marked B on the Amin's map.]

**Field, J.**—The plaintiffs in this case sued for declaration of title to, and for possession of, certain lands, which they alleged in their plaint to be re-formation on the site of, and accretion to, their estate Roy Bahadoor Chur. This chur includes Chur Rajapore, Chur Ramchunderpore, and Chur Hogla. The quantity of land claimed by the plaintiffs in their plaint as first drawn, was 1,700 bighas, more or less; but after that the Amin had made a local investigation and prepared a map, they amended their claim (paying additional court-fee), and the quantity now sought to be recovered by them is 3,257 bighas.

During the proceedings in the Court of first instance, the right to recover any portion of the land as an accretion to Roy Bahadoor Chur was abandoned, and the only title upon which the plaintiffs now ask to succeed, is that of re-formation on the original site of their estate.

The Subordinate Judge, adopting the Amin's map and the accuracy of his measurement, has found that the whole of the land included within the red boundary on that map, and comprised in plots A' and B, is land re-formed on the original site of Roy Bahadoor Chur. He has given the plaintiffs a decree for plot A; but as to plot B he has held, that the plaintiffs are barred by limitation; and in respect of this plot he has [235] dismissed their case. He says in his judgment at page 184 of the printed paper book,—“I am, however, of opinion that the plaintiffs' claim to plot B is barred by the general limitation of twelve years. It is true that, according to the finding arrived at by the Amin after careful investigation, the said plot is a part of the re-formed land of Mouza Raja-

pore, of which their father had possession until it was completely washed away by the river Pudma ; still, when the defendants plead that the re-formation took place more than twelve years ago, and that they (the defendants) have since been in possession thereof, it is incumbent on the plaintiffs to prove, for the purpose of removing the plea of general limitation, that the said plot was thrown up by the river within twelve years preceding the date of the suit, or that they held its possession at any time within that period. But the plaintiffs have not been able to show, or even to allege, that, after the disputed chur had formed, it was ever held in their possession ; and their endeavour to prove that the re-formation took place within twelve years preceding the date of the suit, has failed in respect of the plot B."

Now the first question which has been raised before us, and which it is necessary for us to decide, is, whether the Subordinate Judge is right in thus unreservedly placing the burden of proof upon the plaintiffs. In the case of *Radha Proshad Singh v. Ram Coomar Singh* (1 C. L. R., 259), decided by the Privy Council on the 29th November 1877, it was held, that the principle of *Lopez's* case is not applicable to land in which, by long possession or otherwise, another party has acquired an indefeasible title. The plaintiffs' case is, that the land was wholly submerged in 1865 and 1866 ; that re-formation began in 1871 ; and that the whole of the land which forms the subject of this suit was completely re-formed in 1874-1875. If this contention be correct, it is evident that, at the point of time, twelve years before the institution of this suit, the land in question was wholly submerged, and was not therefore capable of actual visible possession. The chief defendants contend that the land was re-formed as far back as 1861, and that they have been in possession, if not during the whole of the period which has elapsed [236] since 1861, at least for more than twelve years before the institution of this suit. If the defendants succeed in proving the case so set up by them, it is clear that, even if plot B is a re-formation on the site of the plaintiffs' estate, the present case falls within the principle of the case of *Radha Proshad Singh v. Ram Coomar Singh* (1 C. L. R. 259), decided by the Privy Council. If, on the other hand, the plaintiffs are correct in saying that the land did not begin to be re-formed till 1871, it is clear that the defendants cannot, by adverse possession of twelve years, have acquired a good title ; and that the plaintiffs are entitled to succeed in respect of plot B, as well as in respect of plot A. The question then arises, upon which side, in the first instance, should be laid the burden of proof ? If the usual rule,—namely, that the burden of proof lies on the party who substantially asserts the affirmative of the issue,—be applied, it may seem that the burden of proof should be laid upon the defendants, who allege that the land was in existence twelve years before the institution of the suit, rather than upon the plaintiffs, who contend that it was not in existence at that time. It will, however, be more satisfactory to examine the question from a wider position. The general rule is, that when a plaintiff sues to recover possession of property, and is met with the plea of limitation, the burden of proof is on him to show that he has been in possession at some time within the period allowed by law after the cause of action has arisen, for bringing a suit upon such cause of action. This is the rule laid down by their Lordships of the Privy Council in the case of *Maharajah Koowur v. Baboo Nund Lall Singh* (8 Moore's I. A., 199) ; they say :—" The appellant is seeking to disturb the possession, admitted to have existed for about eleven years, of defendants, who insist on a possession of much longer duration as a statutory bar to the suit. It clearly lies upon him to remove that bar by satisfactory proof that the cause of action accrued to him (for that is the way in which the Regulation puts it) on a dispossession within twelve years next before the commencement

of the suit, and, therefore, that he or some person through whom he claims, was in possession during that period. No proof of anterior title, such as would [237] be involved in the decision of the boundary question in his favour, can relieve him from this burden, or shift it upon his adversaries by compelling them to prove the time and manner of dispossession." In the case of *Gossain Doss Koondoo v. Seroo Koomaree Debia* (19 W. R., 193), COUCH, C.J., said:—"The plaintiff must show that he, or some one through whom he claims, has had possession within twelve years before the suit. If he sues for the recovery of immoveable property on the ground of having been dispossessed from it, he must show that he has come within twelve years from the time when his cause of action arose, the time when he was dispossessed. It is not enough for him to prove his title to the property, which is the subject of the suit, and leave it to the defendant to show that the suit is barred by the law of limitation by proving when the plaintiff was last in possession." The general rule enunciated in these cases has not, so far as I am aware, been doubted or shaken by the authority of more recent decisions. But an exception appears to have been grafted upon this general rule by certain decisions which I am now about to notice. In the case of *Radha Gobind Roy v. Inglis* (7 C. L. R., 364), decided by the Privy Council on the 6th July 1880, the plaintiff claimed certain lands included within the limits of a beel or lake. The land so claimed had become dry and cultivable during, at least, a part of the year. The plaintiff was held to be entitled, not merely to the right of fishery in the beel, but also to the soil of the beel. The proprietor of a neighbouring talook was the defendant, and he denied the plaintiff's title to the soil of the beel, and relied on adverse possession for more than twelve years before the institution of the suit. Their Lordships of the Privy Council said:—"The question remains, whether the disputed land had or had not been occupied by the defendant for twelve years before the suit was instituted, so as to give him a title against the plaintiff by the operation of the Statute of Limitations. On this question, undoubtedly, the issue is on the defendant. The plaintiff has proved his title; the defendant must prove that the plaintiff has lost it by reason of his (the defendant's) adverse possession. The High Court came to the [238] conclusion that the defendant had not satisfied the burden of proof thrown upon him, and their Lordships are not prepared to reverse that judgment." Here there is nothing to show that the plaintiff had at any time been in possession of the dried-up soil of the beel, and so long as the soil remained submerged, it may well be that the possession was deemed to have followed the title. In appeal from Original Decree, No. 185 of 1877, decided by GARTH, C.J., and TOTTENHAM, J., on the 21st December 1878, the facts were as follows:—A portion of the land admittedly formed part of the plaintiffs' estate Madharpore as delineated on the Government map of 1846, and the Court was of opinion, that they had made out a *prima facie* case of title and possession up to the year 1846 to the lands demarcated as theirs on this map, and, therefore, to this disputed portion. The next question was, whether the plaintiffs had been in possession of this portion at any time within twelve years before the commencement of the suit. The Court, observing that the onus of proving such possession was undoubtedly on the plaintiffs, held that, as they had established a *prima facie* case of possession in 1846, such possession must, under the circumstances, be presumed to have continued until something was proved to have happened to put an end to it. "Take for example," it was said, "the case of a large tract of jungle land granted thirty years ago to a zamindar. He takes possession in the first instance, perhaps, by putting up a few boundary posts or by sending his agent to look over the property. Nothing is done to the land for the next twenty years. It remains in its primitive state of jungle. But then some wrong-doer

brings a portion of it into cultivation, and after five or six years claims that portion as his own. The true owner then brings a suit to recover his property. How is he to show his possession within twelve years? He has exercised no direct acts of ownership over the property, and unless the possession which he had at first is presumed to continue, it would be impossible for him to enforce his rights."

In Reg. App. No. 280 of 1877, the following passage occurs in the Judgment of PONTIFEX J. :—

"Now we are of opinion that the plaintiffs are not barred by [239] limitation from enforcing their claim to this portion of plot A for this reason. The land, which was a dry chur in 1858, was gradually covered by water, and, according to the case of both parties, gradually re-formed subsequently; and in fact even during the progress of this suit, re-formation on the southern boundary has still been proceeding. The plaintiffs in their plaint allege that the re-formation commenced in 1274. No doubt the defendants (in their written statement) and their witnesses attempt to put back the re-formation to an earlier date; and they have adduced in support of their case certain kabuliats, which they say were given by tenants for the cultivation of indigo. But we are of opinion that the evidence of the defendants is not so precise that we can say that those kabuliats apply to the whole or any particular part of the re-formed lands, they may very well have included only land within plot D; and we think, in a case like the present, where, the land has formed gradually on the plaintiffs' site after an equally gradual diluviation, the whole process of diluvion and alluvion occurring some time after 1858 (the date when possession was taken under the decree in the former suit), and before 1876 (when the plaint in this suit was filed), it lay rather on the defendants, than on the plaintiffs, where the exact date of re-formation was in doubt, to show when actual possession of the various portions of these re-formed lands was taken. As the plaintiffs were actually in possession up to the diluviation, and as upon re-formation it might be doubtful how soon the land would be fit for the purpose of cultivation, which indeed might depend on the nature of the crop, and as even upon the defendants' evidence it is doubtful whether the land had been fit for cultivation more than twelve years before suit, we think that in this case it did not lie on the plaintiffs to show they had been dispossessed within twelve years, and we cannot accept as satisfactory the evidence adduced by the defendants as to their possession for twelve years before suit."

I may also refer to the recent decision of this Court in *Kally Churn Sahoo v. The Secretary of State* (I. L. R., 6 Cal., 725).

[240] It appears to me that the principle to be gathered from these cases is, that although, according to the general rule, it lies upon the plaintiffs, who are met with the plea of limitation, to show their own possession within twelve years before the institution of the suit, when the property in dispute is capable of actual and visible possession, yet that, from the nature of the thing, an exception must be made to this general rule in the case of property which is not susceptible of actual and visible possession. In respect of this latter class of cases, it appears to be only reasonable to say that, when the title and possession have been proved to be in a certain person up to a certain point of time,—when there has been no transfer of the title to any third person,—and there is no evidence that possession was exercised by a person other than the person having the title, so long as actual visible possession was possible, the possession of the person having the title will be presumed to continue until the property has again become susceptible of actual visible possession. Proof of possession is presumptive proof of owner-

ship, because men generally own the property which they possess. It may with equal reason be said, that if the ownership of property is proved and there is nothing to show that the possession of such property is with any person other than the owner, it may fairly be presumed to be with the owner. A presumption dispenses with or supplies the place of evidence. If the above be a reasonable presumption, it takes the place, in a case like the present, of evidence to show the plaintiffs' possession within twelve years before suit in a property in which, from the nature of the thing, evidence of actual possession is impossible. There are a few cases which at first sight appear to conflict with the principle which I have endeavoured to evolve from the above cases. In the case of *Koomar Runjit Singh v. Schoene Kilburn* (4 C. L. R., 390), the plaintiff alleged that the lands had re-formed twelve years before the institution of the suit, and that he had exercised actual possession by sowing *khesarr*. It is clear that the plaintiff here, by his own allegation, excluded a presumption which could only arise if the lands were not susceptible of cultivation and possession. In [241] the case of *Gokool Kristo Sen Moonshee v. David* (23 W. R., 443), the land had been submerged, and after its re-appearance in 1271 the plaintiff had never been in possession. This being so, the plaintiffs' suit failed, because he did not prove *secundum allegata* that his vendor had been in possession before the land disappeared or was diluviated. Apparently the Court thought that, if he had succeeded in proving that he or his vendor was in possession before the diluviation, his cause of action would have arisen when, upon the re-appearance of the land, he was prevented by the defendant from resuming actual possession.

This appears to be the real point of decision in this case; and if this is so, there is nothing which conflicts with the Privy Council decision or the other cases above quoted. In the case of *Mahomed Ibrahim v. Morrison* (I. L. R., 5 Cal., 36), reference was made to a class of cases which supported the proposition that when limitation is pleaded in respect of lands, which are either in a jungly or unculturable state, it is for the defendant to establish his plea by proving adverse possession for more than twelve years; and it was held, that that proposition could not be applied to land brought under cultivation; but that, in this latter case, the plaintiff, in order to get over the plea of limitation, must at least establish, that either the land in suit formed within twelve years or was not in a fit state of cultivation within that period. It is not very clear whether this was a re-formation on the old site, and no question appears to have arisen as to which party was entitled to the site before the formation of the chur.

It appears to me, that none of these cases are in conflict with the principle which I have above adverted to, as deducible from the Privy Council case, and the other cases bearing upon the same point. If otherwise, the decisions which are in conflict with the Privy Council case must be taken to have been overruled by it. The conclusion to which I am then led is, that the burden of proof has, in this case, been improperly laid upon the plaintiffs, and that it should have been laid upon the defendants; in other words, that it is for the defendants to show that, as alleged by them, the lands were re-formed twelve or more years [242] before the institution of this suit, and have since been in their possession. [His Lordship then discussed the evidence and concurred in reversing the decree of the Subordinate Judge as to plot B.]

*Appeal allowed.*

#### NOTES.

#### [DILUVION-ADVERSE POSSESSION—ONUS OF PROOF WHEN ON CLAIMANT AND WHEN ON DEFENDANT—

See the notes to 8 Cal. 796 in the Law Reports Reprints Calcutta Vol. I.

See also 9 Cal. 744; 9 Mad. 175; 6 Bom. 508; 9 I.C. 554.



With reference to the last clause of the last para of the headnote, it should be noted that the Privy Council in 29 Cal. 518 P.C. stated that such presumption would continue even after re-formation of land until dispossession.]

[7 Cal. 243]

The 7th March, 1881.

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND  
MR. JUSTICE McDONELL.

Uma Sundari Dasi.....Plaintiff v. Ramjihaldar and others.....Defendants.\*

*Joinder of parties—Adding plaintiffs—Consent—Lunatic not so found—Appearance—  
Act XXV of 1858—Civil Procedure Code (Act X of 1877), s. 32.*

A person alleged to be a lunatic, though not found so under Act XXV of 1858, may appear either by vakeel or in person.

Under s. 32 of the Code of Civil Procedure, no person can be added as a plaintiff, unless he has previously consented thereto; and if a person objects to be added as a plaintiff, the proper course is to make him a defendant.

THIS was a suit for arrears of rent and ejectment, instituted by Uma Sundari Dasi, widow of one Nilmadhub Datta, against the defendants, for the rent of a certain jote held by them under the joint family, of which the plaintiff above-named was one of the members. The plaintiff prayed, that a decree should be passed for the whole arrears due with interest; (ii) that the proportionate share of the plaintiff should be awarded to her, together with the costs of the suit; (iii) for ejectment and the recovery of khas possession. The plaint also prayed that, as the defendants did not pay rent separately to the co-sharer, the other co-sharers might be joined as co-plaintiffs; and an application to that effect was made to the Court. Notice of this application was given to all the co-sharers, but only one of them, Nogendor Datta, appeared, and he opposed the application. On the 11th of January 1879, an order was passed making him and the rest of the co-sharers plaintiffs. In the words of the [243] Munsif,—“These last gave no express consent, but such consent was only presumed from their absence.”

One of the co-sharers so joined as plaintiff was admitted to be a lunatic, but he had not been adjudged to be so under Act XXV of 1858; and it was contended, that, as the provisions of the Civil Procedure Code with respect to persons of unsound mind were by s. 463 restricted to persons adjudged to be lunatics, then the alleged lunatic could not sue by a next friend, and that, therefore, the suit must be dismissed, as all the co-sharers were not represented. On appeal, the Judge was not inclined to agree with the Munsif in his conclusion that the alleged lunatic could not sue as plaintiff, but he dismissed the appeal on the ground that the Munsif was wrong in adding the other co-sharers as plaintiffs without their express consent. The plaintiff then appealed to the High Court.

Baboo Umbica Churn Bose, for the appellant, argued, that the lower Court was wrong in holding that the co-sharers could not be added without their express consent; that the verification of one plaintiff would be sufficient, and therefore express consent would not be necessary. The lower

\* Appeal from Appellate Decree, No. 2526 of 1879, against the decree of A. T. Maclean, Esq., Judge of the 24-Pargannas, dated the 7th July 1879, affirming the decree of Baboo Benode Behary Chowdhry, Munsif of Baraipore, dated the 9th April 1879.



Court should have allowed the suit to proceed under s. 30\* of Act X of 1877. At any rate, the proper course for the Judge would have been to return the plaint for amendment with leave to bring a fresh suit, or to remand the case with directions to make the co-sharers defendants.

Baboo Lall Mohun Doss for the Respondents.

The Judgment of the Court (GARTH, C. J., and McDONELL, J.,) was delivered by

**Garth, C. J.**—We think that the Court below was not justified in dismissing the plaintiff's suit.

The Munsif was undoubtedly wrong in rejecting the claim, because one of the parties who had been made a plaintiff was of infirm mind. The man had not been adjudicated a lunatic; and had not therefore lost his civil rights, and there was no reason why he should not have appeared either by vakeel or in [244] person; see 2 Wm. Saund, *Rock v. Slade* (7 Dowl., 22), and *Gleddon v. Trebble* (9 C.B., N.S., 367). In this respect the District Judge was quite correct.

But the great mistake which was made by the Munsif was this.

One out of several co-sharers brought the suit, asking to have his co-sharers joined as plaintiffs. No objection upon the ground of the non-joinder of these co-sharers appears to have been taken by the defendants; and therefore, if the plaintiff herself had not suggested the difficulty, the suit might have proceeded in the name of one plaintiff, and she might have recovered the whole rent.

Section 34 of the Civil Procedure Code says, that "all objections for want of parties or for joinder of parties who have an interest in the suit, should be taken at the earliest possible opportunity, and in all cases before the first hearing; and any such objection not so taken shall be deemed to have been waived by the defendant."

The reason why the defendant in a case of this kind is entitled to have all the co-sharers made plaintiffs upon the record is this, that he contracted to pay his rent to them all jointly. They are all entitled to the rent, and he has a right to look to all and each of them for his costs, in case he should be successful in any suit which they may bring against him. But he must make his objection in proper time; and if he does not do so, the plaintiff who sues may recover the whole rent.

In this case, although no objection was taken by the defendants, the Munsif, at the plaintiff's suggestion, thought it right to add the names of all the co-sharers as plaintiffs, although they did not consent to being so joined.

It is clear that, by the terms of s. 32, he had no right to do this. No person is obliged to have his or her name added as plaintiff in a suit without his or her consent. And the justice of this rule is obvious, because the suit may be improperly brought; and if a party were made plaintiff without his consent, he might also be made liable for costs.

If the defendants object that other parties should be joined as plaintiffs, and they refuse to be joined, the proper course is to make them defendants, so that they are all before the [245] Court and the Court may make what order it considers just as to costs.

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\*[Sec. 30:—Where there are numerous parties having the same interest in one suit, one

One party may sue or defend on behalf of all in same interest.

or more of such parties may, with the permission of the Court sue or be sued, or may defend in such suit, on behalf of all parties so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such parties either by personal service or (if from the number of parties or any other cause such service is not reasonably practicable) then by public advertisement, as the Court in each case may direct.]

The principal mistake, therefore, which has been made in this case is, that the Munsif has joined the co-sharers as plaintiffs instead of defendants; and what the District Judge ought to have done, was to send the case back to the Munsif, in order that this mistake should be rectified by amendment, and that the suit should then be tried upon its merits.

We consider that we are bound to do now what the District Judge ought to have done; that is, to send the case back to the first Court, with directions that the persons who were made plaintiffs against their will should be made defendants, and that the case should be tried upon its merits. We think that the costs in all the Courts should abide the result.

*Case remanded.*

**NOTES.**

**[I. UNADJUDGED LUNATIC—CAPACITY WITH REFERENCE TO SUITS—**

The C. P. C. 1908 Sch. I, O. 32, r. 15 specifically extends the provisions as to minors, to "persons who though not so adjudged are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued".

This is in accordance with the law that had been judicially established prior to the Code of 1908:—(1897) 20 All. 2; (1891) 16 Bom. 132; (1901) 24 Mad. 504; (1899) 23 Bom. 653.

**II. JOINDER OF PLAINTIFFS—**

When the person himself objects, he should be made a defendant:—

See also (1885) 11 Cal. 618; (1889) 17 Cal. 160; (1891) 19 Cal. 760; *Hukm Chand* on C. P. C. p. 405-408.

**III. WAIVER OF OBJECTION TO NON-JOINDER—**

See (1884) 6 All. 57; (1887) 10 Mad. 322; (1891) 14 Mad. 494; (1901) 26 Bom. 301.

**IV. CO-SHARER WHEN A NECESSARY PARTY—**

See *Hukm Chand* on Civil Procedure 396-398.]

**[7 Cal. 245]**

**PRIVY COUNCIL.**

*The 10th February, 1881.*

**PRESENT:**

**SIR B. PEACOCK, SIR M. E. SMITH, SIR R. P. COLLIER, AND SIR R. COUCH.**

**Sudisht Lal.....Plaintiff v. Mussamut Sheobarat Koer.....Defendant.**

*[On Appeal from the High Court of Judicature at Fort William in Bengal.]*

*Mukhtarnama—Pardanishin woman—Extent of liability—Account stated—Explanation of document.*

In order to charge a pardanishin woman upon an instrument or power purporting to have been executed by her, it is requisite that the person relying on such a document should give satisfactory evidence that it has been explained to, and understood by her.

A mukhtarnama executed by a pardanishin woman appointed her husband to be her general mukhtar, and declared that "all acts done by the said mukhtar, such as giving and taking loans to and from others, executing on my behalf, getting executed in my favour, deed of absolute sale," and so on, "shall be accepted by me."

[245] It was sought to render the principal liable, on an account stated by her husband as her mukhtar so empowered, for a debt, without proof that the money constituting it had been borrowed on her account.

*Held*, on the construction of the mukhtarnama, that the mukhtar had no authority to bind her by such a statement of account, whatever authority he might have had to bind her by an actual borrowing of money on her behalf.

No implication of authority in the mukhtar to bind the woman by his stated account had arisen from the carrying on of a course of business. Accordingly, when the evidence of express authority failed, the statement of account by the mukhtar was insufficient to render the principal liable.

No evidence was given of the items lent, so as to establish an indebtedness independently of the account stated.

APPEAL from a decree of a Division Bench of the High Court of Bengal (25th June 1878), reversing the decree of the Second Subordinate Judge of Zilla Mozufferpore (23rd December 1876).

The question raised in this case was, whether the defendant, the respondent in this appeal, a pardanishin woman, who had constituted her husband to be her mukhtar, was liable for a debt for money lent upon a statement of account by him, without proof of the borrowing of the money on her account.

This question depended mainly on the construction and effect of the words of a mukhtarnama, given by the defendant to her husband, as to which the Courts in India differed.

The material parts of the mukhtarnama and the facts of the case are stated in their Lordships' judgment.

The Subordinate Judge decided that the husband, having authority under the mukhtarnama to admit such a debt as the one claimed, had done so in stating the account on behalf of his wife. A Divisional Bench of the High Court (L. S. JACKSON and L. R. TOTTENHAM, JJ.), in reversing that decision, said:—

"Now a very important matter for consideration in this case is, whether the defendant ever executed the mukhtarnama referred to by the plaintiff; and, if so, whether she authorized her husband, Ajudhya Pershad, to do that which he did in signing the settlement of account. Strictly speaking, the execution of that mukhtarnama is not proved in this case; but there can be little doubt, from the fact of its having been registred and having been used frequently on various public occasions before [247] various public officers, that Ajudhya Pershad really had such a mukhtarnama from his wife. Whether that instrument authorized him to take, without her authority, so serious a step as to sign an acknowledgment of indebtedness of nearly Rs. 30,000, is an entirely different question. It appears to us, that the mukhtarnama itself does not authorize such a proceeding. It does not differ very much from the formal power-of-attorney which mukhtars generally use for the purpose of representing their principals in formal proceedings. It makes no reference whatever to any banking business, nor does it contain any authority to sign such a document as that produced. There is not so much as a suggestion that the defendant was ever informed what the consequence of her authorizing a separation of her account from that of Sheoraj would be, or that she ever had the least notion that so large a liability as this was to be passed over to her. Considering that the defendant was a pardanishin lady,—that she is still young,—that at the time of her father and her mother's death she was an infant,—that her affairs, during her minority, were managed ostensibly by her sister, but in reality by a person who has since been dealt with by the Criminal Court and sentenced to transportation,—that when she came of age her affairs were taken into the hands of her young husband, who was only eighteen years of age,—we think the Court would be justified in requiring the strictest proof and observance of all formal precautions before it holds the defendant answerable. There appears to be the strongest reason to believe that, throughout his dealings, Ajudhya Pershad has not had the defendant's interest at heart. He has been making use of her property without the least regard to her benefit, and with a view to his own advantage. It appears, in fact, that he is actually in partnership with the plaintiff in one branch of business, viz., that relating to saltpetre; and it is actually stated, that the funds for carrying on that business in partnership with the plaintiff were put down to the debit of the defendant's account. It may be that, in respect of an ancestral banking business carried on not very prudently or

successfully, during the defendant's minority, by her sister or in her sister's name, some liabilities did arise; and if those [248] liabilities had been fairly and properly brought before the Court, and the defendant had been shown that she did owe something to the plaintiff, the Court would have assisted the plaintiff in recovering that amount. In fact it is more than probable, that the defendant herself would not have resisted. But looking at the shape in which the plaintiff's suit was brought before the Court, and considering the very large sum demanded from the defendant on the strength of a document executed without sufficient authority in favor of the husband, it seems to us, that the Subordinate Judge ought not to have given, the plaintiff the decree which he has given, that that decree ought to be set aside, and the appeal allowed with costs."

On this appeal

Mr. Leith, Q. C., and Mr. C. W. Arathoon for the Appellant.

Mr. R. V. Doyné for the Respondent.

For the appellant it was contended, that the authority of the husband, as duly constituted mukhtar of his wife, to state an account on her behalf, had been made out.

Counsel for the respondent was not called upon.

Their Lordships' Judgment was delivered by

**Sir M. E. Smith.**—This is an action brought by Sudisht Lal, a mahajan carrying on his business at Mozufferporc, against Mussamut Sheobarat Koer, to recover a sum of Rs. 23,470 and interest, upon the footing of a stated and settled account. The plaint is based entirely upon an account which, it alleges, had been settled, not by the defendant herself, but by her husband, Ajudhya Pershad, who, it is said, had authority from her to state and settle accounts. In the outset it may be noticed that no evidence was given of the items of the account so as to establish an indebtedness independently of the account stated. This omission seems to have been intentional, for the plaintiff himself, and two of his gomashtras, who might have given that evidence if a debt really existed, were not called.

The circumstances which preceded the action may be shortly stated. Ram Dyal Misser, who is now dead, carried on a [249] banking business in the same place as the plaintiff, at Mozufferporc. He died in the year 1857, leaving a widow and two daughters, of whom the defendant is one. His widow died in the year 1860. The elder sister, whose name is Sheoraj Koer, had married Durga Persad Tribaidi. The defendant had married the person already named, Ajudhya. The banking business of Misser was carried on by the widow during her lifetime, and there is some evidence that it was also carried on after her death by the two daughters, the defendant being at her mother's death a minor, and the husband of the elder sister, Sheoraj, carrying on the business on her behalf and on that of her infant sister. The defendant, Mussamut Sheobarat, became of age in February 1869, and shortly after her coming of age it appears that the banking account was separated; whatever may have been due at that time from the two sisters to the plaintiff's firm was divided, and one-half carried to the debit of each of the sisters. Although there is some evidence that the sisters carried on a banking business, there is really no satisfactory evidence that such a business was carried on by the defendant after the separation, and certainly none that it was carried on with her knowledge and authority. However, it is alleged on the part of the plaintiff that such a business was carried on, and was managed by Ajudhya, her husband, and the account which is sued on is said to have been signed by him as the adjustment of a banking account. The account so signed is set out

at length in the record, and begins with this item: "Credit. Former balance, principal and interest, as per former chitta, for the year 1280, Rs. 21,933 14a. 0p." There are other items and interest, and some items on the other side of the account, resulting in a balance of Rs. 23,405 13a., the amount for which the action is brought, plus a sum of Rs. 50, as to which no evidence whatever exists. The plaintiff's claim to recover this sum rests entirely upon the admission which was made by Ajudhya, the husband, in settling this account. Not only is there no proof of indebtedness independently of the account, but there is not sufficient evidence to satisfy their Lordships that a banking business was carried on by the defendants; whilst there is some evidence that Ajudhya was [250] carrying on business with the plaintiff's firm on his own account, and that he had purchased with the plaintiff a saltpetre property which they were working together.

In this state of the evidence it is plain that no authority can be inferred from the fact that a banking business was carried on to the knowledge of the defendant. The authority, therefore, upon which the plaintiff must rely as having been supplied to Ajudhya, depends entirely upon the mukhtarnama which has been given in evidence; indeed, that is the authority on which his case has been rested. This mukhtarnama is said to have been executed by the defendant shortly after her coming of age. Their Lordships desire to observe that there is no satisfactory evidence that this mukhtarnama was explained to the defendant in such a way as to enable her to comprehend the extent of the power she was conferring upon her husband. In the case of deeds and powers executed by pardanishin ladies, it is requisite that those who rely upon them should satisfy the Court that they have been explained to, and understood by, those who execute them. There is a want of satisfactory evidence of that kind in the present case. But their Lordships do not desire to rest their decision upon this ground. They are disposed to look at the mukhtarnama which was received by the Subordinate Judge, and was construed by the High Court, although that Court expressed some doubt as to whether, if it ought to have been construed differently from the view they took of it, they should have acted upon it. This instrument is said by the High Court to be very nearly in the terms of the ordinary mukhtarnama given to mukhtars to transact business and to bring and defend suits. Undoubtedly there is much in its language which is of the ordinary kind, but there are some special powers conferred by it, and it is upon them that the plaintiff most relies for the authority of the husband. The document begins with a recital:—"Whereas often cases connected with monetary transactions, as loans, purchase and sale of properties, atanamias, hebanamias, ticca pattas with zurpeshgi and without zurpeshgi, and realization of decretal money, in which sometimes I, the declarant, am plaintiff and sometimes defendant remain pending decision, and may be instituted in future [251] in the Civil, Revenue, and Criminal Courts, as well as in the Calcutta High Court; that is, whereas I, the declarant, am under the necessity to attend to all business, such as monetary transaction, purchase and sale of property, preparation of deeds of gifts and grants, leases with or without zurpeshgi, and execution of deeds of absolute sale and recovery of decretal money, viz., all the village and Court affairs—filing answers in appeal cases and taking out execution of decrees in the Courts"—enumerating them—"by engaging pleaders and mukhtars when required in the cases instituted in the Civil Courts,"—this is very much the language of an ordinary mukhtarnama. It goes on:—"As also realizing decretal money, and the money covered by bonds from debtors, by executing receipts and acquittances on behalf of me, the declarant, according to the account of the mahajani shop, saltpetre godown, and zemindari

villages." The words, "according to the account of the mahajani shop," do not necessarily import a statement that she was then carrying on that business. She was entitled to a share of whatever was due to the old business, and if it became necessary to sue for such debts, the mukhtar would be empowered to sue for them and to give discharges to the debtors. Then the operative part of the instrument is:—"I, the declarant thereof, of my own free will and accord, appoint my husband, Ajudhya Persad Sukul, my general mukhtar,"—the generality of that language, "appoint my husband my general mukhtar," must be construed, and if necessary controlled, by what comes afterwards,— "and declare to the effect that all acts done by the said mukhtar, such as giving and taking loans to and from others; executing on my behalf, getting executed in my favour, deeds of absolute sale," and so on, "shall be accepted by me." The words that are most relied on are:—"and declare to the effect that all acts done by the said mukhtar, such as giving and taking loans to and from others." If it had been proved that the husband had contracted loans and obtained advances on behalf of his wife, it may be that, under this power-of-attorney, she would be bound by his acts, as being within the scope of his authority. But it would have to be shown, not only that he borrowed the [252] money, but that it was borrowed for her. If it had appeared that it was taken for his own purposes, and the plaintiff who advanced the money knew it, the wife could not be charged with it. In the present case, without any proof that money had been borrowed at all, and certainly with none that it had been borrowed on her account, the defendant is sought to be fixed with a large debt by a mere statement of account. Their Lordships think upon the construction of the mukhtarnama that the husband, Ajudhya, had no authority to bind her by such a statement, whatever authority he might have had to bind her by an actual borrowing of money on her account. This is the view taken by the High Court.

Their Lordships must not be supposed to lay down that when an agent is appointed to manage a banking business, and is invested with the powers of a manager of that business, a statement of account made by him in the regular and ordinary way of business would not be evidence against his principal; that question does not arise on this record. It is enough for them to say that, in this case, there is no sufficient proof that the business was carried on with the defendant's knowledge and by her authority, and therefore no implication founded on the course of business can arise. The evidence of express authority also fails.

Their Lordships will humbly recommend Her Majesty to affirm the judgment under appeal, and to dismiss this appeal with costs.

*Appeal dismissed.*

Solicitor for the Appellant: Mr. T. L. Wilson.

Solicitors for the Respondent: Messrs. Barrow and Rogers.

#### NOTES.

#### [I. DEEDS AND POWERS OF PARDANASHIN WOMEN—

The proposition laid down in this case that such deeds and powers should be shown, by those who rely upon them, to have been explained to and understood by those who executed them has been several times re-affirmed by the Privy Council:—(1901) 28 Cal. 446; (1902) 29 Cal. 749; 684; (1912) 31 I. A. 156.

See also (1886) 8 All. 267; (1892) 14 All. 8; (1895) 17 All. 125; (1907) 31 Bom. 185=8 Bom. 18 R. 781; (1904) 7 O. C. 292.

This special rule does not apply where the ladies were transacting the business, (1906) 33 Cal. 778; (1903) 31 Cal. 233; see also (1888) 15 Cal. 684 where the defence was set up as an afterthought by her representative.

Nor to quasi-pardanashins:—(1901) 23 All. 137=27 I. A. 168.

#### II. MUKHTEARNAMAH.

Applied in (1889) 13 C. L. R. 247.]

## [253] APPELLATE CIVIL.

The 8th April, 1881.

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND  
MR. JUSTICE McDONELL.

Poorna Chunder Sen.....Defendant,

versus •

Prosunno Coomar Dass.....Plaintiff\*.

*Power-of-Attorney—Construction of Power—Power to Sell or Mortgage.*

Under a power-of-attorney containing a clause empowering A to sell or mortgage the donor's property for the payment of his debts, A executed a simple money-bond to one of the donor's creditors, for payment of the sum due and interest.

*Held*, that the act was *extra vires*, and did not bind the donor.

THIS was a suit instituted by the plaintiff on the 17th of September, 1879, against Ram Chunder Sen, Gour Chunder Sen, and Poorna Chunder Sen, for the sum of Rs. 3,000 and interest, due on a registered money-bond executed by the defendants in favor of the plaintiff, on the 28th of March, 1876. The bond was executed on behalf of Poorna Chunder Sen by the other defendants, who held a power-of-attorney from him. The main question was, whether authority to sign such a bond was given admitting that the debt for which the bond was given was a debt for which Poorna Chunder Sen would have been liable had a proper suit been brought in a proper time. The power-of-attorney was in the following terms:—

"Know all men by these Presents, that I, Poorna Chunder Sen, son of Ram Mohun Sen, deceased, of Chittagong, now residing in Cirencester, in the County of Gloucester, England, zemindar by profession (for divers considerations and good causes me hereunto moving), have made, ordained, constituted, and appointed, and by these Presents do make, ordain, constitute, and appoint my uncle, Baboo Ram Sunder Sen, and my cousins, Gour Chunder Sen and Ram Chunder Sen, of Chittagong, in the district of Bengal, or any of them, my true and lawful attorneys [254] and attorney for me and in my name to give all kinds of pattas to tenants,—to sell or mortgage, and for registering the same, any part of my estate at their or his discretion for the payment of my debts,—to ask, demand, recover, and receive any sum due to me,—to pay any amount due by me, giving, and by these presents granting, to my said attorneys and attorney, my sole and full power and authority to take, pursue, and follow such legal course, or any other course at their or his discretion, towards recovery, receiving, and obtaining of any dues and payment of my debts as I myself might or could do were I personally present; and in my name to make, sign, seal, and deliver any document necessary to be taken or given; and further, to do, perform, and finish, for me and in my name all and singular things and thing which shall be or may be necessary, as entirely as the said Poorna Chunder Sen, in my own person, might or could do in about the premises, ratifying, confirming, and allowing whatever my said attorneys or attorney shall wilfully do or cause to be done in and about the execution of the abovementioned objects. In witness whereof, &c."

\* Appeal from Original Decree, No. 43 of 1880, against the decree of Baboo Motilal Nath Goenta, Subordinate Judge of Chittagong, dated the 3rd December, 1879.



The Subordinate Judge gave the plaintiff a decree. The defendant Poorna Chunder appealed to the High Court.

Baboo Mohiny Mohun Roy, for the appellant, argued that the power-of-attorney did not justify the giving of the bond.—

Baboo Chunder Madub Ghose for the respondent.—There was a special power given in this case. “Debts” in the power-of-attorney mean family debts, and this bond was a family debt for which Poorna is liable. Power is given to sell or mortgage, and this includes entering into a bond for payment. Besides this authority is given to members of the defendant's family, and should not be construed as strictly as if given to a stranger.

The judgment of the Court (GARTH, C. J., and McDONELL, J.) was delivered by

Garth, C. J.—Two questions arise on this appeal: one is purely a question of law, and the other a question of fact.

We will deal with the question of law first, namely, whether under the power-of-attorney which was given by the defendant to his uncle and two cousins on the 25th October, 1875, he gave [255] them any authority to enter into such a bond as that which forms the subject of this suit. This question depends upon the language and the true meaning of the power.

Now it has been contended by the learned pleader for the plaintiff, that authority was given to the attorneys to sign such a bond in one or other of two ways. He says, *first*, that the power authorizes Ram Sunder Sen and others to sell or mortgage any part of Poorna Chunder Sen's estate for the payment of his debts; and that there being a power to sell or mortgage his estate for the payment of his debts, there is also a power given by implication to give a simple bond for the same purpose. But we are bound to construe the language of an instrument of this kind with reasonable strictness; and we think it is impossible to say that a power to sell or to mortgage property for payment of debts includes a power to give a simple money bond, which is an instrument of a totally different nature, and which in fact is not a means of paying debtors at all.

Then, *secondly*, it is argued, that the latter portion of the power gives authority to execute such a bond. The words are:—

“Granting to my attorneys full power and authority to take such legal or any other course at their discretion towards recovery, receiving, and obtaining of any dues and payment of my debts, as I myself might or could do were I personally present.” It is contended that these words confer upon the attorneys authority to take any course, legal or otherwise, for the purpose of paying the debts of Poorna Chunder. But in fact, they mean a totally different thing. The clause relates evidently to obtaining payment of the debts due to Poorna Chunder, and not to paying debts due from him. [The rest of the judgment is not material for the purposes of this report.]

*Appeal allowed.*



**[256] SMALL CAUSE COURT REFERENCE.***The 31st May, 1881.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND  
MR. JUSTICE McDONELL.

Sheikh Akbar.....Plaintiff

*versus*

Sheikh Khan and another.....Defendants \*

**[=8 C.L.R. 533]***Promissory Note—Bill of Exchange—Original Consideration—Evidence—Stamp  
—Account stated—Limitation Act (XV of 1877), sched. ii, cl. 64.*

When a cause of action for money is once complete in itself, whether for goods sold or for money lent, or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note, under such circumstances as to make the debtor liable upon it to some third person.

But when the original cause of action is the bill or note itself, and does not exist independently of it, as for instance, when, in consideration of *A* depositing money with *B*, *B* contracts by a promissory note to repay it with interest at six months' date, here there is no cause of action for money lent, or otherwise than upon the note itself, because the deposit is made upon the terms contained in the note, and no other. In such a case the note is the only contract between the parties, and if for want of a proper stamp or some other reason the note is not admissible in evidence, the creditor must lose his money.

The period of limitation for suits on accounts stated is the same, whether the accounts are stated verbally or in writing, and is governed by Act XV of 1877, sched. ii, cl. 64.

THIS was a reference from the Judge of the Small Cause Court at Dacca, the material portions of which are as follows :—

" This is a suit to recover Rs. 225 on a *likkhan*, or writing, dated the 10th December, 1877, payable within two months of that date, under which the plaintiff is said to have deposited Rs. 225 with the defendants. The cause of action is expressly stated to have arisen two months after that date, or otherwise the suit would be barred by limitation, as it was instituted on the 7th February, 1877, or more than three years after date of [257] deposit. The *likkhan* was not filed with the plaint, on the express plea that it was on the record of a criminal prosecution which the plaintiff had previously instituted against defendant No. 1 on a charge of criminal breach of trust.

" At the trial it was alleged, that the document was subsequently taken out of the criminal record and handed over to plaintiff's vakeel's mohurir, who accidentally lost. Plaintiff, therefore, filed an unattested copy of the *likkhan*.

\* Small Cause Court Reference, No. 5 of 1881, from Baboo Nuffer Chunder Bhutto, Judge of the Small Cause Court at Dacca, dated the 24th March, 1881.

which he had kept, and attempted to prove the contents by secondary evidence. It will be seen that the document was a promissory note as per definition (25), s. 3, Act VIII of 1869, which governed it. That being so, it required a stamp duty of annas three according to art. 2 of sched. i of the said Act, being payable otherwise than on demand. It is, however, admitted on both sides that there was an adhesive stamp of one anna only affixed on the document. That being the case, the first question that arises is, whether the document was admissible in evidence; and if not, whether secondary evidence of the passing of consideration is admissible."

The learned Judge, having discussed this point, decided that secondary evidence was not admissible on the authority of *Ankur Chunder Roy Chowdhry v. Madhub Chunder Ghose* (21 W. R., 1.) *Prossunno Nath Lahiree v. Tripoora Soonduree Dabee* (24 W. R., 88.) ; but he considered there was a conflict between those cases and the case of *Golap Chand Marwaree v. Thakurani Mohokkoon Kooaree* (I. L. R., 3 Calc., 314), on the question as to whether independent evidence of the consideration for the note should be allowed to be given. He then continued :

"The first question for reference, therefore, is, whether the plaintiff in this case is entitled to recover the amount merely on proving that the original consideration passed, irrespective of the roka or promissory note given in acknowledgment thereof.

"Then arises another question, namely, when did the cause of action arise in this case, and whether the suit was not barred by limitation, supposing that *Golap Chand Marwaree's* case (I. L. R. 3 Calc., 314), governed it? If it was a case of actual deposit of money, and three years' limitation applied to it, and if the time was to be computed from the date of deposit, it is perfectly clear that the suit, [258] being brought nearly two months after three years of the date of the *likkhan*, was barred by limitation. Article 60\* of the second schedule of the Limitation Act does not apply, because this is not a case of actual deposit at all. From the evidence on both sides it appears, that the plaintiff had a case against his brother's widow for a share of assets left by that brother on his death. That case was compromised for a sum of Rs. 250, of which Rs. 25 was paid then and there, and Rs. 225 could not be raised without interfering with a karbar which that brother left, and which the second defendant, that widow's brother, managed on her behalf, and whose co-partner the first defendant was. According to their notions of legal propriety in order to make the compromise valid, plaintiff gave a registered receipt to that widow (Sandal Bibi) on that day (10th day of December, 1877) in full acquittance, and the defendant agreed by this promissory note to pay plaintiff the remaining sum of Rs. 225 within two months, the private understanding being that the sum would be paid gradually from the proceeds of the karbar. This suit has been brought after such a lapse of time, because defendant No. 1, who left the karbar about a year and-a-half ago, has fallen out with the widow Sandal Bibi, the sister-in-law of the plaintiff."

Description of Suit.	Period of limitation.	Time from which period begins to run.
* Art. 60.—For money deposited under an agreement that it shall be payable on demand.	Three years.	When the demand is made.

The learned Judge then went on to say, that he took the transaction to be one of loan merely, but not being quite satisfied as to the correctness of his decision, he determined to refer the point, and therefore dismissed the suit on the second ground, contingent upon the opinion of the High Court. The second point for reference was,—What period of limitation was applicable to the case, assuming that the case of *Golap Chand Marwaree* (I. L. R., 3 Cal., 314) applied to it, and from what date that period was to be computed ?

Mr. *W. M. Das* for the plaintiff.—The taking of the promissory note is no objection to our recovering in this suit : *Clay v. Crowe* (8 Exch., 295) and *Wain v. Bailey* (10 Ad. and E., 616). We should be allowed to give independent evidence of the consideration. [GARTH, C. J.—The question is, have you not taken the promissory note in discharge of the claim, and not merely on account of a debt ? You gave a receipt in full discharge of the amount. [259] Besides, a compromise of this kind is equivalent to an account stated, and looking at it in that way, you would be barred by limitation, would you not ?]

Baboo *Rajendronath Bose*, for the defendants, argued, that taking the suit as upon a verbal account stated, it came under Act XV of 1877, sched. ii, cl. 64.\*

The judgment of the Court (GARTH, C. J., and McDONELL, J.) was delivered by

Garth, C. J.—We have taken time to consider our judgment in this case, not because we had any doubt as to the result of the decision in the lower Court being correct, but because several points and authorities have been dealt with there, which appear to require some explanation.

In the first place we think it clear that the document in question was not admissible in evidence. It was a copy of a lost promissory note, which was itself inadmissible as being insufficiently stamped ; and the copy, of course, could not be received in evidence any more than the original.

Whether evidence of the consideration for the note was admissible, depends upon the circumstances under which the note was given ; and it is upon this part of the case that we think the Judge in the Court below has not quite understood the meaning of the authorities to which he refers.

When a cause of action for money is once complete in itself, whether for goods sold, or for money lent, or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the original consideration, provided that he has not endorsed or lost

Description of Suit.	Period of limitation.	Time from which period begins to run.
* 64.—For money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them.	Three years	When the accounts are stated in writing signed by the defendant or his agent duly authorized in this behalf, unless where the debt is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then when that time arrives.

or parted with the bill or note, under such circumstances as to make the debtor liable upon it to some third person. In such cases the bill or note is said to be taken by the creditor *on account of the debt*, and if it is not paid at maturity, the creditor may disregard the bill or note and sue for the original consideration. (See *James v. Williams* (13 M. and W., 828), and other cases mentioned [260] in Addison on Contracts, 3rd edn., page 1204). The cases of *Clay v. Crowe* (8 Exch., 295) and *Wain v. Bailey* (10 Ad. & E., 616) cited in argument before us by Mr. Das were of this nature.

But when the original cause of action is the bill or note itself, and does not exist independently of it, as for instance, when, in consideration of *A* depositing money with *B*, *B* contracts by a promissory note to repay it with interest at six months' date, here there is no cause of action for money lent, or otherwise than upon the note itself, because the deposit is made upon the terms contained in the note, and no other. In such a case the note is the only contract between the parties, and if for want of a proper stamp or some other reason the note is not admissible in evidence, the creditor must lose his money. Of this nature were the cases referred to by the Judge of the lower Court: *Ankur Chunder Roy Chowdhry v. Madhub Chunder Ghose* (21 W. R., 1.), and *Prossunno Nath Lahree v. Tripoora Soonduree Dabee* (24 W. R., 88.) The case to which he refers, decided by Kennedy, J., apparently belongs to the former class: and in *Farr v. Price* (1 East, 55), all that Lord Kenyon ruled was, that if, on the new trial, the plaintiff could prove his claim under the common counts,—that is to say, independently of the note, he might recover. There is no doubt as to the principle of these authorities. The difficulty often is to ascertain, as a matter of fact, to which class any particular case belongs.

It will be found that one very material and practical distinction between the two classes of cases, where the bill or note is not properly stamped and lost, as it has been here, consists in this; that in the former class, namely, where the cause of action is complete before the bill or note is given, the onus of proving the bill or note is generally thrown upon the defendant; as thus, suppose the plaintiff's claim is for goods sold, and he proves at the trial the sale of the goods and the price. This constitutes his *prima facie* case. The defendant says, "yes but I gave you a promissory note for the price of those goods." The defendant is then bound to prove the note, but he cannot do so, because [261] it is lost and unstamped. On the other hand, in the latter class of cases, where the cause of suit is inseparable from the giving of the bill or note, it is obvious that the onus of proving the lost instrument must fall upon the plaintiff and that he cannot make out a *prima facie* case without proving it. Now, applying this principle to the present case, we understand the facts to be these: The plaintiff had a claim against the defendants for the value of a share in a partnership business, and it was verbally agreed between them that, in settlement of that claim, Rs. 250 should be taken as the value of the share, which sum was to be paid by the defendants to the plaintiff. The defendants did in fact give the plaintiff Rs. 25 in part-payment of that sum, but they were unable at that time to pay the rest. So far the transaction appears to have consisted of a settlement of an open claim at an agreed sum, and the plaintiff might have sued for that sum as upon an account stated without regard to the promissory note.

But then came the giving of the note, which the lower Court treats, and we think properly treats, as a sort of loan transaction. The plaintiff gave the defendants a receipt for the remaining Rs. 225, in return for which the defendants gave the plaintiff this promissory note. It was, therefore, a loan

of the Rs. 225 to the defendants upon the terms contained in the promissory note, and as there was no loan independently of the note, the note itself was the best evidence of the transaction, and as it could not be proved for want of a proper stamp, the plaintiff could not recover upon it.

But then, secondly, could the plaintiff recover the Rs. 225 as upon the account stated? We think he could not, for two reasons:—

*1st.*—He had given the defendants a receipt for that sum, allowing them to retain it upon the terms of the note; and he had thus converted his original claim upon the account stated into a claim upon the note.

*2nd.*—His claim upon the account stated, if he had any, was barred by limitation.

It was ingeniously suggested in argument on behalf of the plaintiff, that as art. 64\* of sched. ii of the Limitation Act says nothing in the third column as to accounts stated by word of [262] mouth, that article must be considered as applicable only to accounts stated in writing, and that as no special period of limitation is prescribed for suits upon accounts stated orally, the period of limitation for such suits would be six years. It is certainly difficult to understand, what the Legislature could have intended by this omission, but we think that, giving a reasonable construction to art. 64, we must consider that the second column means to fix three years as the period of limitation in all suits upon accounts stated. To prescribe a limitation of three years in suits upon accounts stated in writing, and six years in suits upon accounts stated orally, would be an obvious absurdity.

It was further contended on behalf of the plaintiff, that, as by the promissory note the plaintiff gave the defendants two months' time to pay the Rs. 225, limitation ought not to run till the expiration of that time. But the obvious answer to this is, that the promissory note is not proved, and that it cannot be used for extending the time for payment of the Rs. 225 any more than for any other purpose.

In the result, therefore, we find that the judgment of the lower Court is correct, and although it is no doubt an extremely hard case upon the plaintiff, we think that this suit has been rightly dismissed.

Since this judgment was written, Mr. Das has drawn our attention to the case of *The Eastern Financial Association v. Pestany, Cursetji Shroff* (3 Bom. H. C. Rep., 9), in which Couch, C. J., who was sitting alone, apparently gave the plaintiffs an opportunity of paying the additional duty and the penalty in the case of a promissory note payable after date. The plaintiffs, however, declined to pay the additional stamp; the attention of the learned Chief Justice does not appear to have been drawn to the provisions of the Stamp Act, and certainly, as far as we can see, the point was not argued.

We find, however, a decision in this Court by Phear and Morris, JJ.—*Nandan Misser v. Chatterbati* (13 B. L. R., Appx., 33),—in which the precise point which arises here was argued, and in which those learned Judges held that, having regard to s. 28 of the Stamp Act of 1869, a promissory note payable after date could [263] not be stamped with an additional stamp. We find also that Mr. Justice Wilson has decided the point in the same way, and we have not the least doubt of the correctness of that view.

As the point is a technical one, and as the merits of the case seem undoubtedly to be with the plaintiff, we make no order as to costs.

[*Note*.—In the case of *Golap Chand Marwaree v. Thakurani Mohokoom Kooaree* (the facts of which are not fully reported in I. L. R., 8 Calc., 814), it appears from the plaint that the second defendant, Mittaram Sahoo, had lent to the first defendant Thakurani Mohokoom Kooaree, Rs. 1,500, on account of which the latter gave an unstamped promissory note to Mittaram Sahoo, who endorsed it for value to the plaintiff. The Court of first instance refused to admit the note in evidence, and also refused to allow the plaintiff to summon Mittaram Sahoo to produce his books in order to show therefrom that Thakurani Mohokoom Kooaree was his debtor for the amount for which the note was given].

## NOTES.

### [PROMISSORY NOTE—CAUSE OF ACTION.

When at a time that an obligation comes into existence, a document is executed as the evidence and record of that obligation, a suit to enforce it can be only on the document itself. But if the document is executed on account of a pre-existing independent obligation complete in itself an action on the original cause of action is maintainable.

See (1905) 29 Mad. 111=15 M.L.J. 484; (1906) 17 M.L.J. 126; (1911) 21 M. L. J. 462; (1905) 28 All. 298; (1911) 18 I.C. 138.

When money is lent on terms contained in a pro-note which happens to be inadmissible, the creditor cannot recover independently of the note.—(1903) 26 All. 178.

Admission of liability independent of the loan evidenced by a note is enough for a suit independent of the note.—(1899) 24 Bom. 360.

See (1886) 10 Mad. 94; (1882) 11 C. L. R. 310; (1882) 8 Cal. 721; (1888) 12 Bom. 443; (1883) 10 Cal. 284.

See (1896) 23 Cal. 851 *contra*.]

[1 Cal. 263]

## APPELLATE CIVIL.

*The 15th February, 1881.*

PRESENT :

MR. JUSTICE McDONELL AND MR. JUSTICE FIELD.

Huro Prosad Roy.....Plaintiff.

*versus*.

Womatara Debee.....Defendant.\*

[=3 C. L. R. 449]

*Suit for Enhancement—Grounds of Enhancement—Increased Value of Produce—Evidence to Prove.*

In a suit for enhancement of rent, the plaintiff, among other grounds, contended that the value of the produce of the land had increased, and called witnesses belonging to the

\* Appeals from Appellate Decree, Nos. 2413 to 2415 of 1879, against the decree of A. T. Maclean, Esq., Judge of the 24-Parganas, dated the 14th August, 1879, modifying the decree of Baboo Brojendro Coomar Seal, First Subordinate Judge of that district, dated the 26th May, 1879.

cultivating class, who stated from memory the prices which had prevailed in the locality for a number of years. The District Judge considered this evidence to be no safe guide to the value of produce, which he held, could only be proved by traders and merchants with books of accounts, by which their memory could be refreshed and tested,—

*Held*, that the evidence adduced was relevant and entitled to consideration.

[264] There is material difference between a case in which a Judge has assigned one bad reason for believing or disbelieving a particular piece of evidence, while he has given one or more good reasons for the same belief or disbelief; or a case in which, putting this particular piece of evidence wholly aside, enough remains to support the judgment, and a case in which the essential question, or one of the essential questions, to be decided rests upon the evidence believed or disbelieved regarded as of great value, or considered worthless, for a reason which is unsound and unsustainable.

MR. *Evan*, *Baboo Bhowany Charn Dutt* and *Baboo Opendro Chunder Bose* for the appellant.

*Baboo Nilmadhub Bose*, *Baboo Omerendro Nath Chatterjee*, and *Baboo Saroda Churn Mitter* for the respondent.

The facts of this case fully appear from the judgment of the Court (*McDONELL* and *FIELD*, JJ.), which was delivered by

**McDonell, J.**—This is a suit for enhancement of rent. The defendant is a tenant, under the plaintiff, of a holding, which originally consisted of 1,202 bighas, and the rent of which was originally fixed at Rs. 641-1-1. Three grounds of enhancement were set out in the plaint. The first ground is, that the quantity of land held by the defendant is more than that for which rent was formerly paid. He says, that the quantity of land is now 1,900 instead of 1,202 bighas. The second ground is, that the productive powers of the land have increased; and the third ground is, that the value of the produce has increased.

As to the first two grounds there is no question in the present appeal, and the third ground is the only one with which we have to deal. That prices have, within the last twenty, thirty, or forty years, increased considerably in these provinces is a matter as to which few reasonable people have any doubt. At the same time, in any particular case, it is necessary that evidence of this increase of price be produced before the Court which has to decide the question of enhancement; and this evidence must be such as the law declares to be relevant and admissible.

In the present case, the evidence which was produced before the Subordinate Judge to prove the increase of the price or [265] value of the produce was the testimony of a number of witnesses belonging to the cultivating class, who stated from memory the prices which, to their knowledge, have prevailed in the locality for a number of years back. The Subordinate Judge dealt with the testimony of these witnesses, and upon this evidence he came to a certain conclusion. Whether upon this evidence this conclusion was right or wrong, is a question into which we do not propose to enter. The case then came on appeal before the District Judge of the 24 Pargannas. The learned District Judge in his judgment first refers to certain arithmetical errors in the calculations of the Subordinate Judge. He then notices certain matters which formed the subject of a cross-appeal, and observes that the defendant contended that the extra expenses of protection of the land from salt water and of cutting and conveying crops to market absorbed the extra profits. He then notices a point, which was the subject of argument in the

course of the hearing of the appeal, namely, that the Subordinate Judge was incorrect in his method of striking an average. In this Court it has been said that ten years is too long a period for a fair average, and that five years is a reasonable period. The Judge then cursorily refers to certain former cases instituted for enhancement of the rent of the lands which form the subject of the present suit. Having thus noticed these points, he then, without definitely disposing of any of them, proceeds as follows:—"First as to the evidence offered by plaintiff to prove increased value and produce. Eight witnesses were examined, none of them hold under defendant; generally speaking, they hold neighbouring land. They appear to be substantial cultivators with retentive memories. The first gives the price of grain thirty-four years ago, and generally gives a comparison between prices now and then and intermediately. The rest are much the same; and the Subordinate Judge sweeps all their evidence away, and adopts some of the figures of one witness, Panch Cowree. I confess I cannot understand why Panch Cowree is selected, or why, apparently, his highest figure is to be taken. The fact is, this sort of evidence ought not to satisfy any Court of the relative value of produce in any given period. I do not know a more difficult subject of inquiry, [266] and I have frequently held—and I see no reason for change of opinion—that the price of grain during a short or long series of years must be proved by the evidence of men who have something more than memory to fall back upon. We have nothing to do with the quantity of produce, in which case the evidence of practical cultivators might be of more value than that of grain dealers. Value of produce can and should be proved by traders and merchants with books of accounts by which memory could be refreshed and tested. I shall, therefore, hold that the evidence in this case is no safe guide to the value of produce, and cannot be acted upon".

Now it has been contended on the part of the appellant, that the District Judge has here prescribed a general rule as to the evidence to be given in this class of cases; that he has in fact said that he will not consider or take into account any evidence which consists merely of the oral testimony of witnesses of the cultivating class; and that the only evidence which he will regard as relevant in an inquiry of this kind, is the evidence of traders and merchants with books of accounts, by referring to which they may refresh their memory. It is said that the Judge cannot thus make for himself new rules of evidence; and that it is our duty to set aside a judgment based upon reasoning which states with a mistaken view of the relevancy of evidence.

On the other hand, it has been argued that the remarks of the District Judge which we have above quoted, were not intended to lay down in any general rule as to the kind of evidence relevant in this class of cases; but they are to be read merely as observations dealing with the witnesses and the evidence in this particular case, and stating the grounds upon which the Judge considers this evidence to be unworthy of credit. And it has been further contended that, as the Judge has disbelieved this evidence, we are bound by this finding, and cannot on second appeal question the Judge's disbelief.

It appears to us that even if the District Judge did not say, or intend to say, that he would absolutely refuse to consider evidence of the nature of that produced by the plaintiff, he has yet, in his strong feeling of preference for another species of evidence not produced, virtually done this so far as the present [267] appellant is concerned; that he has substantially omitted to consider the evidence upon the record, and this, for a reason which cannot be supported—the reason, namely, that the fact to be proved ought to be proved by evidence of another kind than that produced. We entertain no doubt that in thus putting



aside and omitting to consider the relevant evidence actually produced upon the essential question in the case, the District Judge committed an error in law which we are competent, and indeed bound, to deal with on second appeal. Some cases have been cited to us, to show that this Court has repeatedly refused to interfere on second appeal where the Judge of a lower Appellate Court has given an erroneous and improper reason for disbelieving or setting no value upon evidence. There are, however, many cases which support a different view. *M. S. Degumber Dossee v. Kissendhur Nundy* (1 Ind. Jur., N. S., 35.) *Gunee Biswas v. Sreegopal Paul Chowdhry* (8 W. R., 395), *Ram Das Saha v. Manmahini Dasi* (7 B. L. R., App., 4), *Shundhabun Mohunt v. Shurut Chunder Roy* (23 W. R., 160), *M. S. Roop Narainee Koor v. Ressel Tewaree* (24 W. R., 119), *Surrosutty Dossee v. Umbika Nund Biswas* (*Ibid*, 192), *Sheo Pursun Pandey v. Brun Pandey* (24 W. R., 251), *Chand Monee Dossee v. Obhoy Churn Mal* (*Ibid*, 289)-*Abdul Rohman v. Bibee Sofy Mikhayesh Saheba* (*Ibid*, 293), *Rustee Sahoo v. Jeo Narain Singh* (*Ibid*, 338), *Bibee Ameerun v. Shaikh Cherag Ali* (*Ibid*, 343), *Hunsa Koor v. Sheo Gobind Raoot* (*Ibid*, 431). Without attempting to reconcile the decisions on this point, which can be properly estimated only with reference to the facts of the particular cases, we may observe that there is a material difference between a case in which a Judge has assigned one bad reason for believing or disbelieving a particular piece of evidence, while he has given one or more good reasons for the same belief or disbelief; or a case in which, putting this particular piece of evidence wholly aside, enough remains to support the judgment, and a case in which the essential question, or one of the essential [268] questions, to be decided rests upon the evidence believed or disbelieved, regarded as of great value or considered worthless for a reason which is unsound and unsustainable. In the case now before us, evidence such as that to which the District Judge refers—the evidence, that is, of traders and merchants with books of accounts—would no doubt be valuable for certain purposes; but it is to be observed that this evidence, if produced, would go to show the price of grain at hâts, bazars, and other places of trade. The difference between that price and the price paid for the crops upon the spot where they are grown, or at the nearest market at which they are usually sold, may vary considerably. The witnesses who have been called by the plaintiff are the holders of land in the neighbourhood, who may not unreasonably be supposed to remember the prices at which they have sold their crops from year to year either upon the lands where they were grown, or at the nearest market available to, and frequented by, the tenants. That such evidence is relevant in this case, and that such evidence ought to be fairly considered and weighed, we apprehend there can be no doubt.

We think, therefore, that the case must go back in order that this evidence may be duly considered; and that upon this evidence the District Judge may find whether there has been the increase of price alleged by the plaintiff, or any other increase of price which will entitle him to enhancement of rent upon the only ground with which this appeal is concerned. The case will be remanded to the District Judge, who will proceed to deal with it and with the questions raised in the cross-appeal in conformity with the directions contained in this judgment.

Appeals Nos. 2413 and 2415 are admittedly governed by this decision.

The costs of these appeals will be costs in the suit, and will abide the final result.

*Case remanded.*

NOTES.

[SECOND APPEAL—FINDINGS OF FACTS:—

The rule of law laid down in this and in (1885) 7 All. 649 F. B. and either adopted or approved in 11 C. L. R. 104; Weekly Notes, 1881, p. 14; Weekly Notes, 1882, p. 63 p. 66; (1882) 9 Cal. 809 and in (1888) 10 Cal. 992 was overruled in (1890) 18 Cal. 23 P. C. where it was held that "there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, *however gross* or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the first Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding."

Following this principle it was held in (1892) 20 Cal. 93 P. C. that though the first appellate court's decision as to the effect of the evidence is final, yet the soundness of the conclusions may involve matters of law which may be questioned in Second Appeal.

See also (1905) 32 Cal. 719 (723)=1 C. L. J. 232; (1896) 19 Mad. 485],

[269] *The 19th February, 1881.*

PRESENT:

MR. JUSTICE MC DONELL AND MR. JUSTICE FIELD.

Shookmoy Chunder Dass and another.....Defendants.

*versus.*

Monohari Dassi and another.....Plaintiffs.\*

*Hindu Law—Will—Estate Tail—Accumulation.*

A Hindu by his will directed that his estate should remain intact, and that the profits should be applied, in the first place, towards performing religious duties; and he provided that his immoveable property business, and the capital stock thereof should also remain intact, and that his heirs, sons' sons, and great grandsons in succession, should be entitled to the profits, no person having any right of alienation.

The testator then provided that his eldest son should act as manager and shebait and prepare accounts; and that he should have no power of alienation. He then made provisions for the payment of Government revenue, and declared that of the surplus profits six-sixteenths should be applied, in part, towards the worship of his ancestral deities, and the residue towards the maintenance of all the members of the family, and religious ceremonies, the remaining ten-sixteenths to be carried to the credit of his estate. In case of disputes between his eldest son and the testator's third wife, the mother of the testator's minor children, the testator directed that his eldest son should receive five-sixteenths of the ten annas share; if another son should be born of the testator's third wife, the remaining eleven-sixteenths, was to go to her sons. If no son was born, then the eldest son was to take five and-a-half sixteenths, and the sons of the third wife the remaining ten and-a-half sixteenths, absolutely, as long as the family remained joint; the expenses of the *debsheva* and maintenance of the family were to be defrayed from the six annas share. In case of separation, the shares of the sons were to be placed to their respective credits every year, each son on attaining majority to be entitled to his share.

\* Appeal from Original Decree, No. 127 of 1879, preferred against the decree of Baboo Gunga Churn Sircar, Subordinate Judge of Dacca, dated the 24th September 1878.

The testator then provided, that in case of separation, his sons (with the exception of the landed properties and capital stock of the business, and the articles used by the idols) should be at liberty to take the moveable property absolutely, according to the conditions laid down for the division of the ten annas share of the profits. He then provided for the maintenance of his third wife and minor sons out of the six annas share, each son on attaining majority to be entitled to his share under the will absolutely. After providing that his sons should live in his ancestral dwellinghouse, but that none of them should have any power of alienation, the testator directed that, if any [270] of his heirs died without male issue, the widow of such heir should receive maintenance only, and that his grandson by a daughter should get nothing, but his share should go over to the surviving sons. The testator finally directed that his eldest son, sons' grandsons, and other heirs in succession should perform the duties of kurta and shobait.

In a suit by the widow of one of the testator's sons by his third wife, seeking to recover such a share of the testator's property as she would have been entitled to in the case of intestacy,—

*Held*, that the intention of the testator, in disposing of the profits of the six annas share, was not an intention to create a valid estate in the *corpus* in favour of any individual, but to tie up such *corpus* and to give the profits only to his male descendants; or in other words, to create a sort of estate in tail male in the profits, and that the bequest was void.

*Held* also, that the disposition of the ten annas share of the profits was void, there being in one event a direction to accumulate for ever without a disposition of the profits; and in the other event, the gift was void for the same reasons as the gift of the six annas share.

*Held* further, that the disposition of the family dwellinghouse, save in so far as it prohibited alienation, was good, and that there was a sufficient disposition of the moveable property.

THIS was a suit by a Hindu lady to recover, by right of inheritance from her husband, a four-anna share in the estate of her father-in-law, one Kristo Prosad Das, who had died leaving a will, dated the 17th Bysack 1260 (28th April 1853), the material provisions of which were as follows:

"Para. 6.—My estate shall remain intact, and from the profits thereof there shall be performed the worship, the periodical festivals, and the ceremonies of my ancestral deities, idols, and chakras, according to my turn as they have hitherto been performed. As regards the enjoyment of the profits, I do hereby provide that my houses, zemindaries, taluks, and other immoveable properties, and my businesses of various descriptions, and the capital stock thereof, shall always remain intact, as at present, and my heirs, sons, sons' sons, and great grandsons, and so on in succession, shall be entitled to enjoy the profits thereof. No one shall be competent to alienate by sale or gift the immoveable property, to close any business, to misappropriate the capital stock thereof, or to divide the same. If any one succeeds in doing so or will do so, it shall be disallowed by the authorities.

"Para. 7.—After my death, my eldest son, Sreeman Shookmoy [271] Chunder Das, shall, as provided by this will, act as kurta (manager) for the preservation and management of my entire estate, as shobait to the duties, idols and chakras in my turn; and shall as kurta manage and perform the affairs and duties, as they are now performed by me, from the profits of my estates, commercial transactions, mercantile and banking businesses, zemindaries and taluks, and the rents and profits of my houses; and as such *karmadhyakha* (manager of business), he shall prepare accounts as they are now prepared in my time, year after year, shall keep one set with himself and shall make over

another set to the mother and guardian of the minors. But he shall always be devoid of power to alienate my immoveable properties, which are now in existence, by sale, gift or otherwise, or to misappropriate or waste the capital stock of my business. If he do so, such act shall be null and void; and the person who acts in contravention (of these provisions) shall be deprived of his right and interest (under this will).

"Para. 8.—Whichever of my sons shall, after my death, act as *samarakshak* (protector) and *karmadhyakha* (business manager) of the estate for the time being according to the terms of this will, shall duly and at the proper times pay the Government revenue from the profits of the landed properties belonging to the estate, and shall thus protect the estate. If any immoveable property shall be lost through the negligence of the manager and otherwise than by divine visitation and circumstances over which there is no control, the liability to make good such loss shall rest with the manager. After discharging the public revenue, the collection charges and the cost of repairs of the houses from the profits of the immoveable properties, and of the trading business, six-sixteenths (six annas) of the entire surplus balance shall be applied, year after year, in part towards the performance of the worship and periodical festivals of my ancestral deities, idols, and chakras in the proper turn; and the residue thereof towards the maintenance of all the members of the family and the performance or religious rites and ceremonies; and the remaining ten-sixteenths (ten annas) shall be carried to the credit of my estate. If disagreement and discord eventually take place between him (the said Shookmoy Chunder) and [272] the mother of the minors, and they want to live in separate mess, then the said six-sixteenths (six annas share) being regarded as a whole (or sixteen sixteenths), my eldest son Sreeman Shookmoy Chunder Das, in consideration of his having in my lifetime increased the wealth by his labor and exertions in managing the trading business, shall receive five-sixteenths of such whole (or sixteen-sixteenths, i.e., five-sixteenths of ten-sixteenths) in the following case,—that is to say, if a son is born to my last married wife of her present conception; and the sons of my last married wife shall receive the remaining eleven-sixteenths (or eleven annas) in equal shares. If the issue of the present conception of my last married wife is not a male child, or if being a male child he dies unmarried, then my eldest son Shookmoy Chunder Das shall, for the reasons abovementioned, receive five and-a-half-sixteenths, and the other sons ten and-a-half-sixteenths in equal shares, and they, in their respective rights, shall be competent to enjoy and make gift of such profits.

"Para. 9.—As long as my last married wife and the sons born of her womb, and my eldest son, the said Shookmoy Chunder Das, shall live in concord with one another, the expenses of the *debsheva*, &c., and of the maintenance and daily and periodical rites and ceremonies of all the members of the family, shall be defrayed from the six annas share of the profits aforesaid. If, however, after all they disagree and fall out with each other and separate in mess, then the sum of money that may fall to the respective shares of the different sons, under the terms of the will, shall be placed to their respective credits in the accounts of every year. Any of the sharers shall, upon attainment of majority, be competent to take and receive, upon his receipt from the manager, the money placed at his credit, whenever he may wish to do so. If the manager fraudulently refuses to pay the same, he and his right to receive the profits shall be liable to make good the sharer's claim with interest on the amount in deposit to his credit (such interest to run) from the date of demand, and the manager shall have no right of objection thereto.

"Para. 10.—The several objects to which the six annas share has been appropriated are likely to be effectuated in the same manner (as before) so long as concord and harmony exist. If, [273] however, my last married wife or her sons, do not agree with Shookmoy Chunder Das, or his wife and son, and if there arise (in consequence) a necessity for separation, they shall be at liberty to separate; and, with the exception of the landed properties and capital stock of the trading business now belonging to my estate, and the articles used by the idols, to divide and take, to appropriate, and to convey by gift, sale or otherwise the other immoveable properties, subject to the conditions, provisions, and shares laid down in the eighth paragraph preceding, for the division of the ten annas share of the profits. Out of the six annas share set aside for the expenses of *debsheva*, &c, my last married wife shall, during the minority of her sons, receive from the manager rupees twelve per month for the maintenance of herself and the minors, and the balance shall remain in the hands of the manager, who shall meet from it the expenses of the yearly, periodical, and daily rites and ceremonies. Any one of my sons by my last married wife who attains majority shall, from the date of his so attaining majority, cease to receive for his maintenance his proportionate share of the said twelve rupees; and shall be entitled to his proper share (under this will), and shall enjoy and appropriate the same, and the surplus balance of the said six annas share which remains after defraying the worship, the duties, and periodical and daily festivals and ceremonies, shall be received by my sons born of my two wives, in equal shares, without any difference in their proportionate shares.

"Para. 11.—All my sons shall reside in and occupy my ancestral dwelling and the dwellinghouse and gardens constructed and laid out by myself. No one of them shall be competent to demolish the same, or alienate them by sale or gift. All my sons will be entitled to hold and enjoy the same in equal shares.

"Para. 12.—If any one of my heirs dies without male issue, his widow shall receive maintenance only, and his grandson by a daughter (if any) shall get nothing. The profits of his share shall be received in equal shares by the surviving sons; she shall remain in the family dwellinghouse as long as she lives, and on her death, the surviving sons shall receive the same in equal shares for their residence.

[274] "Para. 15.—After the death of Sreeman Shookmoy Chunder Das, by the will of God, my eldest surviving heir for the time being shall discharge and perform all the duties aforesaid as protector and manager of the entire estate, as kurta and shebait, according to the provisions of the seventh paragraph. And this direction shall hold good in respect of the sons, grandsons, and other heirs in succession."

Kristo Prosad Das had been married three times. By his first wife he had no son. By his second wife he had one son, Shookmoy Chunder Das. By his third wife he had three sons, Hari Charan Das, who died unmarried, Gourhari Das, and Anand Hari Das. At the date of his will his wife was *encompte*, and subsequently gave birth to a son, who died an infant.

Kristo Prosad Das died on the 12th Joisto 1260 (24th May 1853). The present suit was instituted by S. M. Monohari Dassia, the widow of Anand Hari Das, who died in Phalgun 1279 (February 1873), against Shookmoy Chunder Das, Gourhari Das, and S. M. Pria Dassia, the widow of the testator.

The Subordinate Judge held, that the testator had attempted to create an estate unknown to the Hindu law, and that the will was invalid; and he gave the plaintiff a decree.

From this decision the defendants appealed to the High Court.

Mr. *Evans* and Baboo *Durga Mohun Doss*, Baboo *Rashbehary Ghose*, Baboo *Aukhil Chunder Sen*, and Baboo *Lall Mohun Doss* for the appellants.

Mr. *Branson* and Baboo *Hurry Mohun Chuckerbutty* and Baboo *Opendro-nath Mitter* for the respondents.

The **judgment** of the Court (FIELD and McDONELL, JJ.) was delivered by

**Field, J.**—The most important questions to be decided in this case are concerned with the construction to be put upon the will, dated 17th Bysak 1260 (corresponding with the 28th April 1853), made by the late Kristo Prosad Das.

It may be well to observe that this will was made before the [275] passing of the Hindu Wills Act of 1870, and that, therefore, the provisions of this Act, and the provisions of the Succession Act incorporated therein by reference, have no direct application to the will with which we have to deal in the present case.

The testator Kristo Prosad Das was thrice married, as he states in the 4th paragraph of the will. By his first wife he had no male offspring. By his second wife he had a son Shookmoy Chunder Das, the defendant No. 1. By his third wife, Sreemutty Pria Dassia, he had three sons born before the date of the will, *viz.*, Hari Charan Das, Gourhari Das, and Anand Hari Das; and his wife was on that date pregnant, and, according to the finding of the Subordinate Judge, was subsequently delivered of a posthumous son, who was born alive, and died a short time after his birth. It may here be observed that although an objection has been taken to the finding of the Subordinate Judge on this point, such objection has not been argued or pressed before us by the learned Council who represented the respondents.

Hari Charan died after the testator's death and before the institution of the present suit. Gourhari Das is the defendant No. 3, and the plaintiff is the widow of Anand Hari Das, the third son by the third wife.

The will, after setting forth the family relations of the testator, and the manner in which he had acquired his property, contains the following paragraphs, which we have had carefully translated, the translation to be found at page 84 and following pages of the paper-book being admittedly incorrect in many essential particulars.

(His Lordship then stated the provisions of the will as above and continued):

The plaintiff, as the widow of Anand Hari Das, has brought this suit to recover the share of the property to which she, as Anand's widow, would be entitled if Kristo Prosad Das had died intestate; and her main contention is, that the provisions of the will are void, and that effect cannot be given to them so as to deprive her of the share to which she is entitled in the family property.

The Subordinate Judge has given her a decree, which is to be found [276] at page 166 of the paper-book. Substantially he comes to the conclusion that the testator has made no devise or bequest of the *corpus* of his property; that

he has attempted to create an estate which is invalid under the Hindu law; that, therefore, the general intention of the will fails; and the property must descend according to Hindu law, in the same manner as it would descend if Kristo Prosad had died intestate.

In order to deal with the questions which have been argued before us, it will be useful to summarize the provisions and limitations contained in the will. They are—

*1st.* The *corpus* of the estate,—that is, the houses, zemindari, taluks, and capital employed in the business,—is to remain intact. There is to be no alienation and no partition. This direction is repeated more than once in the will.

*2nd.* The moveables may be partitioned and alienated if Shookmoy and the widow cannot live together amicably.

*3rd.* There is a general direction that the testator's sons, grandsons, great-grandsons, and so on, are to enjoy the profits of the estate; but this general direction is controlled by the directions which follow as to the mode of enjoyment.

*4th.* The eldest son Shookmoy Chunder Das is to act as manager and shevait without power of alienation and without power to withdraw the capital invested in business. He is to keep regular accounts. On Shookmoy's death the eldest male heir for the time being is to succeed to the position of manager and shevait.

*5th.* In respect of the manner in which the profits are to be dealt with, the Government revenue, collecting charges, and costs of repairs of houses are to be first defrayed therefrom, after which the profits are to be divided into two portions—a six-anna portion and a ten-anna portion.

*6th.* The six-anna portion is to be devoted to the worship of the idols and the maintenance of the family. The testator expressly declares that this portion will be sufficient for these objects (see para. 10). If the members cannot manage to live together in harmony during the minority of Sreemutty Pria Dassia's children, she is to receive out of this six-anna portion twelve rupees per mensem for the support of herself and her children. Each [277] son, after attaining majority, is to get his share under the other provisions of the will, and his maintenance is no longer to be defrayed from the monthly allowance of twelve rupees. The balance of the six annas share, after defraying the expenses of worship, is to be divided equally between all the sons. It may be observed here, that there is no express provision as to the accumulation of this balance during the minority of the children.

*7th.* The ten annas portion of the profits is to be credited to the estate; or, in other words, to be accumulated so long as Shookmoy and Pria Dassia live in harmony.

*8th.* If Shookmoy and Sreemutty Pria Dassia cannot live together in harmony, then the ten annas share of the profits is to be divided, Shookmoy getting five-sixteenths, if a fourth son be born of Pria Dassia, which event the Subordinate Judge finds to have taken place. The sons of Sreemutty Pria Dassia are to receive the remainder of the ten annas portion of the profits in equal shares. In the case of the minors, their shares are to be accumulated till



majority, and then paid to them on demand. An absolute power of disposal is given to the sons over the profits so divided amongst them.

9th. The dwelling-houses, ancestral and constructed by the testator, and his gardens are given to all the sons in equal shares without power of alienation.

10th. The share of an heir (son) dying without male issue is to go to the sons (male heirs) existing at the time of his death.

In construing the provisions of this will, we must follow the usual rule, that is, endeavour to collect the testator's intention from the language used by him, and then consider whether such intention is within the testator's power, limited as it must be by the general policy of the law, (8 Moore's Ind. App., 80). In order to discover that intention, we must also follow the rule laid down by their Lordships of the Privy Council in the *Tagore case* (9 B. L. R., 409), where they say that "the true mode of construing a will is to consider it as expressing in all its parts, whether consistent with law or not, the intention of the testator, and to determine upon a reading of the whole will, whether, assuming the limitations therein mentioned to take effect, an interest claimed [278] under it was intended under the circumstances to be conferred." It will be convenient to consider the intention of the testator, *first*, as to the six annas share of the profits; *secondly*, as to the ten annas share of the profits; *thirdly*, as to the dwelling-houses and gardens, and *fourthly*, as to the moveable property.

*First*, then, with regard to the six annas share of the profits, the testator directs in the 8th paragraph of the will, that such share shall be applied to defray the cost of worship of the idols and the expenses of the maintenance and clothing and ceremonies of the entire family. It has been contended on the authority of the case of *Chundermoni Dassee v. Moti Lall Mullick* (5 C. L. R., 496), that this disposition of the six annas share of the profits is wholly void. In that case the testator directed that certain lands should be held by his executors on trust to apply the rents and profits, *first*, in the celebration of certain poojas and in performing the worship of the family idols and other religious festivals; and *secondly*, for the maintenance of the five younger sons, their wives, sons, and male descendants, and female descendants till marriage. It was held, that the real object of the testator was to establish a permanent endowment to the testator's descendants, and that the perpetual trusts for this purpose were void. We think that the argument founded on this case will probably be sufficiently answered by the case *Ashutosh Dutt v. Doorga Churn Chatterjee* (L. R., 6 Ind. Ap., 182; S. C., 5 C. L. R., 296) where, in a somewhat similar case to the present, it was held, that a direction that the surplus, after meeting the cost of religious acts and ceremonies, should be devoted to the support of the family, amounted to a good bequest of the surplus to the members of the joint family for their own use and benefit. It appears to us, however, that the present case is not so exactly similar to either of the case just quoted that it can be decided upon the authority of either of them. In the present case there is no gift of the *corpus* of the real estate. The intention of the testator clearly was, that such *corpus* was never to be alienated or partitioned; and in order to carry out this intention, he has directed the management of the property to be vested in his [279] eldest son him surviving, and after him in the eldest male descendant for the time being,—that is, in a perpetual series of manager or trustees. Mr. Evans has contended, that the gift of the six annas share of the profits is a good gift of the *corpus* according to the cases to be found at Theobald on Wills, p.



243 ; see also s. 159\* of the Indian Succession Act, X of 1865. In the case of *Monnox v. Greener* (L. R., 14 Eq., 462), Sir R. Malins, V. C., said, that there was no distinction between giving the income of the land and the rents and profits of the land, and that a gift of the income of land unrestricted is simply a gift of the fee-simple of the land. Can it be said that, in the present case, there is an unrestricted gift of the six annas share of the profits? Can it be held that a gift of these profits was intended to be a gift of the real estate itself, when the intention of the testator to be gathered from the whole will clearly was, that there should be no gift of the real estate, that the real estate should remain unalienable and unpartitioned in the hands of a perpetual series of managers? It appears to us, that there can be only one answer to this question ; and that the answer must be in the negative.

It is settled law that a private person cannot, by gift or will, create a new estate, or make property inheritable otherwise than the law directs : (*Jatindra Mohan Tagore v. Ganendra Mohan Tagore* 9 B. L. R., 394), *Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb* (2 B. L. R., O. C., 26, 27), *Sonatum Bysak v. S. M. Juggutsoondree Dossee* (8 Moore's I. A., 66). If then there be a good gift of an estate, and there be also a prohibition against alienation or partition, the gift will be good and the prohibition will be void : *Jatindra Mohan Tagore v. Ganendra Mohan Tagore* (9 B. L. R., 404), *S. M. Krishnaramani Dossee v. Ananda Krishna Bose* (4 B. L. R., O. C., 231), *Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb* (2 B. L. R., O. C., 26, 27). When there is a good gift with an invalid restriction, the gift will be good, the restriction void. Where there is a general intention to create a valid estate and a particular intention to deprive such estate of its legal incidents, [280] effect will be given to the general intention, and the particular intention will be disregarded. It is possible to say that in the present case we can gather from the will a general intention on the part of the testator to create a valid estate in the real property in favour of any person or persons who could take such estate according to the Hindu law? It appears to us, that it is impossible to gather any such intention from the will. The general intention which is obtainable from the whole instrument, is clearly not an intention to create a valid estate in the *corpus*, in favor of any individual, but to tie up such *corpus*, and to give the profits only to the male descendants of the testator ; or, in other words, to create, in the profits merely, a sort of estate in tail male. It is clear that to this general intention effect cannot be given according to the principles laid down in the decided cases. We think, therefore, that the principle of *Mannox v. Greener* (L. R., 14 Eq., 462), cannot be applied to the present case.

There are other considerations upon which it appears to us that the bequest of the six annas share of the profits must fail. The testator directs that the surplus of this six annas share, after defraying the expenses of worship, is to be divided equally between the sons of both his wives. In another part of the will he directs that the minor sons are to get their shares only on attaining majority. As to what is to be done with the minor's share of the profits in the meantime, there is no clear direction. As to what is to be done with this six annas share of the profits after the death of the sons, there is no express direction—no direction at all, unless we can come to the conclusion that the general provisions of paragraphs six and twelve

\*[Sec. 159 :—Where the interest or produce of a fund is bequeathed to any person, and the will affords no indication of an intention that the enjoyment of the bequest should be of limited duration, the principal as well as the interest shall belong to the legatees.]

, Bequest of the interest or produce of a fund.

apply. As to paragraph twelve, it has been contended by Mr. Evans that this paragraph contemplates the failure of sons of the testator's son, and not an indefinite failure of male issue; and he relies upon the case of *Sreenuttty Soorjeemoney Dossey v. Denoobundoo Mullick* (9 Moore's I. A., 128). In all probability it would be proper to put the construction so contended for upon this paragraph of the will, inasmuch as, although the testator uses the word "heirs" in the first sentence, he directs that the share of the profits of his deceased heir shall be divided equally among his [281] "sons," not "heirs," who will be then alive. But it is not in our view, material to decide this question, inasmuch as, according to the construction which we think must be put upon the whole will, the general intention of the testator fails. The general direction contained in paragraph six is clearly intended to create an estate in tail male. Such an estate would, we think, be void by Hindu law. In the case of *Sonatum Bysack v. Sreemuttty Juggut Soondree Dossee* (8 Moore's I. A., 80) Sir James Colville, who delivered the judgment of the Supreme Court, said:—"We cannot see that the testator has made any distinction between his grandsons, his great grandsons, or the remoter descendants comprised in the terms 'et cetera heirs.' All are to inherit their ancestor's share according to the shaasters, or Hindu law, modified only by the exclusion of the females or the descendants of females; therefore the object which he has in view is to create for his own property, as long as he has any descendants in the strict male line, a new course of descent. That object is, we think, beyond the scope of the testamentary power recognized by law, and must therefore fail." Their Lordships of the Privy Council did not expressly overrule this dictum, and, in the view which they took of the case, it was unnecessary to find specially upon this point; but the *Tagore case* (9 B. L. R., 377), is an authority that the creation by a Hindu of an estate of inheritance in tail male is void. It has been argued that the present case is similar to, and ought to be governed by, that of *Sonatum Bysack v. Sreemuttty Juggut Soondree Dossee* (8 Moore's I. A., 80), but it appears to us that there is one essential difference between the two cases. In that case there was an express grant of the *corpus* to the idol; and the Privy Council held, that the effect of this was to grant the property effectually for the benefit of the sons. In the present case, not only is there no express grant of the *corpus*, but, as has been already pointed out, the presumption of such a grant is opposed to the general intention of the testator to be gathered from the whole of the provisions of the will.

Upon the best consideration that we have been able to give to the matter, it appears to us that the disposition of the six annas [282] share of the profits is void, and that as regards such share the testator must be deemed to have died intestate.

Then as regards the ten annas share of the profits, the case is still stronger. Two events appear to be here contemplated,—*first*, the event of the family continuing joint; and *second*, the event of the family becoming divided. In the former case the ten annas share of the profits is to be credited to the estate; in other words, is to be accumulated, and apparently for ever. It is scarcely necessary to say that any such direction for accumulation without a disposition of the beneficial interest is void; *Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb* (2 B. L. R., O. C., 41), and *S. M. Krishnamamani Dasi v. Ananda Krishna Bose* (4 B. L. R., O. C., 277).

Then, in the second event,—that is, in the case of the eldest son and the third wife and her sons not being able to agree,—the profits are to be divided in the shares directed in the eighth paragraph of the will. There is no grant of the

*corpus*, no disposition of the beneficial interest, and the remarks already made with reference to the six annas share of the profits apply here with still greater force. In any case it will be observed that the disposition of the ten annas share of the profits is made to depend, not upon the will of the testator, but on the subsequent acts of the legatees. It appears to us that, as regards the ten annas share of the profits of the real estate also, the testator must be taken to have died intestate.

*Thirdly.*—As to the dwellinghouses and gardens, we think the eleventh paragraph of the will contains a valid disposition. The general intention of the testator here, was to give this portion of the property in equal shares to all his sons, and to this general intention effect must be given. We have also a particular intention prohibiting transfer by sale or gift. This particular intention is opposed to the policy of the law, and must, therefore, be disregarded. The result is, that so far as these portions of the property are concerned, the will does not interfere with the plaintiff's rights by Hindu law.

*Fourthly.*—With respect to the moveable property, there is no express gift in the will, but there is a direction in the tenth [283] paragraph, that, in the event of separation, the moveable property shall be partitioned according to the shares mentioned in paragraph eight as applicable to the ten annas share of the profits.

We think that, although there is no gift of the moveables in so many words, we may reasonably gather from these provisions an intention on the part of the testator to give the moveables to his sons in the shares above specified, and that this case comes within one of the general rules of construction, namely, that effect should be given to a general prevailing intention, however imperfectly and obscurely indicated, if discoverable by a fair and liberal construction of the language of the will, and if allowed by law.

(The result will be, that the decree of the Subordinate Judge will be modified in respect of the moveables only, and as to the rest of the property will be confirmed.

It remains to deal with the question of accounts, and it appears to us, that we ought not to interfere with the direction given in this respect by the Court of first instance. The will itself directs the managing member to keep accounts; and if these directions have been followed, there ought to be no difficulty in accounting for the profits since the death of the testator.

It may be well to observe that, as to the *factum* of the will, we entertain no doubt that the will was duly executed by the testator. Some arguments were addressed to us to impugn the genuineness of the will; but we think that there can be no reasonable doubt as to the will having been executed by the testator, regard being had to the direct testimony and to the internal evidence supplied by the instrument itself.

*Decree modified.*

#### NOTES.

[Affirmed by the Privy Council in (1885) 11 Cal. 684=12 I. A. 103.

See Notes to that case in our "Law Reports" Reprints.]

[284] The 5th April 1881.

PRESENT

MR. JUSTICE PONTIFEX AND MR. JUSTICE FIELD.

Obhoy Churn Nundi and others.... .....Defendants

versus

Kritartha Moyi Dossee .. . . Plaintiff.<sup>a</sup>

*Jurisdiction—Valuation of Suit—Exclusion of Time of Proceeding in another Court—Parties—Adding Defendants—Limitation Act (XV of 1877), ss 14 and 22*

A suit was instituted in the Court of the Subordinate Judge, who, after seven months, returned the plaint to be filed in the Munsif's Court, on the ground that the suit had been overvalued. There was nothing to show want of *bond fides* in the plaintiff's instituting the suit in the Court of the Subordinate Judge.

*Held* that, in computing the period of limitation prescribed for the suit, the time during which the plaint was on the file of the Subordinate Judge's Court must be deducted.

A suit for property in the possession of several persons was brought by the plaintiff against one of those persons only. After the institution of the suit and after the period of limitation prescribed for a separate suit on the same cause of action against the other persons in possession had elapsed, those latter were added as defendant.

*Held*, that the suit must be dismissed as against the added defendants on the ground that it was barred by limitation.

THIS was a suit for the recovery of immoveable property, instituted by Kritarthamoyi Dossee in the Court of the Subordinate Judge of Hoogly, against Obhoy Churn Nundi and Issur Chunder Pal, on the 23rd of November 1876. The plaintiff stated that her husband Kunjo Behari Pal, the defendant Issur Chunder Pal, and one Indro Chunder Pal, three brothers, formed a joint Hindu family, that, after the death of the plaintiff's husband, she continued to live jointly with her brothers-in law, that Issur Chunder Pal having mortgaged some of the joint property, the mortgagee brought a suit in the High Court at Calcutta and obtained a decree, in execution of which the property was, on the 24th of March 1864, sold to the defendant Obhoy Churn Nundi, who entered into possession. [285] The plaintiff alleged, that one third of the property so dealt with was hers, and prayed for a declaration of her right thereto and for possession, dating her cause of action from the 24th of November 1864, the day of the sale to Obhoy Churn Nundi.

By an order dated the 21st of June 1877, Ishur Chunder Acharjee (in whose name the property was purchased at the sale in November 1864) and Dhonendro Nath Nundi, were made defendants to the suit, and by a similar order, dated the 6th of July 1877, Brojendro Narain Nundi was made a defendant. Some time afterwards, the Subordinate Judge, on the ground that the suit had been overvalued, directed the plaint to be returned and filed in the Court of the First Munsif of Hooghly, which was immediately done. At the trial the Munsif dismissed the case on the merits, but this decision was reversed on appeal, the Judge saying — "The only matter really argued in this appeal was the question

<sup>a</sup> Appeal from Appellate Decree, No. 108 of 1880, against the decree of J. P. Grant, Esq., Judge of Hoogly, dated the 5th October, 1879, reversing the decree of Baboo Pree Nath Surma, First Munsif of Hoogly, dated the 31st January 1878.

of limitation, and that merely in respect of the manner in which the suit was first valued and instituted in the Court of the Subordinate Judge, withdrawn therefrom, and afterwards brought in the Court of the Sadr Munsif. Another point of limitation inseparably mixed up with the merits had already been decided by this Court in a cognate suit arising out of the same circumstances as this one, in which the plaintiff was unsuccessful in the first instance, but gained her appeal. This appeal would have been disposed of at once in the same way, but that a special appeal having been preferred to the High Court by the unsuccessful respondent before this court, this appeal was, at the wish of both parties, kept in abeyance pending the disposal of the special appeal. The special appeal resulted in the upholding of the appellate order of this Court, which has, as I have said, the effect of deciding the main question between the parties to this appeal in the same way. The only matter for argument and judgment here being the exceptional circumstances attendant upon the institution of the suit."

In reference to an objection taken before him that the suit was out of time as against the added defendants, the Judge said :—" This argument betrays an ignorance of the law of procedure regarding the adding of parties, and the principles of [286] it. The adding of parties is exclusively the prerogative of the Court. The Court may be moved by parties already before it to exercise its prerogative in this way, but it is none the less the act of the Court. As to limitation, that applies solely to the institution of suits. A suit against a principal defendant once brought in time, the Court may add parties to it, though at the time of adding them, the plaintiff, if he had not already brought his suit, would be out of Court."

The Judge went on to say, that he considered the valuation first stated in the plaint was correct, and that the Subordinate Judge was wrong in forcing the plaintiff into the Munsif's Court. The defendants appealed to the High Court.

Baboo *Troyluckyanath Mitter*, for the appellants, argued, that the decision of the Court below could not stand, as there was no finding as to who had been in possession within twelve years previous to suit ; that the date of the institution of the suit was the day on which the plaint was filed in the Munsif's Court, and the claim was therefore barred, as the plaintiff could not claim to except the time spent in the Subordinate Judge's Court, under s. 14, Act XV of 1877 ; and that as against the added defendants the suit was clearly barred, s. 22, Act XV of 1877\*.

Baboo *Mohiny Mohun Roy* and Baboo *Issur Chunder Chuckerbutty* for the respondent.

The judgment of the Court (PONTIFEX and FIELD, JJ.) was delivered by

**Pontifex, J.**—In this case the defendants are the appellants on the second appeal to this Court. It appears that, on the 24th November 1864, the defendants had, at a Sheriff's sale, purchased property, in which the plaintiff had an

Effect of substituting or adding new plaintiff or defendant.

Proviso where original plaintiff dies.  
deceased plaintiff :

Proviso where original defendant dies.

\*[Sec. 22 :—When, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit, shall, as regards him, be deemed to have been instituted when he was so made a party.

Provided that, when a plaintiff dies, and the suit is continued by his legal representative, it shall, as regards him, be deemed to have been instituted when it was instituted by the

Provided also, that, when a defendant dies, and the suit is continued against his legal representative, it shall, as regards him, be deemed to have been instituted when it was instituted against the deceased defendant.]

interest, and had taken possession thereof. After the expiration of twelve years all but one day, the plaintiff instituted this suit in the Subordinate Judge's Court for the recovery of her property, valuing the suit at Rs. 1,001; at the same time she brought another suit, in the same Court, for another property purchased at the same sale by the Sheriff, by another purchaser. After this case had been in the Subordinate Judge's Court for about seven [287] months, he came to the conclusion that the suit was overvalued, and therefore returned the plaint that it might be filed in the Munsif's Court, which was done on that very day. In special appeal it is contended, that the time during which the suit was pending in the Subordinate Judge's Court ought not to be allowed to the plaintiff; and that, if disallowed, her claim is barred by limitation. We agree with the lower Court that the present case is covered by the 14th section of the Limitation Act, there being no reason to suppose that the plaintiff was not acting *bona fide* in instituting her suit in the Court of the Subordinate Judges; therefore, as against the defendants, whom she made defendants on the 24th November 1864, the plaintiff will be entitled to a decree, but as against the other defendants, added after the 24th November 1864, she will not be entitled to a decree; for although Act XV of 1877 had not come into operation when the suit was instituted, yet the law embodied in s. 22 of that Act was applicable to a case like the present even before that Act was passed,—namely, that after the institution of a suit like the present for the recovery of land held by several persons against one of such persons, if a new defendant is added, the suit should, as regards him, be deemed to have been instituted when he was so made a party. We think, therefore, that, in this respect, the decree of the District Judge was wrong, and the plaintiff's suit must be dismissed against all the defendants added after the institution of the suit. But it has also been urged before us on behalf of the appellants, that it has not been shown that the plaintiff was in possession of the disputed property within twelve years before the date of institution of the suit. The Munsif has held that the plaintiff has failed to show that she was in possession within twelve years. But as another suit had already been decided arising out of similar circumstances in the Subordinate Judge's Court, and as both these cases came before Mr. Grant at the same time, and as we find, in his judgment in this case, Mr. Grant said, that this appeal would have been disposed of in the same way as the other appeal decided by him; but that as a special appeal in the other case was filed in the High Court, this case was, at the instance of the parties, kept in abeyance till [288] the disposal of that special appeal,—it is evident to us that Mr. Grant decided this question, which is a question of fact, in favour of the plaintiff. We, therefore, think that the appellants cannot set up this objection.

We accordingly allow the appeal so far as regards the defendants who were made defendants after the 24th November 1864, and dismiss the suit as against them; and disallow the appeal, and affirm the judgment of the lower Court, as against Obhoy Churn Nundi and Issur Ghunder Pal, who were made defendants on the 23rd November 1864. There will be no costs in this appeal, as the appellants partly fail and partly succeed.

#### NOTES.

##### [NOTE: PARTIES TO A SUIT ON—

"Persons damaged by a tortious act, need not all be joined in a suit by one of them, though they may be joined when objection for want of it is taken at the proper time.

But in cases on contract, all of those who have the same cause of action must join.—(1897) 25 Cal. 285. See also (1904) 2 C. I. J. 486; (1907) 6 C. I. J. 383; 1 Bom. L. R. 208.]

The 11th May, 1881.

PRESENT :

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE PRINSEP.

Uma Sundari Dabee.....Defendant.

*versus*

Sourobinee Dabee.....Plaintiff.\*

*Hindu Will—Adoption—Failure by Widow to adopt—Inheritance,  
Widow's Right to.*

A husband's express authorization, or even direction, to adopt, does not constitute a legal duty on the part of the widow to do so, and for all legal purposes it is absolutely non-existent till it is acted upon.

A widow's refusal to comply with such a direction, is no ground of forfeiture as regards her rights of inheritance.

When a Hindu, by his will, gave his widow authority to adopt, if necessary, from one to three *dattaka* sons, and she, having neglected to do so, brought a suit, to recover possession of her husband's property and for an account of the administration, against the administrator of the estate, after having ineffectually attempted to get the letters of administration recalled and fresh letters granted her as heiress of her husband,—

*Held*, that she was entitled to the decree she prayed for.

IN this case the plaintiff, Srimoti Sourobinee Dabee, was the widow, and the principal defendant, Srimoti Uma Sundari Dabee, was the mother, of one Paramata Lall Gossami, who died on the 23rd Cheyet 1281 B. S., corresponding with the 5th April 1874, leaving no issue.

[289] On the day that he died, Paramata Lall executed an instrument therein termed a will; and on the 28th June 1875, the defendant obtained letters of administration with a copy of the will annexed. Subsequently, the plaintiff made an unsuccessful attempt to have these letters of administration recalled and fresh letters granted to her, and the District Judge's order on this application was confirmed by the High Court on the 19th June 1877. Accordingly, the plaintiff instituted the present suit on the 27th June 1877, alleging her right as heiress of her husband under the Hindu law, and asking that the defendant, as administratrix, might be compelled to make over to her the estate of her deceased husband, and also to render an account of the administration, and pay what sums might be found due upon the taking of such account.

It appeared that, at the time of the death of Paramata Lall Gossami, the plaintiff was *enceinte*; but that, subsequently, a daughter was born. The will, which was in the Bengalee language, after alluding to that fact, and declaring that, if a son were born, the plaintiff was to be the guardian, continued :—

"God willing, may not this take place, if my wife gives birth to a daughter and not to a son, or if a son be born and dies at any time, I, for the perpetuation of the aforesaid libations of water and oblations of food, authorise my wife to adopt a *dattaka* son; if necessary, she shall be able to adopt from one to three

\* Appeal from Original Decree, No. 206 of 1879, preferred against the decree of C. D. Field, Esq., Judge of East Burdwan, dated the 17th April 1879.



*dattaka* sons, and for that purpose she shall consult with my mother, kinsmen, and the managing head of the family, and submit his name to the Maharajah of Burdwan. He who shall be selected by the Maharajah of Burdwan, my supporter, shall be adopted by her as *dattaka*. The *dattaka* adopted according to law shall be my son; so that, during his minority, affairs shall also be managed in the manner aforesaid,—i.e., the directions which have been laid down with respect to the guardianship of the son born of my loins, shall also stand good in the case of a *dattaka* son, and not otherwise; but then if my mother dies, or if for any reason whatever she be unwilling before my son attains his majority, then my wife, when competent, shall be guardian, and shall manage all affairs according to family usage; [290] she should always remain under the control of my mother and the Maharajah of Burdwan. If she, of her own free will, sets herself to any action, she shall never be appointed guardian. Therefore, if my mother dies, and my wife does not remain under the control of the Maharajah of Burdwan, the Maharajah shall, for the protection of the property, appoint a manager."

It was contended in the lower Court that this instrument was actually an authority to adopt, and nothing more; that it was in reality not a will, inasmuch as the person who executed it did not by its contents devise his property to any particular person; that the plaintiff was bound to act upon the authority given her to adopt, and that she could not take advantage of her own laches in omitting to do so, and thus get possession of her husband's property; and lastly, that, upon the true construction of the document, its effect was to exclude the plaintiff from the management of the estate and from her rights as heiress.

The District Judge, however, held, that the document was in fact a will, and that all it did was to give the plaintiff permission to adopt; that being so, following the decisions in *Deenomoyee Dossee v. Doorga Pershad Mitter* (3 W.R., Misc. Rul., 6), and *Pearce Dayee v. Hurbunsee Kooer* (19 W. R., 127), the plaintiff could not be compelled to adopt, and the fact of her possessing an authority to adopt a son did not supersede or destroy her personal rights as widow, which remained in force until an adoption was actually made; consequently there was no bar to the plaintiff's bringing a suit for the recovery of her late husband's property: *Bamun Doss Mookerjee v. Mussamut Tarinee* (7 Moore's I. A., 169, and *Prasannamayee Das v. Kadambini Das* (3 B. L. R., O. J., 85).

Further, there being no express words of disinherison used in the will, the plaintiff could not be disinherited or deprived of a Hindu widow's estate in the property by implication: *Davis v. Lowndes* (2 Scoll., 71; see p. 82.) *Denn v. Gaskin* (2 Cowp., 657), *Shuldhani v. Smith* (6 Dow. H. L., 22), *Ganendra Mohan Tagore v. Upendra Mohan Tagore* (4 B. L. R., O. J., 103; see p. 187).

[291] He accordingly gave the plaintiff a decree for her husband's property and for an account of the administration.

From that decree the defendant appealed to the High Court.

Baboo Nil Madhub Sen and Baboo Mohiny Mohun Roy for the appellant.

Mr. W. C. Bonnerjee and Baboo Rashbehary Ghose for the respondent.

The judgment of the Court (CUNNINGHAM and PRINSEP, JJ.) was delivered by

**Cunningham, J.**—In this case the widow and heiress of the late Paramata Lal Gossami sues his mother, who is also administratrix with the will annexed, praying that the administratrix be directed to make over to her



the estate of her deceased husband, to render an account of the administration, and to pay what sums may, on taking such accounts, be found due to the deceased's estate. On the part of the defendant it is contended, that, by the testator's will, the defendant was placed in charge of his property; that the intention of the will was to oblige the plaintiff to adopt, and to exclude her from management of the estate and from her rights as heiress; and that she is, accordingly, not entitled to the possession of the property.

The will in dispute directs, that the widow being *enceinte*, if a son be born, the mother should be guardian.

His Lordship then set out the will as above, and continued:—

Letters of administration with a copy of the will annexed were obtained by the mother, the present defendant, on the 28th June 1875, and the present plaintiff subsequently endeavoured to procure the revocation of these letters. This attempt has been unsuccessful, no legal ground for revocation being, in the opinion of the Court before which the matter came, made out.

Having failed in setting aside the administration, the widow now sues to enforce her right as heiress to her husband's estate.

The Court below has held, *first*, that the effect of the husband's will was not to constitute a legal obligation on the widow to adopt; *secondly*, that the will does not exclude her rights of inheritance; and *thirdly*, that she is consequently entitled to a [292] decree for her husband's property and for an account of the administration.

We concur in these findings. The law is clearly established that a husband's express authorization, or even direction, to his widow to adopt, does not constitute a legal duty on the part of the widow. It is, as has been observed (Mayne, 98), for all legal purposes absolutely non-existent till it is acted upon. The widow cannot be compelled to act upon it, unless and until she chooses to do so.

In the judgment of the Sadr Court in *Baman Dass Mookerjee v. Mussamut Tarinee* (7 Moore's I. A., 169; Cf. 206), in which their Lordships of the Privy Council expressed their entire concurrence, the Court observed,—that “there appears to be no power under Hindu law to compel a widow to adopt, though a case (in Macnaughten's Principles of Hindu Law, Vol. II, p. 247) has been referred to, where there is mention of an incompetency in a widow to succeed if she neglect to make an adoption” (Cf. 190). It is true that “the question of any possible check on a widow who wilfully protracts or evades an adoption specially enjoined upon her by her husband,” was not, on that occasion, before the Sadr Court or the Privy Council; and all that was necessary to decide was, that “the power of a widow, duly authorized to adopt, to claim her personal rights until she does adopt, is not affected by any consideration of what might be the proper course if she could be proved to have violated any clear and positive legal obligation.” We think, however, that the observations of the Sadr Court must be accepted as favoring the proposition that such a legal obligation cannot be created; and the remarks of Peacock, C. J., in *Prasannamayi Dasi v. Kadambini Dasi* (3 B. L. R., O. J., 90), are an authority for the view, that the widow's refusal to comply with such a direction is no ground of forfeiture as regards her rights of inheritance.

We cannot, therefore, regard the language of the testator as having created a trust which the widow is legally bound to carry out. She is at liberty to comply with her husband's directions or not as she pleases; and her omission

or refusal to do [293] so is no bar to her rights of inheritance. Accordingly, the contingency for which the will provides not having occurred, and there being no gift over, the testator must be regarded as intestate, and his widow as heiress-at-law entitled to succeed.

The appeal must, therefore, be dismissed with costs.

*Appeal dismissed.*

*The 29th April 1881.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND

MR. JUSTICE McDONELL.

Womes Chunder Chatterjee and another.....Defendants.

*versus*

Chundee Churn Roy Chowdhry and another.....Plaintiffs.\*

*Second Appeal—Improper Reception of Evidence by Lower Court—Remand.*

On second appeal, the High Court has, generally speaking, no right to look at the evidence to decide whether the remaining evidence in a case other than that which has been improperly admitted, is sufficient to warrant the finding of the Court below.

The only cases which can be with propriety disposed of under such circumstances without a remand, are those where, independently of the evidence improperly admitted, the lower Court has apparently arrived at its conclusions upon other grounds.

*Watson v. Gopee Soonduree Dossee* (24 W. R., 392) dissented from.

THIS was a suit brought to recover possession of certain lands which the plaintiff, one Chundee Churn Roy Chowdhry, contended belonged to his zemindari, he having held possession of the same through his tenants. The defendant No. 1, previously to this suit, claimed the land in question as forming part of his nimhowla, and had brought a case under s. 530<sup>†</sup> of the Criminal Procedure Code; and the Criminal Court had held that he was entitled to remain in possession until such time as a Civil Court should decide the question of title. The plaintiff, therefore, brought this suit to have the question decided.

[294] The defendants, with the exception of one Sidam, contended, that the land in suit belonged to their ancestral nimhowla, and was comprised within the howla of one Parbut Sirdar.

Sidam, the son of Parbut Sirdar, however, filed a written statement, denying that the disputed land ever belonged to the howla of his father. The original patta relating to the nimhowla was not produced, but a copy of the same was admitted in evidence. The plaintiff produced a judgment in a case between Raja Suttayanund Ghosal and the present defendants, in which the Raja alleged, that his land forming a portion of the lands alleged to have been

\*Appeal from Appellate Decree, No. 2479 of 1879, against the decree of Baboo Kedaressur Roy, Subordinate Judge of Jessore, dated the 9th June 1879, affirming the decree of Baboo Manmotho Nath Chatterjee, Munsif of Bagirhat, dated the 2nd May 1878.

†[*g. v. supra*, 7 Cal. 47.]

included in the nimhowla, had been made over to the defendant No. 1, under the order of the Deputy Magistrate, under s. 530 of the Criminal Procedure Code; in this judgment the nimhowla had been rejected as spurious, and a decree given in the Raja's favor.

The Munsif held, that the defendants' allegation as regards the nimhowla had already been disbelieved in the case of Raja Suttanund Ghosal and themselves, and that the written statement of the defendant Sidam was also contradictory to the allegation of the other defendant, and that the evidence of the plaintiff's witnesses had clearly proved the disputed land belonged to the plaintiff's zemindari, whilst the evidence of the defendants' witnesses, as regards possession, was conflicting. He therefore gave a decree in favor of the plaintiff.

The defendants appealed to the Subordinate Judge, who held, that the plaintiff had satisfactorily proved, both by oral and documentary evidence, that the disputed lands belonged to his zemindari, and that he had been in possession of the same through his tenants, whilst, on the question of title, the written statement of Sidam was contrary to the contention of the other defendants, and that although this was not, strictly speaking, evidence as against them, yet, as they had been unable to disprove this statement, the presumption was against their contention; that they had also failed to prove the genuineness of the nimhowla; and that there was no such satisfactory evidence, either oral or documentary, on the record, on behalf of the defendants, as would justify the reversal of the decision of the Munsif. He, therefore, dismissed the appeal.

[298] The defendants appealed to the High Court.

Baboo *Rashbehary Ghose* for the appellants.

Baboo *Durga Mohun Dass* for the respondents.

The following judgments were delivered:—

**Garth, C. J.**—I have had considerable doubt as to whether we ought not to remand this case for retrial.

The plaintiffs sue to recover possession of certain land which they say belongs to their zemindari.

The defendants, on the other hand, contend, that the land in question forms part of certain property which they hold under a nimhowla, subordinate to the howla of one Parbut Sirdar.

Both the lower Courts have found in favor of the plaintiffs; but it has been contended on appeal to this Court, that the Subordinate Judge has based his judgment upon certain documentary evidence, which was not legally admissible against the defendants. One document is a written statement filed in this suit by Sidam, one of the defendants, the son of Parbut Sirdar, in which he says, that the disputed land does not appertain to the howla of his father. This statement of Sidam, the Subordinate Judge appears to have treated as evidence against the other defendants, which he clearly had no right to do.

The other evidence consists of the proceedings in a suit brought by Raja Suttanund Ghosal against the present defendants, in which a decision was given unfavorable to them, as regards their alleged nimhowla patta. These proceedings not being between the parties to this suit, were also improperly received as against the defendants.

The question which we have now to determine is, whether we ought to remand the case on account of the improper reception of this evidence.

The 167th section of the Evidence Act provides, that "the improper admission of evidence shall not be ground of itself for a new trial, if it shall appear to the Court before which the objection is raised, that, independently of the evidence objected to there was sufficient evidence to justify the decision." It [296] seems to me, however, that there is great difficulty in applying the provisions of this section to the generality of cases which come before the High Court on second appeal, and the difficulty arises thus.

On second appeal we have no power to deal with the sufficiency of the evidence; we have only a right to entertain questions of law. And our duty being thus confined, it seems to me, that when evidence has been wrongly admitted by the Court below, this Court has, generally speaking, no right to decide, whether the remaining evidence in the case, other than that which has been improperly admitted, is sufficient to warrant the finding of the Court below.

We cannot decide that question, as it seems to me, without examining in detail that other evidence, and determining, as a question of fact, whether it is sufficient of itself to warrant the lower Court's finding.

I am sorry to say I have great doubt whether, in the case of *Watson v. Gopee Soonduree Dossee* (24 W.R., 392), Mr. Justice Birch and myself were justified in deciding, as we did, that there was sufficient evidence (other than that improperly admitted) to justify the lower Court's judgment. I confess that it never struck me, until some time after that case had been decided, how much difficulty there was in most cases of second appeal in our attempting to deal with the sufficiency of the evidence.

On further consideration, I think that the only cases which we may with propriety dispose of under such circumstances without a remand, are those where, independently of the evidence improperly admitted, the lower Court has apparently arrived at its conclusion upon other grounds. Where this appears pretty clearly from the judgment, a remand is unnecessary, because then the error committed by the lower Court has not affected the decision upon the merits. (See s. 578\* of the Civil Procedure Code.)

It, therefore, only remains for us in this case to see whether, independently of the evidence improperly admitted, the Subordinate Judge has arrived at his conclusion upon other grounds. Now, both Courts appear to have found, upon the evidence of a [297] large number of witnesses, that the land in question forms part of the plaintiff's zemindari.

The evidence improperly admitted related to the proof, or rather the disproof, of the defendants' nimhowla patta. But the defendants, as it seems to me, were bound to prove that patta affirmatively. The onus of proving it lay on them; and without such proof their case must of necessity fail.

Now, as to this patta, the Subordinate Judge finds, as I understand him (quite irrespectively of the documents which have been improperly admitted),

No decree to be revised or modified for error or irregularity not affecting merits of jurisdiction.

\*[Sec. 578 :—No decree shall be reversed or substantially varied, nor shall any case be remanded in appeal, on account of any error, defect or irregularity, whether in the decision or in any order passed in the suit, or otherwise, not affecting the merits of the case or the jurisdiction of the Court.]

that "no reliable evidence had been adduced by the defendants of the genuineness of their nimhowla patta;" and he says further, "as that patta has not been proved, the disputed land could not be held to be the right of the defendants, even if it were within the boundaries given in the patta."

He also says in conclusion, that "there is no such satisfactory evidence on the record on behalf of the defendants, either documentary or oral, as would justify me in reversing the finding of the first Court."

I am of opinion, therefore, that, in the present case, as the lower Court has found for the plaintiffs, upon evidence quite independent of that improperly admitted, a remand is unnecessary; and consequently that the appeal should be dismissed with costs.

**McDonell, J.**—I concur in holding that in this case a remand is unnecessary.

The Subordinate Judge has found that the defendants, upon whom the onus lay, have produced no satisfactory evidence, either documentary or oral, to prove that the lands in dispute formed part of their "nimhowla;" whereas the plaintiff had clearly proved not only his zemindari right to, but his possession of, the said lands within twelve years of suit. It is clear, therefore, that the Subordinate Judge has, quite independently of the evidence improperly admitted, upon other grounds, confirmed the Munsif's decision, and decreed the plaintiff's claim. This second appeal must, therefore, be dismissed with costs.

*Appeal dismissed.*

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## NOTES.

### [I. STATUTORY MODIFICATION.

Sec. 103, Act V of 1908, C. P. Code :—

In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue of fact necessary for the disposal of the appeal but not determined by the lower appellate Court.

This section is entirely new under the present Code.

It gives discretionary powers to the High Court to dispose of questions of fact also.

### [II. REMAND : PRINCIPLE.

See for the adoption of the principle laid down in this case, (1908) 35 Cal. 701=7 C. L. J. 563=12 C. W. N. 657; (1903) 31 Cal. 380; (1895) 23 Cal. 179.]

• [298] *The 3rd May, 1881.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND  
MR. JUSTICE McDONELL.

Punnoo Singh and others.....Plaintiffs.

*versus*

Nirghin Singh and others.....Defendants.

[—8 C. L. R. 310]

*Arrears of rent—Rate of Rent payable—Duty of Court—Beng. Act VIII of 1869.*

The plaintiff sued for arrears of rent for the years 1282 at the rate of Rs. 2-8-0 per bigha. The defendant alleged that the rent was only fifteen annas per bigha. The Judge found that the plaintiff had not proved that the rate of rent was Rs. 2-8 per bigha, and, without finding that the proper rate was fifteen annas, gave the plaintiff a decree for that amount. The plaintiff brought a subsequent suit for arrears of rent for the year 1283, when it was held by the Court of first instance and by the lower Appellate Court, that he could only recover arrears of rent at the rate of fifteen annas, that being the rate of "rent payable for the previous year" within the meaning of s. 14, Beng. Act VIII of 1869.

*Held*, that the decisions were wrong, and must be reversed.

In a suit for arrears of rent, where the plaintiff fails to prove the rate of rent claimed in the plaint, it is the duty of the Court to find the proper rate of rent payable by the tenant to his landlord, and not to give a decree merely for the rent admitted by the tenant.†

THIS case with nine others were suits instituted by the plaintiffs for arrears of rent for the years 1283, 1284, and 1285 (1876, 1877, 1878). The facts are set out in the judgment of the Court of first instance, the material portion of which is as follows :—

"The admitted facts of the case are these: That the plaintiffs brought thirty-five rent-suits for the years 1281 and 1282 F. S. (1874-1875) against the non-resident cultivators of the village Futtehpore Kandhra; that Baboo Gokul

\* Appeals from Appellate Decrees, Nos. 2357 to 2366 of 1879, against the decree of J. F. Browne, Esq., Judge of Patna, dated the 28th of August 1879, affirming the decree of Baboo Chutterdhar Pershad, Second Munsif of Patna, dated the 28th of March 1879.

† [The head-note is misleading and the Facts of the case are :—

"We are of opinion that this broad proposition (*viz.*, that in a suit for arrears of rent where the plaintiff fails to prove the rate of rent claimed in the plaint, it is the duty of the Court to find the proper rate of rent payable by the tenant to his landlord and not to give a decree merely for the rent admitted by the tenant) is scarcely borne out by the language of the judgment referred to. The report does not show what were the pleadings in the cases that came before this Court, but we have referred to the paper books of these cases, and it is clear that the issue which had to be tried was, what was the proper rent payable to the plaintiff for the land admittedly held by the defendant. That we think would be a proper issue in a suit brought to have the rate of rent determined where the parties are not agreed as to what would be a fair and reasonable rate. We can hardly suppose that the learned Chief Justice intended to lay down that in every suit brought for arrears of rent in which the plaintiff failed to prove that the defendant held at the rate alleged, it was the duty of the Court to ascertain what was a fair rate, even though it was not asked to do so. It is a general principle of law that suits must be decided with reference to the pleadings of parties, and unless the Courts are specially asked to determine a particular question as between the parties, we think that it is not only not bound to do so, but it would not be justified in so doing :—(1897) 24 Cal. 433.]

Chand, my predecessor, disbelieved the evidence adduced by the plaintiffs to prove their alleged settlement of rent at the rate of Rs. 2-8 per bigha, and decreed the claim at the defendants' admitted jama; that the plaintiffs appealed from his decision to the Judge, who confirmed the decree passed by this Court; that they then appealed to [299] the High Court, which remanded five of the thirty-five cases for retrial, and refused to hear appeals in the remaining thirty cases, because the amount was below Rs. 100 in each of those cases; that the District Appellate Court, on the 2nd of September 1878, passed a decree at the rate of Rs. 2 per bigha in the five remanded cases, on the ground that the rate of rent was Rs. 2 previous to the year 1280, and that the Court refused to hear reviews in the remaining thirty cases.

"The plaintiffs have brought these ten cases at the rate of Rs. 2 per bigha, at which they obtained decrees against the five tenants on remand. They have produced the same papers upon which the Judge acted in awarding decrees at the rate of Rs. 2 per bigha in the remanded cases. They have proved them. There can be no doubt that the defendants alleged a very low rate of their holdings, and have not proved them to the satisfaction of the Court. But the question is, whether plaintiffs can claim rent at a higher rate than what was awarded for the years 1281 and 1282. It is admitted that no fresh settlement was made for the succeeding years; that no written contract has been taken from the defendants; and that no notice of enhancement has been served on them. In my opinion the plaintiffs, after having failed to succeed in their claim for the arrears of rent of the years immediately preceding at a certain jama, cannot turn round and come to Court on a different allegation. The previous decrees, whether right or wrong, are final. No doubt, in those cases the proper course would have been as directed by the High Court, and adopted by the Judge, in the five remanded cases, to find the actual rate of rent paid independent of the alleged settlement of plaintiffs, and of the rates stated by defendants when their respective allegations seemed incorrect; but I have my doubts whether the same course should be adopted in the present cases after the decrees for the defendant's admitted jama were passed for the years 1281 and 1282. Supposing that the rate of rent was Rs. 2 per bigha for 1280, that state of things did not continue in 1281 and 1282, by the happening of an event, namely, the passing of decrees which were passed by a competent Court and are final between the parties. It has been argued that those decrees are [300] binding on the plaintiffs only for the years 1281 and 1282. But to pass a decree in plaintiffs' favor at a higher rate would be to act contrary to s. 14 of the Rent Law, which expressly provides that a tenant shall not be liable to pay a higher rent than what he has paid in the year immediately preceding, unless he is duly served with a notice of enhancement. Under all these circumstances, I am of opinion that the plaintiffs cannot recover rent at a higher jama than what is admitted by the defendants and what was decreed for the years 1281 and 1282."

On appeal, the Judge of the lower Appellate Court said:—"In the opinion of this Court the view taken by the Munsif is quite correct. The plaintiff could not possibly have obtained, and do not say they did obtain, a greater amount of rent than was actually decreed. This being so, that amount and no other was, in the terms of s. 14 of Beng. Act VIII of 1869, the rent payable for the previous year, and the plaintiffs cannot sue for more rent except after notice of enhancement or on the strength of a new agreement." The plaintiffs appealed to the High Court.

Baboo Mohesh Chunder Chowdhry and Baboo Chunder Madhub Ghose for the appellants.

No one appeared for the respondents.

The judgment of the Court (GARTH, C. J., and McDONELL, J.) was delivered by

**Garth, C. J.**—This suit is brought against the defendants for the rent of a jote for the years 1283, 1284, and 1285, the plaintiffs claiming at the rate of Rs. 2 per bigha.

They say in their plaint that they are, properly speaking, entitled to rent at the rate of Rs. 2-8 per bigha, but that the recovery of such higher rent depends "upon the adoption of other steps," by which we understand them to mean, that to recover the higher rent they must bring a suit for enhancement.

The answer of the defendants is this, that the plaintiffs brought a previous suit against them for the years 1281 and 1282, in which they claimed rent for the same jote at the rate of Rs. 2-8 per bigha; that their answer to that suit was, as it is now, that their proper rent was fifteen annas per bigha; and that in that suit, as the plaintiffs failed to prove the rate of Rs. 2-8 [301] which they claimed, a decree was given in their favor for the sum which the defendants admitted,—namely, at the rate of fifteen annas. The defendants say, therefore, that as fifteen annas was adjudged by the Court to be, as between them and the plaintiffs, the proper rate of rent for the years 1281 and 1282, and as nothing has occurred since to alter that rate, the plaintiffs cannot recover the rent which they claim in this suit,—namely, at the rate of Rs. 2.

Both the lower Courts have adopted the defendants' view of the matter. They say, that, in the former suit, the rent was recovered by the plaintiffs at the rate of fifteen annas per bigha for the years 1281 and 1282, and that the plaintiffs cannot recover more without bringing a suit for enhancement.

Now, for the purpose of understanding rightly the effect of the judgment which was given in the former suit, we think it necessary to refer to the proceedings, not only in that suit, but in five other suits which were brought at the same time against other tenants by the same plaintiffs, and in which the latter claimed rent for the years 1281 and 1282 at the rate of Rs. 2-8 per bigha.

In all these suits the defendants alleged that proper rate of rent was fifteen annas. The Munsif found that the plaintiffs had failed to prove the rate which they claimed; and that the fifteen annas alleged by the defendants respectively was the proper rent. So in each case he gave the plaintiffs a decree accordingly.

Appeals were then preferred in each of the cases to the District Judge, who affirmed the decision of the Munsif, but in a very equivocal form; and it is upon the language and meaning of his judgment that the question which we have now to decide in this case depends.

After considering the question, whether the plaintiffs had proved their case, and whether the proper rate of rent was Rs. 2-8, he found that Rs. 2-8 was not the proper rate. He apparently made no enquiry, and arrived at no decision as to whether the rate alleged by the defendants was the proper one; indeed, he states, that "defendants' case is very likely to be false." But he nevertheless confirmed the decree of the [302] Munsif, giving the plaintiffs in each case a decree at the rate admitted by the defendants.

He then goes on to say, "at the request of the plaintiffs' pleader, I record the fact, that I do not find as a fact that rent has hitherto been paid at the rate



alleged by defendants. I merely find that it has not been paid at the rate alleged by plaintiffs."

That being the judgment of the District Judge in all the cases before him, five of those cases came up on appeal to the High Court. The case against the present defendants could not be so appealed, because the value of the suit was not sufficient to admit of it. But we desire to refer to the judgment of the Division Bench of this Court in the cases which were appealed, because that judgment puts a construction upon the judgment of the District Judge, with which we entirely agree.

The learned Judges of this Court (JACKSON and WHITE, JJ.) delivered judgment in one of the appeals only (No. 141 of 1877), and the effect of their judgment was, that the District Judge had come to no decision at all as to what the proper rent was.

Mr. Justice Jackson, after stating what was the contention of the plaintiffs in second appeal,—namely, that the District Judge had not found any rate of rent to be the proper one, and that he was bound to decide that question, goes on to say :—"The Courts are bound to ascertain, as closely as they can, what the real controversy between the landlord and the ryot is. On this account, I think the lower Appellate Court ought to have ascertained what rate of rent was payable to the plaintiffs, if the rate of Rs. 2-8 was not payable; and as that Court has intimated something more than a doubt, whether the defendants had made a true statement of their case, I think the case must go back to the Court below, in order to a further trial of that question."

The High Court remanded the case, in order that the District Judge might find, what he had not found when the case was before him, what was the proper rent payable by the defendants; and it appears that, on the remand, the then District Judge found that Rs. 2 was the proper rent payable by the defendants [303] for the years 1281 and 1282. That being the result of the suits which were appealed to the High Court, we have now to see, how far the parties to this present suit are affected by the judgment of the District Judge in the suit between the plaintiffs and the present defendants, which was not appealed to the High Court. Is that judgment binding upon the parties to this suit, as having determined what was the proper rate of rent for the years 1281 and 1282?

We entirely agree with the learned Judges of this Court, that the judgment of the District Judge in the former suits determined nothing of the kind. His judgment is so far binding between the parties as regards the rent for the years 1281 and 1282, that the plaintiffs could bring no other suit against the defendants for the rent for those particular years. But as the District Judge professedly did not determine the question between the parties, what was the proper rent due by the defendants for those years, we think that his judgment in no way estops the plaintiffs in this suit from proving what the proper rate of rent was for the years 1283, 1284, and 1285.

It was one thing to adjudge that the plaintiffs should recover from the defendants as the rent for those years the sum which the defendants admitted to be due. It was another thing to adjudge that the sum so admitted by the defendants was the proper amount of rent.

We must, therefore, remand this case, and the analogous cases which depend upon it, to the Munsif's Court, for retrial. We observe that the Munsif appears in the Court below to have received in evidence the decrees

which were made by the District Judge on remand in the other five cases against other defendants. It is clear that he has no right to do this. He is bound to try this and the analogous cases upon their own respective merits, and to ascertain what is the proper amount of rent in each case.

The costs of this appeal will abide the result; and the analogous cases will be governed in all respects by this decision.

*Cases remanded.*

#### NOTES.

[The head-note is misleading. See the observations in (1897) 24 Cal. 433 extracted as foot-note under the head-note to this case (p. 792 *supra*.)

See (1882) 11 C. L. R. 483; (1890) 19 Cal. 656; (1904) 1 C. L. J. 248 for the position explained above.]

### [304] PRIVY COUNCIL.

*The 9th & 10th February & 1st March, 1881.*

PRESENT :

SIR B. PEACOCK, SIR M. E. SMITH, SIR R. P. COLLIER, AND SIR R. COUCH.

Ramlal Mookerjee.....Plaintiff.

*versus*

The Secretary of State for India in Council and others.....Defendants.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

*Hindu Law—Construction of Will—Use of words “putra poutradi krame”—  
Condition subsequent.*

In a will, the words “*putra poutradi krame*,” recognized as apt for conveying an estate of inheritance, do not limit the succession to male descendants, and will include female heirs of a female, where by law the estate would descend to such heirs.

The will of a Hindu, who died, leaving only a widow, a daughter's daughter, and a brother, directed as follows:—

“7. If no daughter or daughter's son of mine should be living at the time of the death of my wife, then my grand-daughter (daughter's daughter shall become the proprietress of my property, and shall remain in undisputed possession thereof ‘*putra poutradi krame*.’

“8. If the death of my wife should take place before my daughter's daughter arrived at majority and bears a son, then the whole of the estate shall remain in charge of the Court of Wards, until she arrives at majority and bears a son.

“9. If my daughter's daughter should be barren or a sonless widow, or if she should be otherwise disqualified, she shall not become entitled to my property, but shall receive an allowance of Rs. 300 per mensem for her life.

“20. If no son or daughter should be born to me, and if my daughter's daughter should die before she bears a son, or if she should be barren or become a sonless widow, or be otherwise disqualified, then the whole of my properties shall pass into the hands of the Government.”

The will further directed the use of the money by the Government in that event, for certain charitable purposes.

In an administration suit brought by the Secretary of State in Council against the testator's brother, wife, and grand-daughter, for the carrying out of the trusts of the will,—

*Held*, that the clause 7, if it stood alone, would confer an absolute estate on the daughter's daughter on the death of the widow ;

That the disqualifications in clause 9 must come into operation, if at all, at or before the death of the widow ; and that it was unnecessary to decide [305] whether, if they had been conditions subsequent, they would or would not have been in violation of Hindu law ;

That clause 20 was supplementary to clause 9, and that by it, the gift over to the Government was to take effect, if at all, immediately upon the widow's death, in the event of the grand-daughter dying before her without having borne a son, or in the event of the grand-daughter being disqualified at the date of such death.

One possible event not having been provided for by the will, *viz.*, that of the grand-daughter predeceasing the widow, having borne a son, their Lordships did not decide what would happen on the occurrence of that event. The rights of a son yet unborn would not, in the case supposed, be affected by any judgment in these proceedings.

*Lady Langdale v. Briggs* (Deg. M. & G., 391), as explained in the *Tagore case* (9 B. L. R., 377), approved.

APPEAL from a decree of the High Court of Bengal (3rd March 1879), reversing a decree of the District Judge of Hughli (29th March 1877), (Reported in I. L. R., 5 Calc., 228, *nom*, *Hori Dasi Dabi v. The Secretary of State for India*.)

The decree of the High Court, of 3rd March 1879, against which this appeal was preferred, was made in an administration suit brought by the Secretary of State for India in Council, against the present appellant and two of the respondents, for the purpose of obtaining a declaration of the true construction of the will of one Beharilal Mookerjee, who died in 1874 at Boinchi, in the Hughli District, possessed of considerable estates.

The clauses of the will, giving rise to questions on which the Courts in India differed, are set forth in their Lordships' judgment. The District Judge of Hughli decided that the will, in so far as it went beyond the gift of a life-interest to the testator's grand-daughter, was invalid ; and that the gift over to the Government was, therefore ineffectual. He held that, "in the event of failure of any male heir to whom Hori Dasi is to transmit the estate at her death, the Government is to become trustee for certain charitable purposes. Inasmuch, however, as it has been held, that the will, so far as it goes beyond the gift of the life-interest to the grand-daughter, is bad, this further provision is also null and void." Against this decision all the parties to the suit severally appealed.

[306] The High Court reversed this decision and made the following decree :—"That the decree of the lower Court be set aside, and in lieu thereof it is hereby declared, that the will executed by Beharilal Mookerjee, and bearing date the 9th of August 1870, is a genuine and valid instrument. And it is further declared, that, under the said will, Srimoti Komoleh Kamini Debi, widow of the said Beharilal Mookerjee, deceased, is entitled, as a Hindu widow, to enjoy the profits of the estate left by the said Beharilal, subject to the payment of rupees one hundred (Rs. 100) per mensem to Srimoti Hori Dasi

Debi for life, as in the said will mentioned; and that, on her death, the said Srimoti Hori Dasi Debi, grand-daughter (daughter's daughter) of the said Beharilal Mookerjee, if she be living at the time, and is not barren or without a living son, or otherwise disqualified, will be entitled to succeed to the estate left by the said Beharilal Mookerjee, deceased, absolutely. And further, that the gift over to the Government for purposes mentioned in the said will, in case of the said Hori Dasi not surviving, or being otherwise disqualified, as in the said will described and mentioned, is good and valid. And it is further declared, that, in the event of the said Hori Dasi being disqualified as aforesaid to succeed to the said estate, she shall be entitled to a monthly allowance of rupees three hundred (Rs. 300) only out of the proceeds of the said estate. And it is hereby further ordered, that the lower Court do frame a proper scheme for the due administration of the trust-fund for charitable purposes and the like, created by the said will of the deceased Beharilal Mookerjee, and that the administration of the said trust-fund be entrusted to the said widow, who shall be assisted in the said administration by Rakhal Das Chowdhri and Sitanath Banerjee, as provided in the will aforesaid, subject, as therein provided, to supervision by the Collector of Hughli, and also to removal in case of misconduct or negligence. And it is further ordered and decreed, that the defendant, Ramlal Mookerjee, do pay to the Secretary of State and Komoleh Kamini Debi and Hori Dasi Debi the sum of rupees four thousand two hundred and seventy-two (Rs. 4,272) to be apportioned between them, being part of the costs incurred by them in this Court; and do further pay to the [307] Secretary of State the sum of rupees one thousand (Rs. 1,000) only as costs for counsel's fees in the Court below; and further do bear his own costs of this Court and of the Court below. And it is further ordered and decreed, that the remaining costs incurred by the Secretary of State, Komoleh Kamini Debi, and Hori Dasi Debi, in this Court, which are hereby assessed at rupees two thousand seven hundred and fifty-five (Rs. 2,755), as also the costs incurred by them in the Court below, be paid out of the estate left by the deceased Beharilal Mookerjee aforesaid. And it is further ordered and decreed, that the costs incurred by the defendants Rakhal Das Chowdhri and Sitanath Banerjee, severally, in the Court below, be likewise paid out of the said estate of Beharilal Mookerjee deceased."

Mr. *Montague Cookson*, Q. C., and Mr. *Macrae* for the appellant.

Mr. *Cowie*, Q. C., and Mr. *Woodroffe* for the Secretary of State for India in Council.

Mr. *Graham*, Q. C., and Mr. *Cowell* for Komoleh Kamini Debi and Hori Dasi Debi.

Mr. *Montague Cookson*, Q. C., for the appellants.—The disposition attempted in this will goes beyond the limit permitted by the Hindu law. An ulterior estate may be created to take effect on the termination of a life-estate in favour of a person, either in fact or in contemplation of law, in existence at the death of the testator—*Soorjee Money Dossee v. Denobundoo Mullick*, (6 Moore's I. A., 526) and *Jatindramohan Tagore v. Ganendramohan Tagore*; (9 B. L. R., 377); *Mayne's Hindu Law and Usage*, para. 350. But in this case there is an ineffectual attempt to create a future interest in favour of a grand-daughter's sons when born. The words "*Putra pouradi krame*" must have been used in clause 8 to indicate descent to male descendants only. The proper construction of clause 20 supports this view of the testator's intention. Clauses 1 to 6, relating to interests anterior to the gift in question, are not, [308] under the same rule of construction, precisely as clauses 7, 8, 9, and 20. The former merely follow the law of succession *ab*

testator, and any lacunae can be filled up by it. But as to the latter the bequest can only be brought within the law by straining the construction—a course not permitted—*Mainwaring v. Beevor* (8 Hare, 49) and *Leake v. Robinson* (2 Mer., 363). The testator's intention must be taken as expressed by the words used, by which alone the validity of the bequest must be tested: for words cannot be supplemented or altered, even if intestacy should result from refraining from so dealing with a defective disposition—*Chapman v. Brown* (3 Burr., 1326) and *Driver v. Frank* (3 M. & S., 25). A similar case of gift to a class of sons occurred in *Bernal v. Bernal* (3 M. & C., 559). Again, at any period of her life, the grand-daughter might come under the disqualifications referred to in clause 20. Thus the will is uncertain as to the point of time fixed for the fulfilment of the conditions under which the estate to the grand-daughter and her sons is to take effect. But by Hindu law the object of a gift must be certain and known—*Jatindramohan Tagore v. Ganendramohan Tagore* (9 B. L. R., 377); *Vayavastha Darpana*, 606. Again, by Hindu law, the property of a female (*stridhan*) is at her absolute disposal; so that the Hindu law is contravened by the limitation in favour of male descendants. If the gift can be taken to be absolute, it then will fall under the rule that an absolute gift cannot be divested by a direction which is only to take effect contingently upon an uncertain future event. The result is, that the gift is one which the Hindu law cannot recognize. He also referred to *Amirtolal Bose v. Rajoneokant Mitter*; (L. R. 2 Ind. App. 113, S. C.); *Mayne's Hindu Law and Usage*, Second Edition, Chap XI, Macnaghten's Hindu law, Vol. ii, case 15, pp. 221, 222; *Vayavastha Darpana*, 606, and *Soudamoney Dossee v. Joyeshchunder Dutt* (I. L. R., 2 Calc., 272.)

Mr. Woodroffe (with whom was Mr. Cowie, Q. C.,) for the Secretary of State in Council, respondents.—If the 7th clause [309] had stood alone, Hori Dasi, the daughter's daughter, would have taken an absolute estate of inheritance on the death of the widow. The words "*putra poutradi krame*" do not indicate any intention to exclude females from the succession, but are apt and sufficient to create a general estate of inheritance—*Jatindra Mohan Tagore v. Ganendramohan Tagore* (9 B. L. R., 377), *Kisto Kishore Bhattacharjee v. Seetamonee Bhattacharjee* (7 W. R., 320), and *Bhoobun Mohini Debya v. Hurrish Chunder Chowdhry* (L. R., 5 Ind. App., 138; S. C., I. L. R., 4 Calc., 23). The argument for the appellant rests on a construction of those words, which they will not bear. There is no rule of Hindu law preventing the creation of an absolute estate in remainder upon a condition. In this case the estate was created conditional upon the grand-daughters not being disqualified, either in the manner pointed out by the will, or otherwise before the death of the widow. The widow's death was the *punctum temporis*. He referred to *Soorjeemoney Dossee v. Denobundhu Mullick* (6 Moore's I. A., 526).

Mr. Graham, Q. C., and Mr. Cowell for the other respondents.—The estate given to the grand-daughter was a general estate of inheritance not limited to her male descendants—*Raja Nursing Debi v. Roy Koylasnath* (9 Moore's I. A., 55.) The will did not contemplate the divesting of the estate when once it had vested, which it would do on the death of the widow, provided that the grand-daughter had not then become disqualified. Such a limitation of future rights, defeasible only upon a contingency which might never arise, is good by Hindu law. The decree does not properly express the conditions, agreeing in that respect, neither with the will, nor with judgment.

Mr. Montague Cookson Q. C., in reply, referred to *Hampton v. Holman* (L. R., 5 Ch. Div., 183.)

Their Lordships' judgment was delivered by

**Sir R. P. Collier.**—This was an administration suit for the purpose of carrying into effect the trusts of the will [310] of one Beharilal Mookerjee, instituted by the Secretary of State for India, in which Komeleh Kamini Debi, widow of the testator, Mani Lal Bundopadhya, father and guardian of a minor, Hori Dasi Debi, daughter's daughter of the testator, and Ramlal Mookerjee, a brother of the testator, were made defendants. Two other defendants were afterwards added, described in the will as advisers of the widow. The plaint concludes in these terms :—

"But as the defendant No. 3, Ramlal Mookerjee, has impeached the will as a forgery, and as defendant No. 1, the widow, who has the management of, and is in the enjoyment of the profits of, the estate under the provisions of the aforesaid will, has omitted to take any action to have the validity of the will determined, or to carry out the charitable bequests therein contained, though the period for carrying out such bequests has expired, and as the rights and interest of this plaintiff, as well as of other persons interested in the above will, are thereby seriously endangered, it is therefore prayed, that the authenticity and validity of the said will may be declared, and that the said Komeleh Kamini Debi, defendant No. 1, be directed and enjoined to make over to the Collector or such other trustee or trustees as the Court may appoint, the sum of one lac and fifty thousand (Rs. 1, 50,000), in Government securities, for the establishment of the aforesaid school and hospital, and a further sum of rupees one thousand (Rs. 1,000) (*sic*) for the furnishing of the said school and dispensary; and further, that the rights of the several parties under the will may be ascertained and determined, and that a scheme for the due administration of the trust under the will may be propounded, with such other relief as the Court may think fit to grant."

Beharilal Mookerjee, a wealthy Hindu, made the will in question on the 9th of August 1870. He had then a wife living. He had never had a son, but had had a daughter, who had died, leaving an infant daughter, Hori Dasi Debi. As he was then not passed middle age, he may have reasonably contemplated having further issue. He died on the 12th of August 1874, without sons or daughters, leaving his wife and grand-daughter him surviving, and a brother, Ramlal Mookerjee, the [311] defendant, with whom he had not been on good terms. The material parts of the will for the purposes of the present appeal are as follows:—

"2. I have no son at present. If one or more sons should be born to me hereafter, and should have arrived at majority at the time of my death, then he or they shall be entitled to my properties according to the shastras.

"3. If my son or son, or any son (of mine), should be a minor at the time of my death, then the whole of my properties shall remain under the Court of Wards until my son, or in the case of my having more sons than one, until the youngest son, has attained majority.

"4. If grandson or great grandson of mine should be living at the time of my death, they shall be the owners of my property according to the shastras.

"5. If no son, grandson, or great grandson of mine should be living at the time of my death, then my wife, Srimoti Komoleh Kamini Debi, shall be proprietress of the whole of my properties, according to the shastras, and shall enjoy the profits thereof during her lifetime.

"6. If one or more daughters should be born to me, then on the death of my wife, she or they, and, on the death of her or of them, my grandsons (daughter's sons), shall be the owners of my property according to the shastras.

"7. If no daughter or daughter's son of mine should be living at the time of the death of my wife, then my grand-daughter (daughter's daughter), Srimoti Hori Dasi Debi, shall become the proprietress of my property, and shall remain in undisputed possession thereof from generation to generation.

"8. If the death of my wife should take place before my grand-daughter (daughter's daughter) arrives at majority and bears a son, then the whole of the estate shall remain in charge of the Court of Wards, until she arrives at majority and bears a son.

"9. If my grand-daughter (daughter's daughter) should be barren or a sonless widow, or if she should be otherwise disqualified, she shall not become entitled to my property, but shall receive an allowance of Rs. 300 per mensem for life."

[312] Here follow bequests for the purposes of establishing a school and dispensary, with respect to which no question now arises. Clause 20 is in these terms:—

"If no son or daughter should be born to me or if my grand daughter (daughter's daughter) should die before she bears a son, or if she should be barren or become a sonless widow, or be otherwise disqualified, then the whole of my properties shall pass into the hands of the Government. The whole of the profits of my estate, which shall remain as surplus after the expenses connected with the various matters specified above have been defrayed, shall be employed by the Government, as it thinks proper, in the improvement of the school and dispensary, and in alleviating the sufferings of the blind, the lame, the poor, and the helpless of my native village, and of the neighbouring villages.

After some previous proceeding, which it is not now necessary to refer, the present suit was instituted on the 19th May 1876. All the defendants, except Ramlal, supported the will, and the widow submitted that she had carried out its directions to the best of her ability.

Ramlal disputed the factum of the will. He also maintained that no part of it was effectual except that which gave the estate to the widow for life.

On the cause coming on for hearing before Mr. Prinsep, the Judge of Hughli, he was of opinion that the making of the will was fully proved; that under its provisions, and subject to the payment of an immediate legacy of Rs. 1,50,000 for charitable purposes, the widow took a life-interest in the estate; that, on her death, Hori Dasi, if not disqualified, would succeed and take a life-interest; but that, after the death of both ladies, or on the death of the widow if Hori Dasi should be then disqualified, the estate would pass to the next legal heir of Beharilal Mokeerjee, a supposed devise to the male descendants of Hori Dasi being, in the Judge's view, opposed to the rule laid down in the *Tagore case* (9 B. L. R., 377), and ineffectual, and the devise to Government coming after it being thus defeated. He also directed, that the fund created by the legacy should be vested [313] in the Collector as trustee, but declined to propound any scheme for the management, and he ordered that the costs of all the parties should come out of the estate.

Against this decision Hori Dasi appealed, on the ground that her interest had been unduly curtailed.



Ramlal, on the ground that Hori Dasi took nothing under the will; he no longer disputed its factum.

The Secretary of State, on the ground that the gift over to the Government, in certain events, ought to have been held good.

The High Court held, that Beharilal's intention was to confer on Hori Dasi, if she survived, and was, on the widow's death, not disqualified, an absolute estate, and that his intention was effectuated; also that the gift over to the Government, which they interpreted as taking effect in the event of Hori Dasi not surviving the widow, or being disqualified at the time of the widow's death, but not in the event of her becoming subsequently disqualified, was good.

The High Court, indeed, observed;—

"The only case not clearly provided for in the will seems to be this: If Hori Dasi had a son who survived her, but herself died before the widow,—Was it intended that the Government should take, or was the son to take? On the one hand, neither of the further events contemplated in the 20th clause would have arisen,—i.e., Hori Dasi would not have died without giving birth to a son, nor would she be disqualified at the death of the widow, unless we say that death itself is included in disqualification; nor, on the other hand, could Hori Dasi's son easily succeed, being a stranger, and not provided for in the will. But we need not occupy ourselves with a case not before us."

A decree was drawn up, which, in some points which will be subsequently referred to, is not in conformity with the judgment.

No argument has been addressed to their Lordships founded on the first six clauses of the will, which are no more than bequests in accordance with what the testator conceived to be the rules of the ordinary Hindu law of succession. All of these, except the 5th, refer to possible events which did not happen. [314] The 5th describes an ordinary Hindu widow's estate, which would take effect on the death of the testator by operation of law. The argument in favour of the appellant has been founded on the 7th, 8th, 9th, and 20th clauses.

It was not, and could not be, disputed, that, since the case of *Soorjeemoney Dossey v. Denobundoo Mullick* (9 Moore's I. A., 123), recognized and confirmed as that case has been in the case commonly called the Tagore case—*Jatindramohan Tagore v. Ganendramohan Tagore* (2 L. R., Ind. App., Sup. Vol., 47; S. C., 9 B.L.R., 377), and in *Bhoobun Mohini Debya v. Hurrish Chunder Chowdhury* (L.R., 5 Ind. App., 138; S. C., I.L.R., 4 Calc., 23), a gift by will upon an event which is to happen, if at all, immediately on the close of a life in being, to a person in existence, and capable of taking under the will at the testator's death, was good and valid under Hindu law; and consequently that it was competent to the testator, by the use of apt words, to confer an absolute estate on Hori Dasi on the death of his widow. But it was argued that the words "*putra poutradi krame*" (translated in the record "from generation to generation," expressed in their etymological sense an intention on the part of the testator to limit the succession to the heirs male of Hori Dasi; that the gift, being "*stridhan*," would descend by law, in the first instance, to her unmarried daughters equally with her sons, and that in its further descent females would have peculiar rights; that, therefore, the testator had endeavoured to create an estate of inheritance in her inconsistent with the general law of inheritance, which endeavour, under the authority of the Tagore case (2 L.R., Ind. App., Sup.



Vol., 47; S.C., 9 B.L.R., 337) would render his gift to Hori Dasi void, or, at the least, would prevent its operating further than to give her an estate for life. This latter view was adopted by the Judge of first instance. Upon this question the High Court observe —

“ We dissent entirely from the learned Judge, when he holds that the words ‘*putra poutradi krame*’ denote an attempt to limit the succession to Hori Dasi’s male descendants in any manner opposed to the decision in the Tagore will case, *Tagore v. Tagore* (9 B.L.R., 337.); the devise and bequest to her are con-[315] tained in the words ‘*adhikarini harbek,*’ and the words added are merely usual words implying an absolute and heritable estate.

“ If these words are to be interpreted in the sense applied to them by the Judge, very few grants in the Bengali language could stand, because the formula is one constantly used to show that the estate is to go beyond the life.”

The effect of these words is thus spoken of by Sir Barnes Peacock in delivering the judgment of the High Court in the Tagore case—*Jatindramohan Tagore v. Ganendramohan Tagore* (4 B. L. R., 182):—

“ A gift to a man and his sons and grandsons, or to a man and his sons’ sons, would, in the absence of anything showing contrary intention, pass a general estate of inheritance according to Hindu law. I believe the words usually used in Bengal are ‘*Putra poutradi krame,*’ and in the Upper Province ‘*naslan baad naslan,*’ the literal meaning of the former being to sons, grandsons, &c., in due succession, and of the latter in regular descent or succession.”

The correctness of these observations was not questioned in the judgment on appeal. It was not denied at the bar that these words, though undoubtedly importing the male sex in their primary signification, would, in the case of a gift to a male, be read as words of general inheritance, and would include female as well as male heirs, where, by the law, his estate would descend to females. Their Lordships feel no greater difficulty in applying them to the female heirs of a female, where, by law, the estate would descend to such heirs, and see no sufficient reason for narrowing the construction of words which have been often recognized in India and by this Board as apt for conferring an estate of inheritance. They are of opinion that clause 7, if it stood alone, would confer an absolute estate on Hori Dasi upon the death of the widow.

Clause 8 has been relied upon for enforcing the argument that the testator’s object was to benefit the sons of his grand daughter, an object which their Lordships think he might reasonably suppose best effectuated by giving complete power [316] over the estate to his grand-daughter. The provision for management by the Court of Wards obviously does not affect Hori Dasi’s estate.

But it has been further contended that the conditions under which, by clause 9, Hori Dasi is to take, or, more properly speaking, under which she is not to take, are so uncertain as to render the gift to her void. It has been argued, that no time is fixed at which the disqualifications are to operate, that she may become a sonless widow at any period of her life, and that, therefore, it must always remain uncertain whether or not she is capable of taking the gift. In their Lordships’ opinion, all difficulty as to the question of time is got rid of, by reading the clause in conjunction with that which precedes it, and treating the death of the widow as the time when it is, if at all, to take effect. This natural interpretation of the clause gives effect to it, and their Lordships are by no means disposed to give it a forced construction which would

defeat its operation. The death of the widow is, in their opinion, the point of time when it is to be ascertained once for all whether Hori Dasi takes, or is disqualified from taking.

More difficulty arises in the construction of clause 20.

It has been argued that the words "if my grand-daughter should die before she bears a son" are not limited to any point of time; that if this be so, the other disqualifications mentioned in that clause (which are repetitions of those in clause 9) are not limited either, and may take effect at any period of Hori Dasi's life; that they are in effect conditions subsequent, upon the happening of any of which, the estate, if it had ever vested in her, would be divested. It has been further argued, that the gift over of an estate on events which may happen, not upon the close of a life in being, but at some uncertain time during its continuance, is void, as contrary to Hindu law.

If, as the High Court have found, their Lordships think rightly, that one main object of the testator was to prevent his brother taking his property in any event, it is obvious that clause 9, creating the incapacity, under certain circumstances, of the grand-daughter to take upon the widow's death, required to be supplemented by another directing on whom the estate, if [317] such incapacity happened, should devolve. This is the purpose of clause 20, which should be read as supplementary to clause 9, and as if it had immediately followed it. This purpose points to the construction that the gift over was to take effect, if at all, at the widow's death. When providing for the devolution of the estate on Hori Dasi's being disqualified to take it, it was natural that the testator should also provide (which he had not done before) for its devolution in the event of her dying before her grandmother. This provision is, by implication, contained in clause 20, and full effect may be given to every part of the clause, without supposing (what their Lordships agree with the High Court is somewhat improbable) that the testator intended the estate, if once vested in his grand-daughter, should be liable to be afterwards divested.

Viewed in this light, the section would read,—

"If no son or daughter be born to me; or if, on my widow's death, my grand-daughter should have died before bearing a son, or should be barren, or become a sonless widow, or otherwise disqualified, then the whole of my properties shall pass into the hands of the Government."

This construction, which their Lordships adopt, makes it unnecessary to discuss whether the disqualifications, if they had been conditions subsequent, would or would not be in violation of Hindu law. It has not been disputed that, if they are to be ascertained on the widow's death, the gift over to the Government is good.

One possible event, undoubtedly, is unprovided for, *viz.*, the grand-daughter predeceasing the widow, having borne a son.

Their Lordships do not deem it necessary to decide what would happen on the occurrence of this event. Indeed, no judgment which they could give would affect the rights, if he should have any, of a son yet unborn, in the case supposed. In declining to declare the rights of the parties in this contingent event, they are acting in conformity with the rule laid down in the case of *Lady Langdale v. Briggs* (8 DeG. M. & G., 391), explained as it was in the *Tagore case* (9 B.L.R., 377.)

[318] It follows that the decree of the High Court must be amended by substituting, for the words "not surviving," "having died during the lifetime of such widow without bearing a son."

It is further necessary that, for the words "or without a living son," there should be substituted the words "or a sonless widow." The decree as it stands is neither in accordance with the will nor the judgment.

Subject to these variations, their Lordships will humbly advise Her Majesty that the decree be affirmed. The costs of all the parties to the appeal should be paid out of the testator's estate.

Solicitors for the appellant: Messrs. *Barrow and Rogers*.

Solicitors for the respondent, the Secretary of State for India in Council: Mr. *H. Treasure*.

Solicitors for the other respondents: Messrs. *Watkins and Lattey*.

## NOTES.

### [I. HINDU WILL: CONSTRUCTION.]

(1) "*Malik*" and "*Putra Pautradi Krame*" have acquired a technical meaning in Hindu Law and have a known legal import.

See (1898) 20 Cal. 906; (1904) 31 Cal. 561; (1907) 7 C. L. J. 291, (1912) 14 I. C. 78; (1897) 24 Cal. 834 --21 I. A. 76 P. C.

(2) "*Heirs and children from generation to generation*," held to convey absolute estate:—(1897) 22 Bom. 855.

### II. GIFT TO A CLASS.—

When a gift is made to a class of persons some alone of that class being capable of taking either at the time of the gift or at the time of the death of the testator, the gift is not wholly void, but good so far as those that could take are concerned. —(1886) 12 Cal. 663.]

[7 Cal. 318.]

## APPELLATE CIVIL.

*The 7th April, 1881.*

PRESENT :

MR. JUSTICE PONTIFEX AND MR. JUSTICE FIELD.

Gyan Chunder Sen and another..... Plaintiff.

*versus*

Durga Churn Sen.....Defendant\*.

[ 8 C. L. R. 415]

*Partition—Appointment of Commissioner—Civil Procedure Code (Act X of 1877), s. 396—General Clauses (Act 1 of 1868).*

In a suit for partition, the Subordinate Judge appointed an Amin under s. 396 of the Civil Procedure Code to effect a partition. The Amin made his report, which was objected to on the merits by the defendant, but ultimately the report was confirmed, the defendant having acquiesced in the proceedings. On appeal to the District Judge, the defendant took an objection, that the appointment of the Amin was irregular.

\* Appeal from Appellate Order, No. 802 of 1880, against the order of J. F. Browne Esq., Officiating Judge of the 24-Pargannas, dated the 28rd September 1880, reversing the order of Baboo Kristo Mookerjee, Second Subordinate Judge of that district, dated the 5th April 1880.

[319] *Held*, that having acquiesced in the proceedings so far, it was too late for the defendant to take the objection.

*Per* PONTIFEX, J. (FIELD, J., doubting).—In a suit for partition, it is competent to the Court, in its preliminary decree, to appoint any one person whom it thinks fit to be a commissioner to make the partition under s. 396 of the Civil Procedure Code. The section uses the word "commissioners," but it is not necessary for the purposes of partition that there should be more than one commissioner, and by force of the General Clauses Act, the word "commissioners" may be read in the singular number.

The intention of s. 396 is, that, upon the first hearing of a suit, the Court shall determine whether the plaintiff is entitled to a partition, and shall ascertain who the several persons entitled in the property are, and shall direct by a preliminary decree or order that commissioners be appointed to make the partition.

THE facts of this case fully appear from the judgment of Pontifex, J.

Baboo Nil Madhub Bose for the appellants.

Baboo Boykant Nath Dass for the respondent.

The judgments of the Court were as follows :—

**Pontifex, J.**—We think this case must go back to the District Judge, who has disposed of it on a preliminary technical objection, which we do not think applies. The plaintiff in the case sued for partition, and obtained a decree from the Subordinate Judge. Against that decree the defendant appealed to the District Judge, not, however, raising the present objection, and his appeal was dismissed. The decree of the Subordinate Judge was, that the plaintiff was entitled to a partition, and to a certain share in the property to be partitioned, and there was a direction that an Amin should proceed to the land and partition the property. An Amin accordingly proceeded to partition the property, and he made a report to the Court. Against that report the defendant took objections on the merits. The Subordinate Judge overruled the objections, and confirmed the Amin's report. Against the order of confirmation, the defendant again appealed to the District Judge, and after having acquiesced in all the proceedings that had taken place before the Amin, for the first time in the Court [320] of the District Judge, took an oral objection that partition-proceedings could not be taken in execution of a decree. The District Judge has held, that that objection is tenable, on the ground, that s. 396 of the Code of Civil Procedure shows, that partition-proceedings are not to form part of what are ordinarily called execution-proceedings. Section 396 directs, that, in any suit in which the partition of immoveable property, not paying revenue to Government, appears to the Court to be necessary, the Court, after ascertaining the several parties interested in such property and their several rights therein, may issue a commission to such persons as it thinks fit. Then it goes on to state what the procedure of the commissioners is to be, and it says that they are to "prepare and sign a report, which shall be annexed to the commission and transmitted to the Court, and the Court, after hearing any objections which the parties may make to the report or reports, shall either quash the same and issue a new commission, or pass a decree in accordance therewith." We think it obvious, that what was intended by that section was, that, upon the first hearing of the suit, the Court shall determine whether the plaintiff is entitled to a partition, and shall ascertain who the several persons interested in the property are, and shall direct by a preliminary decree or order that commissioners be appointed to make the partition. But there is no virtue in the word "commission" in s. 396. It is quite competent to the Court to appoint any person

whom it thinks fit as commissioner to make the partition. True, s. 396 refers to "commissioners" in the plural; but, speaking for myself, I think the General Clauses Act would apply, and under it, words in the plural number include the singular, and *vice versa*. There is no reason that I can see, why in his preliminary decree the Subordinate Judge should not appoint the Amin as commissioner to effect the partition, and what has since been done, is virtually what ought to be done under s. 396. The commissioner prepared a report and returned it to the Court, objections were taken to that report,—those objections were disallowed by the Court; and the Court has affirmed the terms of the partition which had been arrived at by the commissioner, and it then became the duty of the [321] Court to pass a decree in accordance therewith. It is true that the Court has not actually passed a decree, but the order made in execution-proceedings is virtually a decree upon further consideration. The objection was, therefore, at the most a mere technical objection taken after complete acquiescence in all the proceedings. But in my opinion, not even a technical objection lies, because the order of the Subordinate Judge was an order within the meaning of the third clause of s. 396; at all events, after the complete acquiescence in all the previous proceedings, it was too late for the defendant to raise such an objection; and in our opinion it ought not to have been listened to. We think, therefore, that the case must go back to the District Judge to be tried on its merits, the preliminary objection being overruled. It does not appear clearly, whether the objection in the Court below was raised and insisted upon by the defendant, or whether it was an objection taken by the Court. If it was an objection taken by the Court, we think the costs of this hearing should be borne by the parties according to their respective shares in the property. If it was an objection pressed by the defendant, we think the Court below should deal with the costs of this appeal as to it may seem fit.

**Field, J.**—I concur in the order of remand, and I think that the defendant having acquiesced in the proceedings, ought not to have been allowed to take the objection that the provisions of s. 396 of the Code of Civil Procedure require the appointment of more than a single commissioner. Section 2 of the General Clauses Act, I of 1868, enact, that, unless there be something repugnant in the subject or context, words in the singular shall include the plural, and *vice versa*. Having regard to the language of the third clause of s. 396 of the Code of Civil Procedure, I would have some doubt whether there is not in the context something repugnant to the plural, "commissioners" including the singular "commissioner"; but it is not necessary to determine this question, as I agree that the defendant, by acquiescing in the proceedings, has precluded himself from raising it at the stage at which he took the objection.

*Case remanded.*

## NOTES.

### [AMEEN—APPOINTMENT OF—

The equitable principle laid down in this case as to allowing objections as regards the appointment of Ameens, was adopted in (1897) 24 Cal. 725 F. B. and in (1885) 12 Cal. 275. See also 6 Bom. L. R. 586.]

## [322] APPELLATE CRIMINAL.

*The 31st May, 1881.*

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Wood.....Petitioner

*versus*

The Corporation of the town of Calcutta.....Opposite Party.\*

[=9 C. L. R. 193]

*Justice of the Peace—Disqualifying Interest—Summons issued at instance of, and determined by, a Servant of the Prosecutor—Evidence, Refusal to hear—Finality of Assessment—Beng. Act IV of 1876, ss. 75, 77, 78, 79, 346, and 351—High Courts' Criminal Procedure Act (X of 1875), s. 147.*

A, alleged to have carried on business in Calcutta without having taken out a license under Beng. Act IV of 1876, was summoned at the instance of the Corporation by B, a servant of the Corporation and also a Justice of the Peace. The case was subsequently heard by B, and it was shown that notice of the assessment under class ii, sched. 3 had been duly served on A, and, that though he then denied his liability to take out any license, and stated that he carried on no business as alleged, he had not appealed against the assessment under s. 79. It was further shown that the assessment had been confirmed by the Chairman of the Corporation, but that the amount had not been paid. A thereupon tendered evidence to show that he was not liable to take out any license; but B refused to hear such evidence, and convicting A, sentenced him to pay a fine. On an application, under the above circumstances, to the High Court under s. 147, Act X of 1875,—

*Held*, that the finality of the decision of the Chairman referred to in s. 79 has only reference to the class under which a particular person, who is admittedly bound to take out a license under s. 75, should be assessed, and not to the case where the liability to take out a license at all is denied, this being a question which can only be determined judicially after taking evidence by a competent Court in a prosecution under s. 77, and that, therefore, the refusal of B to hear the evidence tendered by A on this point, was illegal.

*Held* also, that the proceedings and ultimate conviction of A were illegal, inasmuch as B being a servant of the prosecutor, i.e., the Corporation, had such an interest as might give him a bias in the matter, and that consequently he ought not to have sat as Justice of the Peace either at the granting or upon the hearing of the summons.

IN this case the petitioner, J. Wood, was summoned at the instance of the Corporation of the Town of Calcutta, on the 29th [323] March 1881, for not having duly taken out a license for the year 1880, for the trade or profession carried on and exercised by him, as a boarding-house keeper at No. 5, Wood Street, in the town of Calcutta, under s. 75 of Beng. Act IV of 1876, and being convicted by Mr. O. C. Dutt, a Justice of the Peace, was fined Rs. 60.

It appeared that, on the 31st January 1881. one Mr. O'Brien Moore, a License Inspector of the Corporation, assessed the petitioner as a boarding-house keeper, under class ii, sched. 3 of Beng. Act IV of 1876, and caused a notice

\* Criminal Motion, No. 113 of 1881, against the order of Mr. O. C. Dutt, Honorary Magistrate of Calcutta, dated the 29th March 1881.

to be served upon him to pay the required license tax for the past year, viz., 1880. The petitioner thereupon informed the License Inspector that he was not liable to take out a license as he was not a boarding-house keeper, and had not carried on any such business in the year 1880. This denial was not accepted, and the assessment having been confirmed by the Chairman, he was informed under s. 79, that he must pay Rs. 50 as his license tax, or appeal against the assessment within fourteen days after depositing that amount as required by that section. No appeal having been preferred on the expiry of the fourteen days,—i.e., on the 28th February 1881,—an application was made to Mr. O. C. Dutt, a Justice of the Peace, who was also employed as the Collector of Taxes under the Corporation, and a summons being granted, the case was heard on the 29th March 1881 by the same Justice of the Peace. At the hearing, the petitioner, through his pleader, admitted the receipt of the notice of assessment under s. 79, but contended that he was not liable to take out a license, as he was not a boarding-house keeper. Mr. O. C. Dutt thereupon examined Mr. Moore on behalf of the prosecution, who proved that the petitioner was assessed by the Chairman under class ii, as a boarding-house keeper, carrying on business as such during the year 1880, and that the notice of assessment having been given, the petitioner did not appeal against that assessment, nor was the amount assessed paid. The petitioner then tendered evidence to prove that he was not a boarding-house keeper, and had not carried on the business of one in the year 1880; but Mr. O. C. Dutt refused to hear it; and, convicting the petitioner, fined him Rs. 60.

[324] The petitioner, accordingly, applied to the High Court under s. 147 of Act X of 1875,\* to have the record called up and the conviction quashed.

Mr. Sale for the petitioner.—The conviction is bad, because Mr. O. C. Dutt, being a Collector of the Municipality, (i.e., a servant of the Corporation, who is the prosecutor) has such an interest in the case as to disqualify him from trying it, and even the consent of the accused would not cure the disqualification—*The Queen v. Bholanath Sen* (I. L. R., 2 Calc., 23). The principle is clearly laid down by Mr. Justice Norman in *The Queen v. Muktar Singh* (4 B. L. R., Ap. Cr., 15), that if the Judge, has any personal or pecuniary interest in the subject of the charge, he is disqualified from trying it, and this principle has been frequently acted upon—*Dimes v. The Grand Junction Canal Co.*, (3 H.L., Cas., 795). It is not necessary to show that there is the probability of a Magistrate being influenced by his position, but even if there be the slightest possibility of his decision being affected thereby, it would be sufficient to disqualify him from hearing the charge. The Chairman, moreover, has no power to decide the question as to whether a person is a trader or not, or liable to assessment under the Act, for s. 79 refers solely to the case of a person, who is admittedly properly assessable, having been assessed under a wrong class, and not to that of a person who denies that he is liable to be assessed at all, for this is a question which can only be determined judicially, and the Chairman has no authority given to determine it. Section 78 too provides, that the

\*[Sec. 147 :—Whenever it appears to the High Court of Judicature at Fort William, Madras, or Bombay that the decision hereinafter mentioned will promote the ends of justice, it may direct the transfer to itself of any particular case from any Criminal Court situate within the local limits of its ordinary original jurisdiction, and the High Court shall have power to determine the case so transferred, and to quash or affirm any conviction or other proceeding which may have been had therein, but so that the same be not quashed for want of form, but on the merits only.]

Chairman shall determine under which of the classes every person to whom a license may be granted shall be assessed, and therefore points to the same conclusion; besides, s. 77 is a semipenal one, and as such must be construed strictly. The Magistrate had, therefore, no right to shut out the evidence tendered, but should have tried the question as to whether the petitioner was liable to assessment at all, and this cannot now be tried on affidavit.

[325] Mr. Sale then proceeded to argue that there was evidence that the petitioner carried on no trade, when he was stopped by the Court.

Mr. W. C. Bonnerjee, (Officiating Standing Counsel) for the Corporation (*contra*).—The case having been brought up under s. 147 of Act X of 1875,\* the Court must be satisfied from the circumstances of the case that there have been a substantial injustice done, and not merely that there have been an irregularity in the proceedings. Mr. O. C. Dutt had no personal or pecuniary interest in the case whatever, and on that ground it could not be contended that he was incapacitated from dealing with the case, merely because he was connected with the Municipality in the way he was. The finding of the Magistrate must also be taken to be correct,—*viz.*, that the decision of the Chairman was to be final. When the Legislature considered that cases under the Act should be dealt with by independent persons, it specifically enacted that such was to be the procedure; for instance, s. 79 provides, that appeals under it are to be heard and determined by not less than three Commissioners *other than* executive officers of the Commissioners. It would seem clear, therefore, that the Legislature never intended to preclude persons in the position of Mr. O. C. Dutt from dealing with cases like the present. Were the contention of the other side to be upheld, then the Act would practically become unworkable, and there must have been numerous cases decided previous to this, in which the proceedings were illegal, for formerly the Justices of the Peace were all members of the Municipal Corporation, and similar cases were heard and determined by them. If the Court, however, considers that the exclusion of the evidence tendered by Wood has vitiated the Magistrate's decision, the case may be sent back to be tried on its merits.

Mr. Sale in reply pointed out that, in *Dimes v. The Grand Junction Canal Co.*, (3 H. L. Cas., 795), it was held, that, under such circumstance, the decision was voidable on objection being taken, and not absolutely void. He also referred to *The Queen v. Gibbon* (L. R., 6 Q. B. Div., 168).

[326] The following judgments of the Court (MITTER and MACLEAN, JJ.) were delivered:—

Mitter, J. (after stating the facts as above, continued).—Mr. O. C. Dutt refused to hear the evidence that was tendered on behalf of the petitioner, on the ground that the Chairman's assessment having become *final* under the last para. of s. 79, the question, whether he was liable to take out a license under s. 75, could not be re-opened. One of the grounds upon which the conviction has been questioned is, that this view of the law is not correct.

The other ground upon which the conviction has been questioned is, that Mr. O. C. Dutt, by reason of his connection with the Corporation of the town of Calcutta, as their collector of taxes, was incompetent to try this case.

I am of opinion that the proceedings and the ultimate conviction are illegal. In the first place it seems to me, that Mr. O. C. Dutt was not right in

\*[*q. v. supra*, 7 Cal. 324.]



convicting the petitioner without allowing him to substantiate his defence by evidence. The construction put upon the word "final" in the last para of s. 79, is, in my opinion, not correct. The decision of the Chairman or Vice-Chairman has reference only to the *class* under which a particular person, who is *admittedly* bound to take out a license under s. 75, should be assessed. The decision referred to herein is what is referred to in s. 78, which is as follows :—

"The Chairman, or some officer authorized by him in that behalf, shall determine under which of the classes mentioned in the third schedule every person to whom a license may be granted shall be assessed; and the Chairman may, in his discretion, remit the payment of license tax either in whole or in part to any person classified under classes 5 or 6 of the third schedule." The language of the section does not authorize the Chairman to determine (when the fact is denied), whether a particular person is bound to take out a license under s. 75. He shall determine *under which of the classes* mentioned in the third schedule every person to whom a license may be granted shall be assessed. Therefore, if the Chairman be of opinion, that a particular person is liable under the Act to take out a license, and if that person denies his liability, the question [327] can only be determined *judicially*,—i.e., after taking evidence by a competent Court in a prosecution under s. 77.

Section 346 of the Act says,—that "the Commissioners may direct any prosecution for any public nuisance whatsoever, and may order proceedings to be taken for the punishment of any person offending against any of the provisions of this Act." It was under the provisions of this section that the prosecution in this case was commenced. Certainly, before a conviction could be had, the prosecutor was bound to prove that the accused had offended "against any of the provisions of this Act." If the view of the law taken by Mr. O. C. Dutt is correct, it is not for the Magistrate before whom the accused is prosecuted to determine that question, but he is bound to accept the decision of the Chairman, who virtually stands in the position of a prosecutor. It is clear to me that this view is not warranted by any of the provisions of the Act in question. The conviction is therefore bad upon this ground.

As to the other objection it is clear upon the authorities—*The Queen v. Meyer* (L.R., 1 Q.B. Div., 173). *The Queen v. Milledge* (L.R., 4 Q.B. Div., 332), *The Queen v. Gibbon* (L.R., 6 Q.B. Div., 168),—that if Mr. O.C. Dutt had been a member of the Corporation, he would have been disqualified not only to take part in the final hearing, but also to issue the original summons.

Whether the principle upon which these cases has been decided, should not be applied to the case of a servant of the Corporation sitting as a Judge, is the question which we have to decide with reference to this objection. The reason of the rule is, that a person who, by his interest, pecuniary or personal, is likely to have a bias in the matter of the prosecution, ought not to sit as a Judge. Having regard to the reason of the rule, I think, that the principle of the cases cited above should be extended to the case of a person who is connected with the Corporation in the same way as Mr. O.C. Dutt.

The proceedings and the conviction must, therefore, be quashed.

[328] MACLEAN, J.—The petitioner, J. Wood, was convicted before Mr. O.C. Dutt, Justice of the Peace, of having exercised the trade, profession, or calling of a boarding-house keeper in 1880, without having taken out a license as required by s. 75, Beng. Act IV of 1876. A fine of Rs. 60 was imposed under s. 77 of the Act.

The record has been called up to this Court under s. 147, Act X of 1875; on the petitioner's application. His chief ground for invoking the interference of this Court is, that he was not allowed to enter into a defence shewing that he did not exercise a boarding-house keeper's calling in 1880; but objection is also taken to Mr. O. C. Dutt's competency to deal with the case, as, besides being a Justice of the Peace, he occupies a post, as collector of taxes, under the Corporation of Calcutta, the prosecutor in the case.

To commence with the first point the case stands thus:—By some unexplained interpretation of the law it seems to be the practice for the officers of the Corporation to take the initiative and assess persons who may be considered fit subjects for assessment. This does not seem to be what the law intends. The law requires every person, who exercises a specified profession, trade or calling, to *take out* a license yearly (s. 75), and it renders such persons liable to fine for exercising the specified profession, &c., *without a license* (s. 77). There is nothing which calls upon the Corporation to assess a person who has not applied for a license.

Now Wood has admittedly not applied for a license of any sort, and if he exercised the calling of a boarding-house keeper without a license, he is justly liable to a fine under s. 77. But, as in all criminal cases, the onus of proving that Wood exercised the calling lay upon, and has not been discharged by, the prosecutor. According to the prevailing practice, the Inspector Moore "assessed" Wood as a boarding house-keeper at the close of January 1881, and the Chairman "determined the class" of the license Wood was to take. I have no doubt this was not any part of the Chairman's duty under s. 78, in the absence of any application from Wood. The absurdity of assessing any one for 1880, in February 1881, becomes appa-[329]rent on reference to s. 76. A license taken out in 1881 would take effect for that year. However, Wood was informed of the class under which he had been assessed (s. 79) on the 14th February 1881, and though he would have been perfectly justified in disregarding the notice of an officious and illegal assessment, he went to the office of the Corporation and made some enquiries, but up to the 28th February he made no appeal.

The period of limitation prescribed by s. 351 would have expired on the 28th February, and on that date Inspector Moore applied for a summons which was issued by order of Mr. O. C. Dutt, and the case came on before him on the 29th March. At the trial Mr. O. C. Dutt adopted a course which had the effect of closing Wood's mouth. He held (following, he says, legal opinion) that no appeal having been preferred under s. 79, the Chairman's decision was final,—that is to say, Wood not having taken out a license was not entitled to go into evidence to shew that he was not in 1880 a boarding-house keeper, because the Chairman had, in 1881, *ex parte*, determined that he was to be assessed under sched. 3. The point seems to me to be so utterly untenable, that it is waste of time to discuss it. The simple issue for trial under s. 77 was, whether Wood had exercised a particular trade or calling or not, and whether the Chairman had assessed him or not, or whether he had appealed or not, had no conceivable connection with that issue. The proceedings on the 29th March must, therefore, be set aside on this ground.

As to the other point, as far as I have been able to discover, Mr. O. C. Dutt is not a member of the Corporation, but he holds the office of collector under the Corporation, being remunerated by a percentage on bills issued for collection of taxes. He has, it is admitted, no interest in the collection of license tax or carriage or horse tax. He had, therefore, no personal interest in

the result of this case against Wood, but he is undoubtedly a servant of the prosecutor,—i.e., the Corporation; and, in my opinion, his sitting as a Judge in the case was illegal. If he had been a member of the Corporation, he would have been absolutely disqualified from sitting, and even from issuing a summons; see *The Queen v. Milledge* (L. R., 4 Q. B. Div., 332). [330] and *The Queen v. Gibbon* (L. R., 6 Q. B. Div., 168). But although these cases do not, I think, directly establish that a servant of the Corporation is disqualified to act as a Justice of the Peace, the principle seems to me to apply with greater force to a Justice who is a servant, than to a Justice who is a member, of the Corporation. On this ground also, therefore, the proceedings must be set aside.

*Conviction quashed.*

Attorney for the petitioner: Mr. E. J. Fink.

Attorney for the opposite party: *The Government Solicitor.*

#### NOTES.

[Followed in (1882) 9 Cal. 397]

[7 Cal. 330.]

#### APPELLATE CIVIL.

*The 10th May, 1881.*

PRESENT:

MR. JUSTICE PONTIFEX AND MR. JUSTICE FIELD.

Doorga Narain Sen.....Plaintiff.

*versus*

Rām Lāl Chhutar.....Defendant.\*

*Appeal—Rent Suit under Rs. 100—Title—Beng. Act VIII of 1869, s. 102—  
Civil Procedure Code (Act X of 1877), s. 622*

A and B, both of whom set up a claim to certain land, brought separate rent suits against the tenants. In none of these suits did the amount claimed exceed Rs. 100. Subsequently to the institution of the rent suits, A sued B to establish his title to the land in dispute. The District Judge, before whom the rent suits came on appeal, allowed them to stand over until the decision in the suit between A and B. That suit was decided in favour of B, and

\* Appeal from Appellate Decrees, Nos. 1667 to 1685 of 1880, against the decree of J. P. Grant, Esq., Judge of Hoogly, dated the 25th June 1880, reversing the decrees of Baboo Pragnunno Coomar Ghose, Second Munsif of that District, dated the 25th June 1878.

the Judge then decided the rent suits instituted by *B* in his favour, and dismissed the suits instituted by *A*.

*Held*, that no second appeal would lie in the rent suits, as no question of title between parties having conflicting claims was decided in them.

*Held* also, that there was no such irregularity on the part of the District Judge in the course which he pursued, of making his decision in the rent [331] suits depend upon the decision in the suit to establish title, as would justify the Court in interfering under s. 622 of the Civil Procedure Code.

Section 102 of Beng. Act VIII of 1869 was enacted in order to protect parties in the position of ryot-defendants, and to prevent their being dragged up to the High Court in cases where the decree or demands is under Rs. 100. In such cases the decree is intended to have the same effect as that of a Small Cause Court.

Baboo *Hem Chunder Bonnerjee* and Baboo *Umakali Mookerjee* for the appellants.

Baboo *Aubinash Chunder Banerjee* for the respondent.

The facts of this case fully appear from the judgment of the Court (PONTIFEX, and FIELD, JJ.), which was delivered by

**Pontifex, J.**—A preliminary objection was taken to the hearing of these appeals, on the ground that, under s. 102 of Beng. Act VIII of 1869, no second appeal would lie in these cases. We think that this objection must prevail. The facts of the case are—that two persons, the plaintiff Doorga Narain and one Banimadhub, were contesting with one another as to who was rightfully entitled to the property in which the defendants had tenures and both of them brought rent suits against the tenants. These rent suits came first before the Subordinate Judge, and afterwards before the District Judge. Subsequently to the institution of those rent suits, Doorga Narain brought a suit against Banimadhub to establish his title, and whilst that suit was pending, the District Judge allowed the rent cases to stand over, thinking he might decide them in accordance with the decision which might be arrived at in the title suit. He decided the suit between Doorga Narain and Banimadhub in Banimadhub's favour, and immediately after the rent suits were called on, and the learned Judge decided those instituted by Banimadhub in favour of Banimadhub, and dismissed the suits of the plaintiff Doorga Narain. He says:—"It has been found in the case as to title that Banimadhub has all along been entitled to the rents, and the decreeing of the present appeals will give them to him. It has been argued that if the ultimate decision as to title in a possible special appeal should be in favour of Doorga Narain, the present [332] decision will complicate any suit for mesne profits that Doorga Narain might bring against Banimadhub. But I do not think, that a Court is justified, when giving present judgment, in considering such remote contingencies, which may never in fact come into being." We think, nevertheless, that if the learned Judge had been applied to, to appoint a receiver in the suit between Doorga Narain and Banimadhub, on the supposition that possibly an appeal might be preferred against his decision in that suit, he would have done so, and so secured the rents payable by the tenants. But the learned Judge was never applied to, to secure the rents, and consequently the decrees dismissing Doorga Narain's rent suits were made. Now it is admitted that the suits are for less amounts than Rs. 100, but it is argued that these are suits in which a question relating to title to land as between parties having conflicting claims thereto, has

been determined by the judgment. The plaintiff urges that such a question has been decided in these cases, but in fact it was not in these suits that any question of title as between parties having conflicting claims was determined. That question was determined in the previous title suit between Doorga Narain and Banimadhub. No such question was determined in this suit. We think, therefore, that these cases fall within the provisions of s. 102 and that no second appeal would lie. It has been decided in the cases of *Shaikh Dilbur v. Issur Chunder Roy* (21 W. R., 36), *Donzell v. Tekan Nodaf* (23 W. R., 227), and *Kashee Ram Doss v. Maharanee Sham Mohinee* (2 C. L. R., 558), that where *A* sues *B* for rent of land, and *B* pleads that the rent of the land is payable to *C* and not to *A*, and where *C* is not made a party to the suit in which a decree is passed against *B*, no question relating to title to land as between parties having conflicting claims thereto is determined by the judgment in such suit. Therefore, there is authority to show that the preliminary objection taken in these cases is valid, and must prevail.

It has then been argued on behalf of the plaintiff that, if that is the case, then there is really no judgment of the Court below in these rent cases, because the judgment of the learned Judge depends entirely upon his judgment in the other suit [333] between Doorga Narain and Banimadhub, and he had no right to impart that into a suit between Doorga Narain and the tenants; and it is argued that the plaintiff would have a right, under s. 622 of the Code of Civil Procedure, to ask this Court to set aside the judgment of the Judge on the ground of irregularity. Now, even if we were to permit the appellant in these appeals to rely upon the provisions of s. 622 without putting him to the expense of making a separate application in order to get the benefit of that section, we do not think these are cases in which we would be justified in interfering under s. 622. It appears to us, that s. 102 of Beng. Act VIII of 1869 was enacted really to protect parties in the position of ryot-defendants, to prevent their being dragged up to the High Court in cases where the decree or demand was under Rs. 100. In such cases the decree was intended to have the same effect as that of a Small Cause Court; and we think it would be very hard in these cases, merely because the Judge has decided between the parties on the ground of the former decision between Doorga Narain and Banimadhub to put the ryots to the very great expense of being dragged into this Court. We think, therefore, that even under s. 622 we should not be inclined to interfere in these cases. The preliminary objection must prevail, and the appeals Nos. 1670, 1675, and 1684 will be dismissed with costs, and others without costs, as the respondents in those cases have not appeared.

*Appeal dismissed.*

[7 Cal. 333.]

ORIGINAL CIVIL.

The 6th June, 1881.

PRESENT:

MR. JUSTICE WILSON

Robarts

versus

Harrison.

[—9 G. L. R. 209]

*Arbitration—Filing of Award—Time within which Award should be filed—  
Civil Procedure Code (Act X of 1877), s. 516—Limitation Act (XV of 1877),  
sched. ii, art. 176.*

The act of an arbitrator, in handing in an award to the proper officer of the Court, for the purpose of the award being filed, cannot be considered as an "application" within the meaning of the Limitation Act.

[334] BY an order dated the 5th February 1880, certain matters in dispute in this suit were referred to arbitration, one of the terms of the order being, that the award should be filed on or before the 5th October 1880. In accordance with this order the arbitrators made and published their award on the 29th September 1880, intimating to the attorneys of both parties that they were ready to file the award on payment of their fees. This was objected to, and subsequently the arbitrators filed their award with consent of both parties on the 29th April 1881.

The plaintiff then applied for and obtained a rule *nisi*, calling upon the defendant to show cause why the award should not be taken off the file, on the ground that it had not been filed within the time mentioned in the order of the 5th February 1880; and that, further, under art. 176\* of sched. ii of Act XV of 1877, the award was filed too late.

Mr. Branson (with him Mr. Allen) showed cause against the rule.—The award was made within time, and there is nothing in the Civil Procedure Code as to the time within which such award must be filed, although ss. 516 and 521 both make mention as to the time in which the award is to be made. Article 176, sched. ii of Act XV of 1877 has no reference to s. 516 of the Code, as, under s. 516, no "application" to file the award is necessary; the mention of s. 516 in art. 176 is probably a mistake for s. 523, otherwise there is no limitation for s. 523. The application contemplated in art. 176 is an application to the Court; this is clear from a consideration

[Art. 176 :—

Description of Application.	Period of limitation.	Time from which period begins to run.
Under the Code of Civil Procedure, section 516 or 523, that an award be filed in Court.	Six months.	The date of the award.]

of all the articles in the 3rd division of sched. ii of the 'Limitation Act. The applications there referred to are applications to the Court. No such application is necessary in filing an award; it is presented and filed as a matter of course. There is no provision for taking an award off the file when once it has been filed. It may be set aside under s. 521, but this must be within ten days from the time in which the award has been submitted, according to art. 158\* of sched. ii of Act XV of 1877. There is no authority in the Civil Procedure Code for such an application as the present. Neither is there any clause in the Limitation Act which touches the case.

[335] Mr. Jackson in support of the rule.—Article 176 of the Limitation Act applies to s. 516.† The act of filing an award is an application in itself. The Court must consent before an award can be filed, and an application is necessary before such consent can be given.

The judgment of the Court was as follows:—

**Wilson, J.**—This was an application by the plaintiff to take off the file an award filed by the arbitrators who made it, on the ground that, under the Limitation Act, it was filed too late.

The reference was in a suit. The award was made and published in due time, on the 29th September 1880. It was filed by the arbitrators on the 29th April 1881. The plaintiff contends, that the filing was out of time under art. 176 of the second schedule of the Limitation Act (XV of 1877), which prescribes a period of six months from the making of the award for an "application under the Code of Civil Procedure, s. 516 or 525, that an award be filed in Court."

In order to see whether this contention is correct, it is necessary to examine the sections of the Code relating to arbitrations. There are three kinds of arbitration dealt with in chap. xxxvii—references of matters in difference in suits already pending; references not in suits, but in which the submission is filed under s. 523, and which thereupon become suits; and thirdly, references not in suits, and in which the submission has not been filed, but in which the award may be filed under s. 525.

The first two kinds of reference may, for the present purpose, be regarded as identical. In each, by the time the award has to be dealt with, the Court has already control of the proceedings, and the rules as to the award are in each case the same. By s. 516 the arbitrators must sign their award and cause it to be filed in Court. This causing the award to be filed, it must be observed, is the act of the arbitrators. The only duty of the Court or its officers is to receive the award when tendered, and, I suppose, to make the proper endorsement or entry, and deposit the document in its proper place. The judicial functions of the Court are to be exercised afterwards, or at any rate in different matters

*Description of Application.	Period of limitation.	Time from which period begins to run.
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158.—Under the Code of Civil Procedure to set aside an award.	Ten days	When the award is submitted to the Court,
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†[Sec. 516 :—When an award in a suit has been made, the persons who made it shall sign it and cause it to be filed in Court together with any depositions and documents which have been taken and proved before them; and notice of the filing shall be taken to the parties.]

altogether. The Court may, on certain grounds, [336] modify the award (s. 518), or remit it (s. 520), or set it aside altogether (s. 521), or may make a decree according to the award (s. 522).

In cases where, before the award, there has been no proceeding in Court, the procedure is entirely different. Before the award can be filed, there must (s. 525) be an application in writing, against which the other parties must have an opportunity of showing cause. And the Court has, or may have, to determine important questions (s. 526), as for instance, whether the arbitrator has or has not exceeded his authority.

These, briefly stated, are the provisions of the Code bearing upon the present question. It remains to consider the meaning of the words "applications under s. 516 or s. 525" as used in art. 176 in the schedule of the Limitation Act. So far as s. 525 is concerned, there is no difficulty. No award can be filed under that section without a written application which the Court deals with judicially. But it is a very different thing to say that the filing of an award by an arbitrator under s. 516 is an application.

The Limitation Act is a disabling Act, and no Court, I think, is justified in straining its language beyond its natural meaning in order to take away from any one the rights which but for it he would possess. There is little in the general framing of the Act to throw light upon particular provisions. But there is something.

The preamble deals only with "applications to Courts," and I think Act is limited accordingly. It is also legitimate, I think, to consider the character of the series of applications enumerated in order to ascertain what an application means: see *Re Ishan Chunder Roy* (8 C. L. R., 52). Now, in the case of all the other applications mentioned in the schedule, the application is one which the Court has to deal with judicially by making an order in accordance with the application or dismissing it. I think I should have to do great violence to the ordinary meaning of words, and to disregard all the indications afforded by the Act itself, if I were to hold that the act of an arbitrator, in handing [337] an award to the proper officer to be filed was an application within the meaning of the Limitation Act.

It was argued, that the effect of holding as I do would be to make the article in question wholly inoperative. It may be so. It may be, on the other hand, as was also suggested, that the article might be held to apply to an application to the Court by any of the parties to compel an arbitrator to file his award. These are questions which do not arise on the present application. I can only take the words of the Statute as they stand, and see whether they apply to the case before me. I think they do not.

This application is dismissed with costs.

*Application dismissed.*

Attorneys for the plaintiff: Messrs *Remfrey and Remfrey*.

Attorneys for the defendant: Messrs. *Sanderson and Co.*



NOTES.

[LIMITATION ACT : APPLICABILITY OF—

The provisions of the Limitation Act are confined to the litigants and are inapplicable to acts which a Court may or has to perform *suo motu*.

This principal was applied in (1889) 13 All. 78 to the case of an appellate Court adding parties as respondents under s. 559 of the Civil Procedure Code (1882).

See also (1886) 8 All. 492 for amendment of decree].

[7 Cal. 337.]

APPELLATE CIVIL.

*The 22 April, 1881.*

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Ramdhani Sahai.....Auction-Purchaser

*versus*

Rajrani Koor. ....Judgment-debtor.

*Auction-sale—Defaulting Purchaser, Liability of—Civil Procedure Code*

(Act X of 1877). ss. 293, 297, 306, 308, 309.

[—9 C. L. R. 23]

The provisions of s. 293, Act X of 1877† (Civil Procedure Code) for making a defaulting purchaser at a sale liable for any deficiency on a resale extend to all sales, whether of moveable property, and also to resales held under ss. 297, 306, and 308.

THE facts in this case were, that, in execution of a decree for Rs. 73 (with costs and interest), held by Ram Sahai Lall in a [338] suit against Rajrani Koor, the respondent, some immoveable property belonging to the latter was put up for sale and knocked down to Ramdhani Sahai, the appellant, for Rs. 600, on the 15th January 1880. He having failed to make the deposit of 25 per cent. on the amount of his bid, as required under s. 306, Act X of 1877, the property was forthwith put up on the same day and resold, fetching Rs. 156 at such second sale. The judgment-debtor then proceeded under s. 293 of

\* Appeal from Appellate Order, No. 2 of 1881, against the order of H. W. Gordon, Esq., Judge of Tirhoot, dated the 6th November 1880, affirming the order of Baboo Mohendro Nath Ghose Officiating Munsif of Hajipore, dated the 25th May 1880.

†[Sec. 293 —The deficiency of price (if any) which may happen on a re-sale under this Code by reason of the purchaser's default, and all expenses attending such re-sale, shall be certified to the Court by the officer holding the sale,

and shall, at the instance of either the judgment-creditor or the Judgment-debtor, be recoverable from the defaulter under the rules contained in this chapter for the execution of a decree for money.]

the Code to recover the deficiency on the resale, *viz.* Rs. 444, from the defaulting purchaser. The latter opposed the application, alleging that he was not liable to pay the amount; but the Munsif, on the 25th May 1880, decided that he was bound to make good the deficiency; and that order was subsequently, on the 6th November 1880, confirmed by the District Judge. The auction-purchaser accordingly now specially appealed to the High Court.

Baboo *Kalikishen Sen* for the appellant.

Baboo *Behary Lall Mitter* for the respondent.

The judgment of the Court (MITTER and MACLEAN, JJ.,) was delivered by

**Mitter, J.** (who, after stating the facts as above, continued). The respondent's pleader objects *in limine* to the hearing of the appeal, on the ground that the original suit was one of the nature cognizable by a Court of Small Causes, and supported his objection by reference to *Soorjo Coomar Surma Roy v. Kristo Coomar Chowdry* (2 B.L.R., 224; S.C., 14 W. R., F. B., 30).

It is in our opinion unnecessary to express any opinion on this point as the case is a very clear one on the merits.

We think that the contention of the appellant's pleader, that s. 293 only applies to cases of resale under s. 309, cannot stand examination. We do not pretend to explain why the Legislature adopted the expression "resold" and "resale" in s. 293 and ss. 308 and 309, while the expression in s. 297 and s. 306 is "put up again and sold;" but it is quite clear that the second sale, whether held under s. 297, s. 306, or s. 308, is a resale, and [339] that s. 293 applies to all of them. It is only necessary to notice the position of s. 293 amongst the general rules, and the 2nd schedule under the heading chap. xix, to understand that the provision for making a defaulting purchaser at a sale liable for deficiency on resale, now extends to all sales, whether of moveable or immovable property, and also to resales held under ss. 297, 306 or 308. It had been held under the old Code that this liability did not extend to purchasers defaulting to make the deposit under s. 353, Act VIII of 1859—*Ajoodhya Persad v. Gopal Dutt Misser* (17 W. R., 271).—and we have no doubt the law has been ~~advisedly~~ made wider in its scope.

Whether the case comes under s. 244, Act X of 1877, or not, is a point which is perhaps open to doubt. We leave it open for the present.

We dismiss the appeal with costs.

*Appeal dismissed.*

#### NOTES.

[As regards the question whether an appeal lies against an order passed under s. 293 C. P. C. (1882), subsequent cases of the Calcutta High Court have taken the view that an appeal lies:—(1889) 16 Cal. 585; (1897) 25 Cal. 99.

The Madras High Court is of the same view.—(1895) 18 Mad. 439; (1899) 12 Mad. 454.

But the Allahabad High Court seems to take a contrary view.—(1892) 14 All. 301 F. B.]

[7 Cal. 339]

*The 27th May, 1881.*

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND  
MR. JUSTICE McDONELL.

Manly.....Defendant.

*versus*

Patterson.....Plaintiff.\*

[ =9 C. L. R. 166]

*Appeal to Privy Council—Application for Leave to Appeal—Judgment of one  
Judge—Ministerial and Judicial Acts—Letters Patent, cl. 15.*

The plaintiff obtained a decree in the Court of first instance. On appeal to the High Court, the decision of the lower Court was upheld, but the decree was varied in respect of some matters relating to the mode in which the relief to which the plaintiff was declared entitled should be granted. The defendant applied for leave to appeal to the Privy Council, but the application was refused, on the ground that the judgment in the High Court and the Court of first instance were in effect concurrent judgments, and that no substantial point of law was involved in the case. The defendant appealed under cl. 15 of the Letters Patent.

*Held*, that no appeal would lie.

*Mussamut Amirunnesa v. Baboo Behary Lall* (25 W. R., 529) followed.

IN this case an application was made by the defendant in the Privy Council Department for leave to appeal against a decree [340] of the High Court (PONTIFEX and McDONELL, JJ.), affirming a decision of the Subordinate Judge of the 24-Pargannas. The application was refused by Mr. Justice Pontifex, who held, that the decisions in the Court of first instance and in the High Court were in effect concurrent, and that no substantial point of law was involved in the case. It appeared that the High Court had modified the decree of the lower Court on the question of costs and on some other matters relating to the manner in which the relief to which the plaintiff was declared should be worked out under the decree. The applicant appealed.

Mr. H. Bell for the appellant.

Mr. Bonnerjee, for the respondent objected that no appeal would lie.

Mr. Bell, for the appellant, contended, that there was an appeal, because the learned Judge had not followed the provisions of s. 596 of the Code of Civil Procedure. He had not confined himself to his ministerial duties, but had gone out of his way to give a judicial decision. In such a case an appeal would lie on the authority of *Kally Soondery Dabia's* case (I. L. R., 6 Calc., 594). The learned Judge says, the judgments are in effect concurrent; that is a judicial decision from which there is an appeal. Even if they were in effect

\* Appeal under s. 15 of the Letters Patent, against the order of Mr. Justice Pontifex, dated the 29th April 1881, in the matter of Privy Council Appeal No. 15 of 1881 (in Appeal from Original Decree No. 120 of 1880.)

concurrent, that would not be sufficient. Section 596 requires that the decree appealed from should affirm the decree of the lower Court, and that is not the case here. *Mussamat Amirunnesa v. Baboo Behary Lall* (25 W. R., 529), is not in point here.

Mr. Bonnerjee was not called upon.

The judgment of the Court (GARTH, C. J., and McDONELL, J.) was delivered by

**Garth, C. J.**—This is an appeal from a decision of Mr. Justice Pontifex in the Privy Council Department, refusing leave to appeal to the Privy Council upon the ground that [341] there was no point of law, and that, on the facts, the High Court had agreed with the judgment of the Court below.

A preliminary objection has been taken by the Standing Counsel that no appeal lies under such circumstances; and there is no doubt that this is an attempt to reopen a question which was decided by this Court in the year 1876. See *Mussamat Amirunnesa v. Baboo Behary Lall* (25 W. R., 529).

The sections in the Civil Procedure Code, under which Mr. Bell says he has a right to appeal, are contained in chap. xlv; but these sections present no new phase of the law upon this subject since the above case was decided, because at that time the Privy Council Act, VI of 1874, was in force, and the sections in that Act upon the subject are identically the same as those in chap. xlv of the Civil Procedure Code of 1877.

At the time when the above case was decided by Mr. Justice Ainslie and myself, we thought it right to consult most of our brother Judges before we delivered our judgment, because it was most important, (having regard to what had been the practice of this Court), that some definite rule should be laid down.

For several years past, the Judge in the Privy Council Department, (selected from amongst the most experienced Judges of the Court), has always sat alone to determine points relating to Privy Council Appeals, and especially as to whether leave to appeal should be granted or refused. For a long time no attempt was made to appeal against his orders, but for the first time in the year 1873 some appeals were preferred against orders refusing an appeal, which were heard by Division Benches without the question of jurisdiction being raised, though in four out of those cases the Judges expressed a doubt as to whether they had any power to hear the appeal.

After consulting other Judges, Mr. Justice Ainslie and myself decided in the above case that the appeal would not lie; and one of our principal reasons for so deciding was this, that the Judge in the Privy Council Department when dealing with such questions had always been considered as acting under the Privy Council orders, rather than as a Judge of the High Court.

[342] I observe we said in that case, "we have been unable to find a single instance, previously to the 23rd of August 1873, of any attempt to appeal against an order or certificate made by a Judge of this Department; and, indeed, it is very difficult to understand how an order or certificate under rule 2 of the Privy Council orders could properly be considered as a judgment of the High Court. It was in aid of the Privy Council that the rule was established; it has its origin in an Act of Parliament passed expressly for the better administration

of justice in Her Majesty's Privy Council, and the certificate given under it would seem rather to form a part of the Privy Council proceedings, than to come within the legitimate province of this Court.

Now the appeal which is now before us is precisely similar to that which in the above case we held would not lie, and therefore we are bound by that authority. If we had any doubt about the correctness of it, all we could do would be to refer the present appeal to a Full Bench. But we do not entertain any such doubt.

Mr. Bell has argued, that the late case of *Kally Soondery Dabia v. Hurrish Chunder Chowdhry* (I. L. R., 6 Cal., 594) in which I had the misfortune to differ from two of my learned brothers, is opposed to the case of *Mussamat Amurunnesa v. Behary Lall* (25 W. R., 529), but we think it is not so. If Mr. Justice Mitter and myself, before whom that appeal was heard, had been of opinion that the question in that case was the same as had been decided in the former one, we should have felt ourselves bound by the decision. But we considered, rightly or wrongly, that the question was a different one; that it arose under a different section of the Code, and depended on different considerations. It is a great satisfaction to me that *Kally Soondery's* case (I. L. R., 6 Cal., 594), is now under appeal to the Privy Council, because I trust that their Lordships may see their way to laying down some definite rule as to what orders made by a single Judge of the High Court in the Privy Council Department are, or are not, appealable to a Division Bench.

If those orders are appealable to a Division Bench, it would of course be useless that a single Judge should continue any [343] longer to sit alone in the Privy Council Department, because all, or nearly all, his orders would be appealed, and thus a double expense would be entailed upon suitors, as well as a double labour upon the Court. For our present purpose it is sufficient to say, that we consider ourselves bound by the former decision in 1876. Mr. Bell's client in the present case is of course not without remedy, because he may always appeal to the Privy Council, and we know that their Lordships have frequently thought right to admit appeals, when leave to appeal has been refused in this Court. The appeal must be dismissed with costs.

### NOTES.

#### [APPEAL : PRIVY COUNCIL—

The order being no Judgment, it was held in the following cases that no appeal lay to the Privy Council under Cl 15 of the Letters Patent.

(1) Order refusing to extend time to file an appeal to the Privy Council —(1906) 33 Cal. 1323--10 C. W. N. 986.

(2) Order granting leave to appeal to the Privy Council —(1890) 17 Cal. 455.

(3) Order by the Privy Council Department refusing to extend time to furnish security:—(1890) 18 Cal. 182.

(4) Order refusing to appoint a Receiver .—(1895) 22 Cal. 928.

See also (1895) 17 All. 438.]

*The 12th April, 1881.*

**PRESENT :**

**MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.**

**Shah Ahmed Sujad and another.....Plaintiffs**

*versus*

**Taree Rai and others.....Defendants.\***

*Cause of Action—Declaratory Decree—Specific Relief Act (I of 1877),  
s. 42—Civil Procedure Code (Act X of 1877), s. 53.*

In a suit for confirmation of possession and declaration of title in respect of land, where the plaint did not disclose any facts from which it could be said that the defendants denied the plaintiffs' title, but from the proceedings in the original cause it was established, that, before the suit was brought, there was a dispute existing between the parties as regards the title, and that a decree in favor of the plaintiffs had been passed by the original Court on the merits of the case,—

*Held*, that though the plaint might have been rejected in the first instance under s. 53 of the Civil Procedure Code, on the ground that it did not disclose any cause of action, it was too late for an Appellate Court to reverse the decree solely on that ground, without being satisfied that no such cause of action was established on the evidence.

THIS was a suit brought by the plaintiffs for confirmation of possession and declaration of title in respect of a plot of land, [344] and for the recovery of rupees 25 as damages for two palm trees which had been felled by the plaintiffs but forcibly taken away by the defendants. The plaint, after giving the history of the plaintiffs' title, and alleging that they were in possession, continued: "The principal defendants, on the 9th Magh 1285 Fusli, forcibly carried away two palm trees felled by the plaintiffs, and which trees stand on the purchased land mentioned above, by which act of defendants there has been a shock to the plaintiffs' future possession, and created the date for the cause of action." The defendants denied the plaintiffs' title. They also alleged, that the plaint disclosed no cause of action for confirmation of possession and declaration of title. The Munsif overruled this last objection, and on the merits awarded a decree in favor of the plaintiffs for confirmation of possession, holding that the plaintiffs' title was proved. The Munsif also awarded a decree for Rs. 5, the value of the palm trees taken away by the defendants.

On appeal, the only point urged before the lower Appellate Court was, that as the plaint disclosed no cause of action for confirmation of possession and declaration of title, the Munsif's decree, in so far as it declared the plaintiffs' title, confirming his possession, was bad in law. The lower Appellate Court yielded to these objections, and reversed so much of the Munsif's decree as related to these two prayers. As regards the damages, the defendants' (appellants') pleader, before the lower Appellate Court, stated that he would not contest the validity of the decree.

\*Appeal from Appellate Decree, No. 1704 of 1879, against the decree of Baboo Aubinash Chunder Mitter, Additional Subordinate Judge of patna, dated the 22nd May 1879, reversing the decree of Moulvi Abdool Aziz, Munsif of Behar, dated the 30th November 1878.

The plaintiffs then specially appealed to the High Court.

Baboo *Doorga Pershad* for the appellants.

Mr. *Sandel* for the respondents.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by

**Mitter, J.** (who, after stating the facts as above, continued):—On the second appeal it is urged before us that the lower Appellate Court was in error in reversing the Munsif's decree [345] for confirmation of possession. The suit was brought on the 3rd May 1878, after the Specific Relief Act came in force. Section 42 of that Act says :—" Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may, in its discretion," &c. Now, in this case, no doubt, the plaint does not disclose any facts from which it could be said that the defendants either denied their title or were interested to deny it, but from the proceedings in the lower Court it was established, that, before the suit was brought, there was a dispute between the parties as regards the title of the plaintiffs. That being so, although, under s. 53 of the Procedure Code, the Munsif might have rejected the plaint on the ground that it did not disclose any cause of action for maintaining a suit for declaration of title and confirmation of possession, yet a decree having been passed by the Munsif upon the merits, it was too late for the Appellate Court to reverse that decree upon the ground that the plaint did not disclose any cause of action for declaration of right and confirm action of possession. The Appellate Court could only reverse the decree if it was satisfied, that not only the plaint did not disclose any cause of action for granting a declaratory decree, but that no such cause of action was established on the evidence. That cannot be said in this case, because it is quite clear from the written statement and other proceedings in the case, that there was really a dispute between the parties as regards the plaintiffs' title before the suit was brought. We, therefore, reverse the decree of the lower Appellate Court so far as it reverses the decree of the Munsif, and remand the case for retrial. Costs to abide the result.

*Appeal allowed, and case remanded.*

[346] *The 6th May, 1881.*

PRESENT :

MR. JUSTICE PONTIFEX AND MR. JUSTICE FIELD.

Woopendro Nath Sircar and another.....(Judgment—Debtors.)

*versus*

Brojendranath Mundul.....(Decree—Holder)\*

*Material Irregularity—Setting aside Sale—Dissuading Purchaser from Bidding—Civil Procedure Code (Act X of 1877), s. 311—Leave to Bid—Decree-holder related to Manager of Defendant.*

[ 9 C.L.J. 244.]

When liberty is given to a decree-holder to bid at the sale of the judgment-debtor's property, he is bound to exercise the most scrupulous fairness in purchasing that property, and if he or his agent dissuades others from purchasing at the sale, that of itself is a sufficient ground why the purchase should be set aside

Where a decree-holder was joint in family with the manager of an infant defendant, and the defendant's property was to be sold in execution of the decree,—

*Held*, that the decree-holder ought not to be granted leave to purchase at the sale, because any purchase made by him would be for the benefit of the family of which the manager of the infant defendant was one of the members ; and it would in fact be a purchase by an agent of the property of his principal.

Baboo Umbica Churn Bose for the appellants.

Baboo Bhowany Churn Dutt for the respondent.

The facts of this case fully appear from the **judgment** of the Court (PONTIFEX and FIELD, JJ.), which was delivered by

**Pontifex, J.**—In this case the appellants are the judgment debtors, and they sought under s. 311 to set aside a sale made under a mortgage decree on the ground of irregularity, alleging that they had sustained substantial injury by reason of that irregularity, the full price for the property not having been obtained. The plaintiff in the suit in which the property was sold was a mortgagee, and he obtained leave to bid, and purchased two lots at that sale.

Now it appears that his uncle Radhamohun, who is joint in estate and lives in commensality with him, had been appointed by the Court of Wards the manager of one of the infant defendants ; and this purchase by the plaintiff-[347] holder, was in fact a purchase for the benefit of the joint family, as is not denied by the pleader for the decree-holder. Now some evidence was read before us, showing that there was irregularity with respect to one of these lots, in publishing the proclamation of sale on the premises, and that the full price was not obtained for the properties ; but we think it is not necessary

\* Appeal from Original Order, No. 52 of 1881, against the order of Baboo Bhoochun Chunder Mookerjee, First Subordinate Judge of the 24-Pargannas, dated the 29th January 1881.



to proceed upon that ground. It appears from the evidence adduced by the decree-holder that the am-mukhtear of Radhamohun, the uncle of the decree-holder, and manager of the infant defendant, at the time when the sale was taking place, discouraged other bidders from bidding for the property. The evidence of the decree-holder's own witnesses is, that this am-mukhtear went about at the sale stating that the decree-holder would bid up to Rs. 1,000 per cotta, and both these witnesses say that they were dissuaded from bidding in consequence of the statement. The first witness says, that this statement was made to him by the am-mukhtear himself. The second witness does not say that the am-mukhtear informed him that he was prepared to bid Rs. 1,000 for every cotta, but he says that some one at the time of the sale did tell him that. We think that when liberty is given to a decree-holder to bid at the sale of the judgment-debtor's property, he is bound to exercise the most scrupulous fairness\* in purchasing that property; and if he or his agent dissuades others from purchasing at the sale, that of itself is a sufficient ground why the purchase should be set aside. We find that the judgment-debtor summoned Radhamohun, the uncle of the decree-holder, who, as I have said, was joint with him, and for whose joint benefit the purchase was made, as a witness upon this proceeding; but Radhamohun refused to attend, and the judgment-debtor, therefore, was unable to examine him upon this point. We think, however, that there is ample evidence to show, that, at the sale, the am-mukhtear of Radhamohun did go about discouraging bidders from purchasing, and that the bidders were dissuaded from bidding at the auction; and that, therefore, the sale should be set aside. We are of opinion that, at any future sale, inasmuch as the decree-holder is joint in family with the manager of one of the defendants, leave ought not to be granted [348] to him to purchase at the sale, because any purchase made by him would be for the benefit of the family of which the manager of the infant defendant is one of the members; and it would in fact be a purchase by an agent of the property of his principal, a purchase which this Court cannot recognize. Under the circumstances, we think the appellant should have the costs of this appeal.

*Appeal allowed.*

#### NOTES.

##### [EXECUTION—SALE—LEAVE TO BID.—

The observation in this case that the decree-holder ought to be very fair was held to be too sweeping, by the Privy Council in (1899) 23 Mad. 227 P. C. (1900) 4 C. W. N. 474, though the actual decision here was held by them to be correct. Disparaging remarks by persons other than the decree-holder do not vitiate the sale —(1889) 17 Cal. 152. A concert among buyers inclusive of the decree-holder-bidder not to bid high does not of itself vitiate the sale :—(1899) 23 Mad. 237 P. C.

Similarly it was held that an agreement with the co-lessee of the judgment-debtor to sell the property to him in consequence of which the co-lessee refrained from bidding does not of itself vitiate the sale :—(1908) 36 Cal. 226—9 C. L. J. 244.]

\*[The Privy Council in (1899) 23 Mad. 227 extracting this passage from the judgment, state, "with the decision of that case no fault is to be found. The decree-holder there was acting in concert with, and partially for the benefit of, one who stood in fiduciary relation to the infant debtor; and there was clearly a conflict between their duty and their interest. The passage extracted from the judgment was not necessary for the decision, and in their Lordships' opinion it is too sweeping in its terms. In *Mahabir Pershad Singh v. Macnaghten* (1899) 16 Cal. 682 it is laid down that leave to bid puts an end to the disability of the mortgagee, and puts him in the same position as any other purchaser. All purchasers are bound to abstain from breaches of trust and from intimidation or falsehood in keeping of bidders."]

[3 Cal. 348]

The 10th May, 1881.

PRESENT :

MR. JUSTICE MORRIS AND MR. JUSTICE PRINSEP.

Shama Soondary.....Plaintiff

versus

Hurro Soondary and others.....Defendants.\*

*Valuation of Suit—Duty of Appellate Court—Court Fees Act (VII of 1870),  
s. 12—Civil Procedure Code (Act X of 1877), s. 578*

\* A suit was instituted and tried on the merits in the Court of a Subordinate Judge without any objection being taken, either by the defendants or by the Court, that the plaint was insufficiently stamped. The defendants appealed on the merits, and the District Judge, being of opinion that the stamp on the plaint was inadequate, called upon the plaintiff to pay the additional fee which would have been payable, had the objection been taken and the question rightly decided in the Court of first instance.

*Held*, on second appeal, that the order of the Judge was properly made under s. 12, cl. ii of the Court Fees Act, VII of 1870.

*Kala Chand Sen v. Anund Kristo Bose* (22 W. R., 433.), dissented from. Section 578 of the Civil Procedure Code, explained.

In this case the plaintiff sued to obtain from the defendants certain *nikas*, or general adjustment papers and account books of a business, which the plaintiff alleged had been carried on by the defendants on behalf of the plaintiff's deceased husband. The plaint was stamped with a ten-rupee stamp, though the plaint stated that "the presumed loss for not rendering to me the account papers sought for may amount to more than [349] Rs. 4,000." No objection was taken that the plaint was insufficiently stamped, and the Court of the first instance decided the case on the merits in favour of the plaintiff. The defendants appealed, and the Judge, *suo motu*, held, that before he could go into the merits of the case, he must, under s. 12, Act. VII of 1870 (the Court Fees Act), require the plaintiff to pay in such an additional amount as would make up the fee payable on a suit valued at four thousand rupees. The plaintiff appealed to the High Court.

Baboo Sreenath Das and Moonshee Serajul Islam for the appellant.

Mr. Branson and Baboo Bykunt Nath Das for the respondents.

The Judgment of the Court (MORRIS and PRINSEP, JJ.) was delivered by

**Morris, J.**—The plaintiff, as a member of a partnership concern, brings this suit against her co-partners and certain persons, who have acted as servants of the concern, to obtain from them certain account papers which she specifies. She estimates the loss arising from the defendants not rendering these accounts to her at Rs. 4,000, but she values the suit at Rs. 10 only, as she seeks to

\*Appeal from Appellate Decree, No. 917 of 1879, against the decree of J. C. Geddes, Esq., Judge of Tippera, dated the 6th January 1879, reversing the decree of Baboo Kally Dass Dutt, Second Subordinate Judge of that district, dated the 16th May 1877.

obtain a simple declaratory decree, and intimates her intention of bringing a further suit for account after she has received the account papers which she requires.

The first Court framed certain issues, none of which had reference to the valuation of the suit, and finally gave a partial decree in favour of the plaintiff. Against this judgment the defendants appealed, and their memorandum of appeal was engrossed on a stamp of like valuation. The District Judge, on taking up the appeal, was of opinion that the plaint bore an inadequate stamp, and under the proviso in the 1st clause of s. 12 of the Court Fees Act, VII of 1870, called upon the plaintiff to make good the stamp due upon the full amount of her claim *viz.*, Rs. 4,000. As she failed to do this within the required time, the District Judge set aside the decision of the [350] Subordinate Judge "as void for want of jurisdiction." Against this order a special appeal has been preferred to this Court, and the ground taken is, that the District Judge has erred in law in the construction which he put upon the 12th section of the Court Fees Act; in other words, that, as no question relating to valuation for the purpose of determining the amount of fee chargeable on the plaint was decided by the Court of first instance, the Appellate Court was not competent, under the 2nd clause of s. 12, to raise the point of its own motion and require an additional fee to be paid. In support of this contention, the case of *Kala Chand Sen v. Anund Kristo Bose* (22 W. R., 433) is referred to, in which, in a case presenting somewhat similar circumstances, a Division Bench of this Court expressed the opinion that "the object of the proviso," (to s. 12) "was no doubt to enable the Appellate Court to interfere for the protection of the revenue in a case where a question of that sort might be raised and improperly decided. In the present case, even if it be assumed that the stamp originally paid was, what it really was not, insufficient, there was no question raised in the Court of first instance. It seems to us, therefore, that the Subordinate Judge ought not to have allowed to be raised on this occasion a question which neither had been raised in the first Court, where, if necessary, the amount of additional stamp might have been at once paid, nor in the grounds of appeal."

We observe that, in that case, the Court held that the stamp originally paid was not insufficient, and therefore this expression of opinion relative to s. 12 of the Court Fees Act taking the form of an *obiter dictum* cannot be regarded as an authoritative declaration of the law.

It appears to us that the words "every question relating to valuation . . . on a plaint . . . shall be decided by the Court in which such plaint is filed &c.," do not carry with them the meaning that a distinct question or issue relating to valuation must be raised and a formal decision thereon passed by the Court of first instance before a Court of appeal can interfere. The law, s. 54, Code of Civil Procedure, directs that a plaint shall be rejected if the relief sought is undervalued, and the plain-[351] tiffs, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so; or if the relief sought is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so.

No plaint can be accepted and registered until these preliminary questions of valuation and sufficiency of stamp have been determined by the Court, and therefore it seems to us that it would be straining the language of s. 12 to say,

that the question relating to valuation therein mentioned has only reference to a question raised as a distinct issue, and decided by the Court of first instance in the presence of, and as between, the parties to the suit.

If then the Court of appeal should, as in the case now before us, consider that the plaint has been admitted "to the detriment of the revenue," the law declares that it "shall require the party by whom such fee has been paid to pay as much additional fee as would have been payable had the question been rightly decided,"—that is, in the present case, that the plaintiff (respondent) shall pay the additional fee on his plaint. If he does not do so, "provisions of s. 10, para. ii, shall apply," or "the suit" (*i.e.*, the appeal "shall be stayed until the additional fee has been paid. If the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed." From this we understand, that, unless the plaintiff submits to the order of the superior Court, he loses any advantage that he may have obtained on his improperly-stamped plaint. This is exactly what the District Judge has done in the present case, though the terms of his order that the suit is "void for want of jurisdiction" are not exactly in accordance with law. We understand him, however, to mean, that as the plaint was not properly admitted, the lower Court could not try the suit, and that, therefore, it must be dismissed on that ground, and not on its merits.

But it is next contended, that an Appellate Court could not consider this matter, because s. 578 of the Code of Civil Procedure declares that "no decree shall be reversed, &c., on [352] account of any error, defect, or irregularity not affecting the merits of the case or the jurisdiction of the Court." This provision is a re-enactment of s. 350, Act VIII of 1859. But while the Act of 1859 was in force, the Court Fees Act of 1870 was passed, and s. 12 of that Act just quoted clearly made it the duty of a superior or Appellate Court to take action for the protection of the revenue, and to dismiss the suit, if the party in default did not pay in the deficient court-fee.

That was clearly an exception to s. 350, Act VIII of 1859. The Code of 1877 has merely followed in the steps of the Act of 1859. Section 12 of the Court Fees Act is still in force, and must be read with s. 578 of Act X of 1877 in the same manner as it was read with s. 350, Act VIII of 1859. We are, therefore, of opinion, that the judgment of the Court below is right, and we dismiss this special appeal with costs.

*Appeal dismissed.*

#### **NOTES.**

[See, besides, 12 All. 129, 15 Mad. 288, *JagannathaIyer's* Court Fees Act (1904) pp. 84—88.]

[7 Cal. 331]

APPELLATE CRIMINAL.

The 3rd June, 1881.

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, and

Mr. JUSTICE PRINSEP.

In the matter of the Petition of Riasat Ali, alias Babu Miya, alias Bodiuzzuma

The Empress

versus

Riasat ali, alias Babu Miya, alias Bodiuzzuma.

*Forgery—Attempt to commit Forgery—Indian Penal Code  
(Act XLV of 1860), ss. 465 and 511.*

A person cannot be convicted of an attempt to commit an offence under s. 511 of the Indian Penal Code, unless the offence would have been committed if the attempt charged had succeeded.

A prisoner who was charged with attempting to commit forgery of a valuable security, was found guilty by the jury of attempting to commit forgery. The jury explained their finding by saying that the prisoner had ordered certain receipt forms to be printed similar to those used by the Bengal Coal Company, and that one of these forms had actually been printed and the [333] proof corrected by him; that the prisoner had had an intention of making such addition to the printed form as would make it a false document; and that he did this dishonestly and with intent to commit fraud. The Sessions Judge sentenced the prisoner to rigorous imprisonment for one year under ss. 465 and 511 of the Indian Penal Code for attempting to commit forgery.

*Held*, that the conviction was wrong, and must be set aside.

IN this case the prisoner was charged with cheating under ss. 417, 419 of the Indian Penal Code; with attempting to cheat under the same sections and s. 511; with abetment of forgery under ss. 109, 116, and 465, and with attempting to commit forgery of valuable securities for the purpose of cheating, ss. 467, 468, and 511. The prisoner pleaded not guilty. From the evidence it appeared, that the prisoner had given orders to the Burdwan Press to print one hundred receipt forms similar to those formerly used by the Bengal Coal Company; that he corrected one proof of those forms, and was suggesting further corrections in a second proof in order to assimilate the form to that at present used by the Company, when he was arrested by the police. The prosecution alleged that the prisoner intended to make use of these receipts and represent them to be those of the Bengal Coal Company for the purpose of cheating. The Sessions Judge considered that there was no ground for proceeding on the first and second charges, as there was in his opinion no evidence of deception having been used when the printer of the Burdwan Press agreed to receive the money and to print the forms, and on those two charges, he directed the jury to return a

\* Criminal Appeal, No. 61 of 1881, against the order of W. H. Page, Esq., Officiating Sessions Judge of Burdwan, dated the 9th December 1880.

verdict of not guilty. On the other two charges, the jury were unanimous in finding the prisoner guilty of an attempt to commit forgery; not guilty of an attempt to forge a valuable security; and not guilty of abetment of forgery. When asked to explain the facts upon which they found the prisoner guilty, the jury said that the prisoner did order the receipt forms to be printed; that, though the form actually printed was not a document within the meaning of s. 29 of the Penal Code, the prisoner had an intention of making such addition to it as would make it a false document; and that he did this dishonestly and with intent to commit fraud. The prisoner was sentenced, under ss. 465 and [354] 511 of the Penal Code, to be rigorously imprisoned for one year. The prisoner appealed to the High Court.

*Moonshee Serajul Islam* for the prisoner.

No one appeared for the Crown..

The **judgments** of the Court (GARTH, C. J., and PRINSEP, J.) were as follows:—

**Garth, C. J.**—The prisoner in this case was charged with an attempt to commit forgery, and the facts proved were that he gave orders to the Burdwan Press to print one hundred receipt forms similar to those which were formerly used by the Bengal Coal Company; that he corrected one proof of those forms, and was suggesting further corrections in a second proof in order to assimilate the form to that now used by the Company, when he was arrested by the police. The jury found him guilty of an attempt to commit forgery, “in that he dishonestly and with the intent to commit fraud caused a document to be printed with the intention of making such an addition to it as would make it a false document.”

Assuming this finding of the jury, as to what the prisoner actually did, to be correct, the question is, whether he could be legally convicted of an attempt to commit forgery? The definition of forgery in ss. 463 and 464 of the Indian Penal Code, so far as it is necessary to refer to it for our present purpose, is as follows:—Section 463 says, “Whoever makes a false document, or part of a document, with intent to commit fraud, commits forgery.” And by s. 464 a person is said to “make a false document who dishonestly makes or executes a document, or part of a document, with the intention of causing it to be believed that such document, or part of a document, was made, sealed or signed by or by the authority of a person, by whom, or by whose authority, he knows that it was not made, sealed or signed.”

Now in this case the jury have not found that the receipt form in itself was a false document. If they had, they must have found the prisoner guilty of forgery, and not of the attempt to commit it. They considered, and rightly considered, as it seems to me, that without the addition of a seal or signature [355] purporting to be the seal or signature of the Bengal Coal Company, the printed form would not be a false document. Their view, as I understand it, was, that the commencing to print or write a document, which, when completed, was intended to be a false document, amounted, if coupled with the intent to defraud, to an attempt to commit forgery.

But it has been suggested, that the printing and correcting of a form which is intended by additions, which are to be made to it, to be a false document, is in itself the making of a part of a false document within the meaning of s. 464, and therefore amounts to forgery. If this were so, it seems

to me that the mere printing or writing of a single word upon a piece of paper, however innocent the word might be, would be the making a part of a false document, if it were coupled with an intention to add such other words to it as would make it eventually a false document. In my opinion this is very far from the meaning of s. 464; and I think that such a construction of the section involves a misconception, not only of the word "make," but also of the sense in which the phrase "part of a document" is used in the section.

I consider that the "making" of a document, or part of a document, does not mean "writing" or "printing" it, but signing or otherwise executing it; as in legal phrase we speak of "making an indenture" or "making a promissory note," by which is not meant the writing out of the form of the instrument, but the sealing or signing it as a deed or note. The fact that the word "makes" is used in the section in conjunction with the words "signs," "seals" or "executes," or makes any mark "denoting the execution, &c.," seems to me very clearly to denote that this is its true meaning. What constitutes a false document, or part of a document, is not the writing of any number of words which in themselves are innocent, but the affixing the seal or signature of some person to the document, or part of a document, knowing that the seal or signature is not his, and that he gave no authority to affix it. In other words, the falsity consists in the document, or part of a document, being signed or sealed with the name or seal of a person who did not in fact sign or seal it.

[356] Referring then again to the finding of the jury, the question in this case seems to be, whether what the prisoner did, amounted to preparation only, or to an actual attempt to commit the offence.

In the case of *Reg v. Cheeseman* (Lee & Cave's Rep., 145), Lord Blackburn thus defines an attempt to commit a crime. He says.—"There is no doubt a difference between the preparation antecedent to an offence and the actual attempt, but if the actual transaction has commenced, which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime:" and in *M'Pherson's case* (Dears & B., 202), Cockburn, C. J., says:—"The word attempt clearly conveys with it the idea, that if the attempt had succeeded, the offence charged would have been committed. An attempt must be to do that which, if successful, would amount to the felony charged." It seems to me, that this definition of an attempt to commit an offence is a sound one, and applying it to the present case, the question is, whether what the prisoner did amounted to an attempt to make a false document.

I have already said that, in my opinion, the printed form was not in itself a false document, and that it would not have become a false document, or part of a document (according to the definition in s. 464), until the seal or signature of the Bengal Coal Company had been forged upon it, so as to make it appear that such seal or signature was that of the Bengal Coal Company. The prisoner, therefore, would not be guilty of the offence of forgery until the printed form had thus been converted into a false document; and for the same reason, I think that he would not be guilty of an attempt to commit forgery until he had done some act towards making one of the forms a false document. If, for instance, he had been caught in the act of writing the name of the Company upon the printed form, and had only completed a single letter of the name, I think that he would have been guilty of the offence charged, because (to use the words of Lord Blackburn) "the actual transaction would have commenced, which would have ended in the crime of forgery, if not interrupted." But as it was, all that

he did [357] consisted in mere preparation for the commission of the crime. He was no more guilty of an attempt to commit forgery in having the forms printed, than he would have been of an attempt to commit burglary by having a false key made of the house where he intended to commit the offence.

I think, therefore, that the conviction should be set aside, and the prisoner discharged. He may think himself extremely fortunate that his premature arrest prevented him from completing what he evidently intended.

**Prinsep, J.**—I concur in setting aside the verdict of the jury and the sentence passed on the appellant, because, in my opinion, the acts found by the jury to have been committed do not amount to an attempt, but at most only to a preparation to commit a forgery which might have proceeded no further. I agree in the opinion expressed by the Chief Justice regarding the legal definition of an attempt to commit an offence,—*viz.*, that there must be something "Commenced which would have ended in the crime if not interrupted." The prisoner, must, therefore, be acquitted and released.

*Conviction set aside.*

### NOTES.

#### [PENAL CODE—ATTEMPT.—

In *Mc Crea's case* (1893) 15 All. 173 this decision was disapproved, See *Mayne's Criminal Law* (1904) Ch. XV. See also (1889) Rat. 470; (1894) 22 Cal. 131; (1902) 1. B. L. R. 264.]

[7 Cal. 357]

### APPELLATE CIVIL.

*The 29th April, 1881.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR.  
JUSTICE McDONELL.

Jotendro Mohun Tagore and others.....Defendants

*versus*

Jogul Kishore.....(Plaintiff)\*

*Right, Title, and Interest, Sale of—Estate taken by Purchaser.*

The test to be applied in order to determine the exact interest which passes at sale under the words "right, title, and interest" of a Hindu widow in any properties, depends upon the question whether the suit in which the sale was directed was one brought against the widow upon a cause of action personal to herself, or one which affects the whole inheritance of the property in suit.

The principle in *Baijun Doobey v. Brij Bhookun Lall Amusti* (L. R., 2 I. A., 275; S. C., 1. L. R., 1 Calc., 133) followed.

\* Appeals from Original Decrees, Nos. 324 and 332 of 1879, and Nos. 38 and 74 of 1880, against the decree of Baboo Kristo Chunder Chatterjee, Subordinate Judge of Nuddea, dated the 12th of September 1879.



[358] THE property in dispute in this suit had been sold in execution of a decree obtained against a Hindu widow named Sharodamoyee, and had been purchased by one Woomamoyee Burmohinia, the decree-holder. Subsequently Woomamoyee conveyed the property by deed of gift to her son Gour Mohun, by whom it was again sold to the Maharajah defendant (the defendant No. 1). Sharodamoyee died in 1869, and her property devolved upon Behari Lall Rai, the brother of her husband Norender Chunder Rai, as the next reversionary heir. A decree had been obtained by one Raghub Chunder Banerjee against Behari Lall Rai, and in execution of this decree he attached the property in dispute, which had been previously sold under the decree of Woomamoyee. The second sale took place in April 1870, and the property was then purchased by Ramdhone Chetlanghi (predecessor of the defendant No. 3); and he, on the 28th April 1878, sold it to the plaintiff.

The plaintiff then brought this present suit against the defendants Nos. 1, 2, and 3; the defendant No. 2 being the patnidar of the defendant No. 1, and the defendant No. 3 being the representative of Ramdhone Chetlanghi, the plaintiff's vendor. The suit was to obtain possession of the property on the allegation that, at the sale in execution against Sharodamoyee, Woomamoyee merely purchased the life-interest of a Hindu widow, and that, on the death of Sharodamoyee, the title of the defendant No. 1 became extinguished.

The defendants contended, that the decree obtained by Woomamoyee against Sharodamoyee was decree against Sharodamoyee not in her personal character, but as representing her husband's estate, and that the sale passed not only her own life-interest but the interest of the reversionary heirs as well.

From the report of the previous litigation between Woomamoyee and the other members of the family (contained in the Sadr Dewany Reports for 1859, p. 1659), it appears that Woomamoyee was the widow of one Bhoirub Chunder Rai, who died in 1822. On his death his five surviving brothers (one of whom was the father of Norender Chunder Rai, the husband of Sharodamoyee) took possession of his share under a hibanama, [359] which it was alleged that Bhoirub had executed in their favour shortly before his death, but his widow Woomamoyee continued to live in the family dwellinghouse and was supported from the income of the joint property. In 1851 disputes arose between the members of joint family, and a partition of the joint property was made, but no share was allotted to Woomamoyee, on the ground that her husband Bhoirub had given his share to his surviving brothers by the hibanama. Being thus excluded from the inheritance of her husband, Woomamoyee brought a suit against all the members of the family, who had partitioned the family property amongst themselves, to set aside the hibanama alleged to have been executed by her husband, and to recover possession of the one-sixth share of her husband with mesne profits from the date of her dispossession. The suit was dismissed by the Principal Sadr Amin; but on appeal the Sadr Dewany Adawlut reversed the lower Court's decision, and set aside the hibanama and awarded Woomamoyee possession of the one-sixth share of her husband with mesne profits and costs: it was in execution of this decree for mesne profits and costs that the property of Sharodamoyee, who was one of the defendants in the suit, as representing her husband Norender Chunder, was attached and sold and purchased by Woomamoyee.

The Subordinate Judge held, that the cause of action, namely, dispossession of Woomamoyee by her co-sharers, having occurred after the death of Norender

Chunder, and during the possession of Sharodamoyee, must be considered as a personal action against Sharodamoyee, for which her husband's estate was not liable; and therefore her right and interest only, and not the estate itself, passed under the execution-sale to Woomamoyee: and he further found that the defendant No. 1, who held under that sale, was not entitled to retain possession after the death of Sharodamoyee. Against this decision the defendant No. 1 appealed to the High Court.

Mr *H. Bell* (with him *Baboo Srinath Dass* and *Baboo Nil Madhub Bose*) for the appellants.—The decree obtained by Woomamoyee was not a personal decree against Sharodamoyee. The [360] suit was for the recovery of a one-sixth share of the family property, and was brought against all the members of the family who were wrongfully keeping her out of possession. It was, therefore, a suit against Sharodamoyee and the other members of the family as representing the estate. The decree awarded Woomamoyee possession of the one-sixth share, and it also gave her mesne profits and costs. These mesne profits and costs were as much a part of the decree as the decree for her specific share. If the reversionary heirs are bound by that part of the decree which gave Woomamoyee her specific share, they must be equally bound by that part of the decree which awarded mesne profits and costs. Sharodamoyee might have borrowed money to pay off the mesne profits and costs, and the loan would have been a legitimate charge on the estate: *Grose v. Amurtamayi Das* (4 B. L. R., O. J., 30). When, therefore, Woomamoyee attached the property of Sharodamoyee in satisfaction of her decree for mesne profits and costs, she was attaching for a debt for which her husband's estate was liable, and she was entitled to sell not only Sharodamoyee's life-interest, but the estate itself: *Bisto Beharee Sahoy v. Lalla Byjnath Persad* (16 W. R., 49), and *Mohini Chunder Roy v. Ram Kishore Acharjee* (23 W. R., 174). In considering what passes at an execution-sale against a widow, the nature of the debt must be considered. If the debt was one binding on the reversioners, the whole estate passes: *Ishan C. Mitter v. Buksh Ali Soudagur* (Marsh., 614) *The General Manager of the Raj Durbhunga v. Maharajah Ramaput Sing* (14 Moore's I. A., 635) In execution-proceedings, it is not the form of the decree but the substance of the transaction which is considered; *Bissessur Lall Sahoo v. Maharajah Luchmessur Singh* (L. R., 6 I. A., 237).

*Baboo Unnoda Prosad Banerjee*, *Baboo Mohini Mohun Roy*, *Baboo Rashbehary Ghose*, and *Baboo Jogesh Chunder Dey* for the respondent.—The decree against Sharodamoyee for mesne profits and costs was merely a personal decree which she was bound to [361] satisfy. Even if it was a decree binding on the estate, the estate would not be liable, unless it was shown that she had no means at her disposal to pay the debt. She could only encumber the estate in case of a pressing necessity. A widow is bound to defray from the income of the estate all proper and reasonable charges: *Roy Mukhun Lall v. Stewart* (18 W. R. 121). But the decree for mesne profits and costs was a simple decree for money, and was in no way binding on the estate. Where the decree against a Hindu widow is in its terms only a personal decree, the sale passes only a life-interest: *Barjun Doobey v. Brij Bhokun Lal Awusti* (L. R. 2 I. A., 275; S. C., I. L. R., 1 Calc. 133). See also *Kistomoyee Dassee v. Prosunno Narain Chowdhry* (6 W. R., 304). In *Nugender Chunder Ghose v. S. M. Kamunee Dossee* (11 Moore's I. A., 241; S. C., 8 W. R., P. C., 17), the Privy Council held, that money paid by a mortgagee to the Collector to stop the sale of an estate, was a mere personal debt binding on the widow in possession, but not binding upon the reversioners. The Privy Council there point out the form which a suit should take if it is

sought to bind the reversioners. In the present case, it cannot be contended that the reversioners are bound, because all that was sold under Woomamoyee's decree was the right and interest of Sharodamoyee. The recent case of *Baijun Doobey v. Brij Bhokun Lal Awusti* (L. R., 2 I. A., 275; S. C., I. L. R., 1 Cal. 133), is a clear authority that where a widow's rights and interests are sold, only the widow's estate passes to the purchaser.

Mr. H. Bell in reply cited *Phoolchund Lall v. Rughoobuns Suhye* (9 W. R., 108) and Mayne's Hindu Law, page 545, on the point that a Hindu widow is not bound to devote her private income to defray a charge binding on the estate.

The judgment of the Court (GARTH, C. J., and McDONELL, J.) was delivered by

**Garth, C. J.**—The two suits (Nos. 63 and 64) out of which this appeal arises were brought to recover possession of a share in an ancestral estate which originally belonged to Neelcanth Roy.

[362] Neelcanth Roy left six sons, who lived together in commensality and carried on a joint business, each having a sixth of the ancestral property.

The eldest of these sons was Bhoirub Rai, who died leaving a daughter, Woomamoyee, and two grandchildren.

Two days before Bhoirub's death, it was alleged by his brothers that he executed a hibanama, the effect of which was to disinherit his own daughter and grandchildren, and to convey his share of the property (subject to certain provisions for the maintenance of his own family) to his surviving brothers.

The existence of this alleged hibanama appears to have been kept secret for some time. Bhoirub died in the year 1822, and after his death the family continued to live together as before in commensality, the eldest male member acting as the karta. In 1851, however, disputes arose in the family. The hibanama was then brought to light, and a private partition took place amongst the brothers, excluding, of course, the heirs of Bhoirub.

Upon this a suit was brought by Woomamoyee and others, claiming, under, Bhoirub, to set aside the alleged hibanama, and the partition that had been made in pursuance of it, and the ultimate result of this suit before the Sadr Dewany Adawlut, was, that the hibanama and the partition were both set aside, and Bhoirub's share of the property was restored to Woomamoyee, his next heir, who obtained a decree against the defendants for mesne profits and costs.

Amongst others of the family who were made defendants in that suit was Sharodamoyee, the widow of Norender Chunder Rai, who was one of Bhoirub's nephews, and after obtaining her decree, Woomamoyee took out execution against Sharodamoyee, and sold her share of the family property in execution to satisfy the amount of mesne profits and costs. Woomamoyee herself became the purchaser at that sale, and having bought Sharodamoyee's share, conveyed it by gift to her son Gourmohun, who again sold it to Maharajah Jotendro Mohun Tagore, who is the principal defendant in the present suit.

In the year 1869 Sharodamoyee died; and on her death, Behari Lal Rai, her nephew, became her reversionary heir. [363] One Raghub Chunder Banerjee had a decree against Behari, and under that decree he sold the right, title, and

interest which Behari had in Sharodamoyee's share of the family property. Ramdhone Chetlanghi purchased this interest at the sale, and conveyed it afterwards to the present plaintiff in the names of two of his servants.

These suits have now been brought by the plaintiff to recover the property from the Maharajah defendant, upon the ground that the Maharajah only purchased the right and interest of Sharodamoyee, which ceased at her death, and that the plaintiff is entitled to the reversion of the property as the purchaser of Behari's rights.

Another question was raised in the Court below, which in our view of the case is immaterial to this appeal,—namely, whether, assuming the plaintiff to be entitled to succeed at all, he is entitled to recover the whole property claimed, or only an eight-anna share of it.

The defendant No. 2 is patnidar of the Maharajah defendant, and therefore defends the suit in the same right and upon the same grounds as he does.

The main question in the case is, whether, under the sale of the right, title, and interest of Sharodamoyee in her share of the family property, the whole inheritance of Norender Chunder Rai in that share passed to the purchaser, or only his widow's interest, subject to the right of the reversionary heir to succeed to the property at her death.

It is contended on the part of the plaintiff, that whatever the original object of Woomamoyee's suit may have been, the decree which she eventually sought to enforce by execution as against Sharodamoyee's share of the property, was a mere money-decree of a personal nature for mesne profits and costs; and that, consequently, the sale under that decree could only pass Sharodamoyee's interest, and could not affect Behari's rights as the reversionary heir after Sharodamoyee's death.

On the other hand it is contended by the defendants, that the express object of Woomamoyee's suit was to recover from all the defendants in the suit, and amongst them from Sharodamoyee, the whole of Woomamoyee's share in the ancestral [364] property. It was not brought to recover from Sharodamoyee merely her own life-interest, but the entire estate in share which had been held by her husband, Norender, under the hibinama: and that the decree which was made against Sharodamoyee for the recovery of that share included not only Sharodamoyee's life-interest, but the interest which Behari would have taken as reversioner, if Woomamoyee had failed in her suit.

A somewhat nice question is thus raised for our determination, and several authorities have been cited on either side.

One point which has been strongly urged upon us on behalf of the plaintiff is this, that, whatever might have been the nature of the decree obtained against Sharodamoyee and the other defendants, as in execution of that decree her right, title, and interest only was sold in the property in question, the sale would only pass her life-interest, and would not affect the interest of Behari after her death.

We think, however, that this proposition is opposed both to principle and authority. It has been held over and over again, not only in this Court, but by the Privy Council, that the words "right, title, and interest" of the execution-debtor must not be construed strictly, but with reference to the circumstances

under which the suit is brought, and the true meaning of the decree under which the sale takes place. And this was the more necessary in the case of sales which took place under the old Civil Procedure Code, because by s. 249 of the Code, the proclamation in every case was for the sale only of the interest of the execution-debtor. And as a matter of form and practice, all sales under that Act were of the right, title, and interest of the execution-debtor. It is, therefore, the duty of the Court in each case to ascertain carefully what was intended to be sold.

Perhaps the most remarkable instance of the application of this rule occurs in the case of *Ishan Chunder Mitter v. Buksh Ali Soudagur* (Marsh Rep., 614) which has been more than once cited with approbation by the Privy Council. In that case a widow had been sued upon a bond given by her husband, and it appeared upon the proceedings, that the suit was really [365] brought against her, not in her own right, but as the guardian of her infant son, who was his father's heir. A decree was obtained against her in the suit, and under that decree her right, title, and interest in the property in question was sold to a purchaser. Now here the widow had in fact no right, title, or interest in the property in question. That property belonged wholly to her son; and yet it was held that, under the sale of her right, title, and interest, the property which belonged to her son passed to the purchaser.

Again, as an authority to the same effect, we may refer to the case of *The General Manager of the Raj Durbhunga v. Maharajah Ramaput Singh* (14 Moore's I. A., 605). There a suit had been brought by *A* against *B* for arrears of rent, and *B* having died pending the suit, a decree was obtained by *A* against *B*'s widow. In execution under this decree, the right, title, and interest of *B*'s widow in certain property which had belonged to her husband was sold. In point of fact, the widow had no interest in that property, because it belonged to her husband's son and heir: but the Privy Council held, reversing the decree of High Court, that, under that sale, the property which was then vested in the son passed to the purchaser.

Again, as an illustration of how the words 'right, title, and interest' may have a different meaning according to the nature of the suit, and of the decree under which the sale takes place, we may refer to the case of *Bisto Beharee Sahoy v. Lalla Byjnath Persad* (16 W. R., 49). There, a suit had been brought and a decree obtained against a widow for a debt; and in execution of that decree her right, title, and interest in certain property which she had inherited from her husband had been sold. The reversioner then brought a suit to dispute the validity of the sale as effecting his interests, and it was held that the right of the reversioner to the property after the widow's death, depended upon whether the debt had, or had not, been incurred by the widow for any necessity contemplated by Hindu law.

The learned Judges say:—"If such necessity had been established, her right and interest would have included the entire estate which would have passed under the decree to the purchaser [366] in execution; whilst if she had sold without such necessity, then all that would have passed under the sale would have been her life-interest." Thereby clearly indicating, that, under the sale of her right, title, and interest, a different estate would have passed to the purchaser according to whether her debt had been incurred with or without legal necessity.

We think, therefore, that we must look to the nature of the suit, and of the decree against Sharodamoyee, to see whether under the sale of her right,

title, and interest in the property in question her own life-interest only, or the whole inheritance, passed to the purchaser.

And this, we think, must depend upon whether the suit was brought against her upon a cause of action personal to herself, or one which affected the whole inheritance of the property in suit. This is the principle, as we understand, upon which the case of *Barjun Doobey v. Brj Bhokun Lall Awusti* (L. R., 2 I. A., 275; S. C., I. L. R., 1 Calc., 133,) was decided. The test applied in that case was, whether the decree for maintenance was a personal one against the widow, or whether it affected the estate of the reversioner; and as the Privy Council considered that the decree was a personal one against the widow, it was held, that, under the sale of her right, title, and interest in the property sold, her own life-interest only passed to the purchaser.

Now applying the same test in this case, we think it clear that Woomamoyee's suit was not against Sharodamoyee personally. Her object was to recover back from Sharodamoyee and the other defendants in the suit her father's inheritance in the ancestral property, of which she had been dispossessed by the other members of the family under colour of the alleged hibanama.

The suit was defended in the interest of Behary, the reversioner, as well as of Sharodamoyee herself. It was defended successfully in the Court of first instance; and there is no reason to suppose that the defendants did not all honestly believe that the hibanama was a genuine instrument.

The reversioner Behari was just as much interested as Sharodamoyee in the result of the suit. It was defended for his benefit [367] as well as hers, and the costs which were decreed against her were costs incurred by the plaintiff, not in prosecuting the claim against her personally, but also against the reversioner, whose rights she was bound to defend, and did defend, in resisting Woomamoyee's claim to the inheritance.

We have had rather more doubt with regard to the decree for mesne profits; but we think that this portion of the decree necessarily followed the other; and that Woomamoyee must be considered as having recovered the mesne profits in the same right and upon the same principle as she recovered the rest of her claim.

The appeal will, therefore, be decreed, and the plaintiff's suit will be dismissed with costs in both Courts.

*Appeal allowed.*

#### NOTES.

[This decision was affirmed by the Privy Council in (1884) 10 Cal. 985 P. C.—II I. A. 66.—See the Notes to that case in the Law Report Reprints.]

[7 Cal. 367]

The 4th May, 1881.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE McDONELL.

Rajendro Kishore Singh.....Plaintiff

versus

Bulaky Mahton and others.....Defendants.\*

*Limitation—Exclusion of Time—Limitation Act (XV of 1877), s. 14.*

The defendants cut down and carried away some trees which had been growing on the plaintiff's land. The plaintiff's manager brought a suit in his own name against the defendants for the value of the trees so cut and carried away. This suit was dismissed on the ground that the manager had no cause of action against the defendants. In a subsequent suit brought by the plaintiff against the defendants for the value of the same trees, he contended that the time occupied in the former suit ought to be excluded in computing the period of limitation prescribed for the second suit.

*Held*, that the provisions of Act XV of 1877, s. 14, did not apply, and that the time could not be excluded, as the reason why the previous suit was dismissed, was, because it was brought in the name of the wrong person, not from defect of jurisdiction, or from any cause of a like nature.

THIS was a suit brought by the Maharajah of Bettia for (*inter alia*) the value of certain trees which had been cut down [368] and illegally appropriated by the defendants. The cutting of the trees was alleged to have taken place on or about the 11th May 1873. Shortly after that date the plaintiff's manager instituted a suit for the value of the same trees; and this suit was, on the 31st of May 1877, finally dismissed, on the ground that the manager, as such, had no cause of action. The present suit was instituted on the 26th of November 1877, and at the hearing, the plaintiff argued that, in computing limitation, he was entitled to exclude the time occupied in the former suit under the provisions of the Limitation Act, XV of 1877, s. 14. This contention was overruled in the Court of first instance, and the suit was dismissed with costs. This decision was upheld on appeal.

The plaintiff then brought this second appeal to the High Court.

Mr. Collinson and Baboo Sreenath Banerjee for the appellant.

No one appeared for the respondents.

The **judgment** of the Court (GARTH, C. J., and McDONELL, J.), so far as is material for the purposes of this report, is as follows :—

**Garth, C. J.**—It has been contended before us, that as regards the claim for the value of the trees, the plaintiff's rights are saved by s. 14 of the last Limitation Act.

\* Appeal from Appellate Decree, No. 2624 of 1879, against the decree of Baboo Kally-prosonno Mookerjee, Second Subordinate Judge of Sarun, dated the 12th August 1879, affirming the decree of Baboo Taraprosunno Banerjee, Munsif of Chupra, dated the 17th September 1878.

That section enacts, "that, in computing the period of limitation, the time during which the plaintiff has been prosecuting with due diligence another suit against the defendants shall be excluded, when the proceeding is founded upon the same cause of action, and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it."

Now it seems that the plaintiff, some time ago, brought a suit for the value of these trees in the name of a person who sued as his manager; and the suit was dismissed by the High Court, on the ground that as manager he had no right to sue on behalf of the plaintiff. It is argued that this was a suit prosecuted by the plaintiff (within the meaning of s. 14) in good [369] faith, and in a Court which from defect of jurisdiction or other cause of a like nature was unable to entertain it.

We think it clear that such a case is not within the meaning of s. 14. It was not from defect of jurisdiction or from any cause of a like nature that the previous suit brought by the manager was dismissed. The Court in which the suit was brought had a perfect right to entertain that suit

The reason why it was dismissed, was because it was brought in the name of the wrong person.

We think, therefore, that the Subordinate Judge in this case was quite right in holding that the claim for cutting down the trees was barred.

*Appeal dismissed.*

# NOTES.

## [LIMITATION—SUIT BY WRONG PERSON.—

See Mitra on Limitation (1911) Vol II, p 794.

See also (1886) 8 All. 475]

[7 Cal. 369]

*The 22nd April, 1881.*

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN

Hoolash Koor.....Appellant,

*versus*

Kassee Proshad and another.....Respondents.\*

*Hindu law—Mitakshara—Minor—Partition—Specification of Shares under Land Registration Act (Beng. Act VII of 1876)—Certificate under Act XL of 1858.*

B, a Hindu governed by the Mitakshara law, died, leaving two minor sons, J and K, and also a widow L and two minor sons by her; the mother of J and K having predeceased him. On J's attaining majority, the Court of Wards, which had taken possession of all the property, withdrew from the management; and L then applied under Act XL of 1858, and obtained a certificate with respect of the shares of K and her two minor sons. Subsequently K having

\* Appeal from Order, No. 346 of 1880, against the Decree of H. Beveridge, Esq., Officiating Judge of Patna, dated the 15th September 1880.



attained majority, his share was excluded from the operation of the death of *J*, leaving *H*, his widow, and an infant son by her, *H* applied for a similar certificate, under Act XL of 1858, with respect to the property of her son, and it appeared that *K* was incapable of managing the property.

*Held*, that though the certificate granted to *L* had been improperly obtained, *H* was not entitled to one, as, no partition having taken place since *B*'s death, the property was still the joint family property.

*Held* also, that neither the granting of the certificate to *L*, nor the registration of the specific shares of each of the co-owners under the provisions [370] of the Land Registration Act, amounted to a partition such as to justify the Court in granting the certificate asked for.

*Gowrah Koeri v. Gujadhur Purshad* (I. L. R., 5 Cal., 219) followed.

THIS was an appeal against an order rejecting the appellant's application, under the provisions of Act XL of 1858, for a certificate for managing the property of her minor son.

The facts appear sufficiently for the purposes of this report from the judgment of Mr. Justice Mitter.

Mr. Branson and Baboo Mohesh Chunder Chowdhry for the appellant.

The Advocate-General (The Hon'ble G. C. Paul) and Baboo Chunder Madhub Ghose for the respondents.

The judgments of the Court (MITTER and MACLEAN, JJ.) were as follows :

**Mitter, J.**—This is an appeal against a judgment of the Judge of Patna rejecting the appellant's petition for a certificate for managing the property of her minor son. Her husband, Joymungul, and Kasee, one of the respondents, were two uterine brothers, sons of one Byjnath, who left by another wife, Mussamut Larawun Koer (the other respondent), two other minor sons. The mother of Joymungul and Kasee is not alive. The present application was made after the death of Joymungul. It was opposed principally by Larawun Koer, on the ground that her minor sons, Kasee, and Joymungul, were members of a joint Hindu family of which no separation has yet taken place. It was, therefore, contended that, under the Mitakshara law, the minor son of Joymungul was not possessed of such property as could be taken charge of under the provisions of Act XL of 1858. The Judge, in accordance with this objection, has refused the application.

It appears that, after the death of Byjnath, the whole of his property was taken charge of by the Court of Wards, all his sons then being under age. On Joymungul's attaining majority, the Court of Wards withdrew their management, and relinquished [371] possession of the property. Mussamut Larawun Koer then applied under Act XL of 1858, and obtained a certificate in respect of the shares of Kasee and her two minor sons. On Kasee's attaining majority, and on his application, his share was excluded from the operation of the certificate granted to Mussamut Larawun Koer. After the Land Registration Act was passed, the names of the four brothers were recorded with the specification of the shares of each.

Notwithstanding these proceedings, the Judge finds on the evidence (and I think the finding is quite correct) that the property remained joint, and the profits of the property were enjoyed jointly by all the members, who lived in

commensality without any reference to their respective shares. There has not been any separate appropriation of the funds of the family or the profits arising from the landed property.

It has been contended before us, that the proceedings taken by Mussamut Larawun Koer under Act XL of 1858, and the registration of the names of the four brothers with the specification of their respective shares, effected a valid partition under the Mitakshara law.

We do not think that this contention is valid. It is true that, according to the true notion of the joint family under the Mitakshara law, no individual member can predicate of the joint property that he is the owner of a particular share, yet a declaration to that effect not accompanied by an intention to deal with a particular share separately would not constitute a separation of the joint family. Under the Land Registration Act, the joint owners are required to specify their shares, and accordingly the shares of the four brothers were specified. As to the certificate obtained under Act XL of 1858 by Mussamut Larawun Koer, it was evidently applied for, as the Judge remarks, under the impression that a certificate under the Act in respect of the property of a minor, who is a member of a joint Hindu family governed by the Mitakshara law, can be granted.

I am of opinion that the decision of the lower Court is correct. The appeal is, therefore, dismissed with costs, which we assess at Rs. 80.

[372] **Maclean, J.**—I fully concur as to the condition of the family as joint and undivided. I regret to be obliged to assent to the order dismissing the appeal. The family is in a peculiar position. The adult uncle of the minor is stated to be incapable of managing. The mother of the other minor holds a certificate which she ought not to have obtained under the current exposition of the law, and no one can, as it seems, obtain a certificate to take charge of the estate of Joymungul's infant son. But the case of *Gourah Koeri v. Gajadhur Purshad* (I. L. R., 5 Cal., 219) is authority which I must follow.

*Appeal dismissed.*

#### NOTES.

##### [HINDU LAW—PARTITION—INTENTION.—

Mere registration of lands in defined shares unaccompanied by an intention to be separate has been held to be ineffectual for a partition.—(1872) 8 B. L. R. 385; (1870) 8 B.L.R. 396; (1877) 1 All. 437; (1885) 12 Cal. 96; (1896) 18 All. 176; 27 Cal. 515; 11 O.C. 264; 381; 8 I. C. 207; 1 I. C. 899; 3 I. C. 234.

But it may be evidence of intention.—(1888) 10 All. 490.]

[7 Cal. 372]

ORIGINAL CIVIL.

The 30th June, 1881.

PRESENT :

MR. JUSTICE WILSON.

IN THE MATTER OF ACT I OF 1875.

Gobind Lall Seal and others.

*versus*

Robert Knight and others.

*Distress Act (I of 1875)—Seizure of property in Possession of Mortgagees.*

Where moveable property upon leasehold premises has been mortgaged by the lessee, and the mortgagee is in possession, the landlord cannot seize it under a distress warrant, as it is not property "belonging to the person from whom the rent is claimed," within the meaning of s. 10\* of the Distress Act

THIS was a claim made by Indra Chundra Singh and Kanti Chundra Singh, to three Gripper printing presses, seized by the Court of Small Causes under a distress warrant for rent due for the premises in which the presses were standing. The Singhs claimed as mortgagees under two several indentures of mortgage and further charge, dated the 20th August and 24th September 1880, and asked that the warrant should be discharged.

The case was transferred from the Small Cause Court to the High Court for hearing, under s. 16† of Act I of 1875.

It appeared from the affidavits, that Gobind Lall and Kannylal Seal, the trustees of a certain settlement, let out on lease a [373] house, No. 3, Chowringhee Road, to Robert Knight, Nichols and Co., and Edgar Bois, the proprietors of the *Statesman* newspaper, for a term of four years, from the 1st of January 1880, at a monthly rental of Rs. 450. By an indenture of mortgage, dated the 8th July, 1878, made between Nichols and Co., Robert Knight, and Edgar Bois, of the first part; Robert Knight, as the proprietor of the *Indian Agriculturist*, of the second part; and Spicer Brothers, of the third part. The parties

\*[Sec. 10 :—In pursuance of the warrant aforesaid the bailiff shall seize the moveable property found in or upon the house or premises mentioned in the warrant and belonging to the person from whom the rent is claimed (hereinafter called the debtor), or such part thereof as may in the bailiff's judgment be sufficient to cover the amount of the said rent, together with the costs of the said distress.

Provided that the bailiff shall not seize :—

- (a) things in actual use; or
- (b) tools and implements not in use, where there is other moveable property in or upon the house or premises sufficient to cover such amount and costs; or
- (c) the debtor's necessary wearing apparel; or
- (d) goods in the custody of the law].

†[Sec. 16 :—Empowers to transfer to High Court cases involving more than Rs. 1000].

of the first part mortgaged to Spicer Brothers, their executors, administrators, and assigns, to secure an advance of £3,000, all the several newspapers (before mentioned), and the copyright and good-will thereof, and a lease then subsisting of the house No. 3, Chowringhee Road, together with all the plant, printing gear, and stock-in-trade in or about the said premises, used for the purpose of, or in connection with, the publication of the said newspapers. This mortgage contained a power for the mortgagees to enter on the premises and seize and take possession of any of the mortgaged properties on failure of payment of principal or interest on the advance made.

By another indenture, dated the 20th August, 1880, Spicer Brothers assigned their interest in the properties mortgaged to them, under the deed of the 8th July 1878, to Indra Chundra Singh and Kanti Chundra Singh; and by an indenture, dated the 24th September 1880, the Singhs made further advances to the mortgagors on the same properties.

On the 18th January 1881, the Singhs demanded repayment of the monies advanced as provided for in the several deeds of mortgage, and on default being made in payment, instructed their attorney to enter on and take possession of the premises No. 3, Chowringhee Road, and the properties and effects assigned to them; and on the 7th February 1881 (amongst other things), possession was taken of the three Gripper presses on behalf of the Singhs, and the same, with other properties on the premises, were advertised for sale under the power-of-sale given in the mortgage securities.

On the 15th February, 1881, the Seals applied to the Small Cause Court for the issue of a distress warrant for the recovery of eight months' rent then due under the lease of the 1st [374] January, 1880, and on obtaining the warrant, seized the three Gripper presses standing in the premises.

The Singhs, thereupon, claimed to be entitled to the properties seized as mortgagees in possession, under the several indentures of mortgage and further charge abovementioned, and denied all liability for the rent due. Interpleader summonses were issued by the Court of Small Causes for the hearing of the claim, and such hearing was transferred to the High Court by an order dated the 18th February 1881.

Mr. *Piffard* (with him Mr. *Stokoe*) on behalf of the claimants.—Property has been seized which is not the property of the tenant. Under Act VII of 1847, no property, except that belonging to the tenant, could be seized: see *Dwarkanath Biswas v. Udditchurn Addy* (1 Ind., Jur., 361). The present Act is Act I of 1875, and allows property found on the premises to be seized which belongs to the person from whom the rent is claimed. We were not the tenants, but mortgagees in possession; the precedent under Act VII of 1847 equally will apply to this Act.

Mr. *Jackson* for the Seals.

**Wilson, J.**—This seems to me a clear case; it is one under the Distress Act (I of 1875). That Act directs, by s. 21, that no distress shall be levied for arrears of rent except under the provisions of this Act, and, therefore, the rights of all parties must be found within the Act. Part IV deals with the levying of distress, s. 8 giving the time for distress, and s. 9 the mode of procedure. Section 10 points out the property which may be seized; that property must be "the moveable property found in or upon the house or premises mentioned in the warrant, and belonging to the person from whom the rent is claimed, here-

inafter called the debtor." Under that clause what is distrained is the property of the debtor, and not the property of any other person. Under the earlier Act (Act VII of 1847), the same was held to be law by Mr. Justice Phear in the case of *Dwarkanath Biswas v. Udditchurn Addy* (1 Ind. Jur., 361). Section 13 of the present Act, [375] goes on to provide for what is to be done if the validity of the distress is to be questioned. "The debtor or any other person alleging himself to be the owner of any property seized under this Act, may, at any time within five days from such seizure, apply to any Judge of the said Court to discharge or suspend the warrant or release a distrained article." Under that section, the application in this case was made to the Small Cause Court, and afterwards the hearing was transferred, under s. 16, to this Court. The facts of the case are, that the distress was levied on the 1st of February 1881, and the claimants lay claim to the property seized, and their title is made out in this way,—viz., on the 8th July 1878, to secure certain monies advanced by Messrs. Spicer Brothers, a certain newspaper and a lease then subsisting, and stock-in-trade, were mortgaged to the Spicers with the usual proviso for redemption, and in default of repayment of the money advanced, the usual powers to enter and take possession were given. By a deed dated the 21st August 1880, to which Spicer and others were parties, the mortgagees assigned to the present claimants the whole of the mortgaged premises to secure an advance made by them. A third deed, dated the 24th September 1880, was executed in consideration of further advances by the claimants, and the further advances were secured in the same way, viz., on the same property mortgaged in the two other deeds. It appears that default was made, and the present claimants entered into the premises and took possession of the printing apparatus, and remained in possession from the 7th September, till they were disturbed by the distress on the 15th February. The question then arises, whether the present claimants are entitled to retain possession. I think they are. Where legal and equitable estates are recognized, the claimants should be considered as the sole owners of the property subject to the equity of redemption.

They being entitled to apply under s. 13, then follows the question, was the property such as the landlord was entitled to seize under s. 10. The same reasoning leads to the conclusion that the property did not belong to that description of property mentioned in s. 10. I think the claims must be allowed, the Court officers will withdraw from this property, and the claim-[376]ants are entitled to their costs in the Small Cause Court, and costs in this Court on scale No. 2.

*Claim allowed.*

Attorneys for the claimants : Messrs. *Roberts, Morgan, & Co.*

Attorney for the landlord : Mr. *Carruthers.*

#### NOTES.

[Act I of 1875 was repealed by Act XV of 1882.]

[7 Cal. 376]

APPELLATE CIVIL.

*The 16th May, 1881.*

PRESENT:

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE PRINSEP.

Tarini Pershad Misra and another.....Defendants.

*versus*

Mahamud Chowdhry and others.....Plaintiffs.\*

*Settlement—Appeal from Settlement Proceedings—Regulation III of 1872, s. 5—Notification of the Lieutenant-Governor of the 7th May 1872—Act XXXVII of 1855, s. 2.*

The officers appointed under s. 2 of Act XXXVII of 1855, and not the Settlement Officers as such, are the persons empowered to try such suits as are referred to by Reg. III of 1872, s. 5, and to certify issues to the Civil Courts under that section.

The notification of the Lieutenant-Governor, dated the 7th May 1872, being still in force, the Settlement Officers have no power to deal with such cases.

Where a Settlement Officer referred certain issues to a Deputy Commissioner as a Civil Court under Reg. III of 1872, s. 5, to be dealt with by him, and he gave a decision thereon and certified the same to the Settlement Officer, and it appeared that the deputy Commissioner had previously been invested with the powers of a Settlement Officer, and the proceedings were subsequently returned to him for the settlement record to be amended in conformity with his findings, he being thoroughly conversant with all the facts of the case, and he accordingly passed an order and amended the record, defining the areas to which the plaintiffs were entitled :

On appeal against that order, —

*Held*, that, so far he was acting as a Civil Court, the Deputy Commissioner had no jurisdiction to try the issues sent him or deal with the case, but that inasmuch as he was vested with the powers of a Settlement Officer and was fully competent as such to deal with the case himself, seeing that the [377] parties could not in any way be prejudiced by the irregularity committed the High Court would not interfere to set aside the order.

*Held* also, that treating the action of the Deputy Commissioner as that of a Settlement Officer, the High Court had no jurisdiction to hear the appeal.

THIS was an appeal from the finding of the Deputy Commissioner of Nya Doomka, given on the 18th June 1879, on certain issues referred to him by the Settlement Officer under s. 5 of the "Sonthol Pargannas Settlement Regulation," Reg. III of 1872.

The material facts of the case were as follows :—

On the 17th August 1864, the plaintiffs respondents, purchased, at an execution-sale of the Beerbhoom Civil Court, the rights of three judgment-debtors in certain lakhiraj lands in the Sonthal Pargannas. In execution of another

\* Appeal from Original Decree, No. 22 of 1880, against the decree of W. Oldham, Esq., Officiating Deputy Commissioner of Nya Doomka, dated the 18th June 1879.

decree, they again, on the 25th November, of the same year, purchased the rights of the same judgment-debtors in the same property as well as the rights in it of two other persons.

On the 31st July 1866, the plaintiffs applied for possession of their auction-purchase under s. 263 of Act VIII of 1859, by ejectment of the judgment-debtors. The present defendants objected, but the Court of execution did not think proper to decide their objections, and reserving such matters for a separate suit, passed an order under s. 264.

On the 13th June 1876, the plaintiffs sued under s. 26 of Reg. III of 1872, for possession of the purchased properties, together with mesne profits, stating that their cause of action had arisen in Magh 1273, - i.e., January-February 1867,—the date on which they were dispossessed from the possession obtained under s. 264.

On the 8th January 1877, the plaintiffs obtained a decree for possession. From this decree the defendants appealed, but, on obtaining a settlement of the disputed lands on 2nd July 1877, they subsequently withdrew their appeal.

On the 13th August 1877, the plaintiffs gave a receipt acknowledging that they had been put into possession of the disputed property under a purwanah of the Court.

On the 22nd August 1877, the defendants raised objections to the order of delivery to the plaintiffs, and on the 25th August [378] 1877, the purwanah, under which delivery was given to the plaintiffs, was cancelled, on the ground that, as the land in question had been settled before the execution of the decree, the decree must, in compliance with s. 26 of the Regulation, remain unexecuted, and the former holder be kept in possession. From this order the plaintiffs appealed to the Commissioner. Their appeal was rejected on the 19th December 1877, a promise being at the time recorded, that, at the time of hearing the plaintiffs' settlement appeal from the order of the 2nd July 1877, which had at that time been filed, the whole question should be fully considered.

On the 11th June 1878, the Commissioner, sitting in appeal from the order of the 2nd July 1877, and referring to the promise given in his order of the 19th December 1877, reviewed the whole case and directed it to be reopened by the Settlement Officer. He observed that, under s. 5 of Reg. III of 1872, officers empowered to hear suits for land might refer issues to Courts established under Act VI of 1871, and that the Local Government had selected Settlement Officers to hear such suits. Accordingly he directed the Settlement Officer to call upon the plaintiffs to file a statement of their claim, to enter it as a suit upon his file, and to refer five issues, which he drew up, to the Courts established under Act VI of 1871.

In compliance with this order the plaintiffs, on 16th June 1878, filed their petition, and, on the 15th July 1878, an amended petition containing further particulars.

The Settlement Officer, on the 20th of July 1878, forwarded to the Deputy Commissioner of Nya Doomka the petition, together with the settlement proceedings and his certificate under s. 5, Reg. III of 1872, referring the five issues for decision by the Deputy Commissioner as a Civil Court.

On the 18th June, 1879, the Deputy Commissioner of Nya Doomka, who had, previously on the 8th April 1879, been invested with the powers of a

Settlement Officer, gave a decision upon the five issues referred to him, which he certified to the Settlement Officer. On the 24th July 1879, the Settlement Officer, dealing with the Deputy Commissioner's decision on the five issues, and referring to the circumstance that the Deputy Commissioner [379] had been invested with the powers of a Settlement Officer, returned all the proceedings to that officer, in order that, he being thoroughly conversant with the case, should amend the settlement record in conformity with his findings of the 18th June. In compliance with this order the Deputy Commissioner, on the 12th August 1879, acting in his capacity as a Settlement Officer, passed orders in the case, amending the settlement record in accordance with his finding of the 18th June 1879, and defining the areas to which the plaintiffs were entitled.

After having failed to obtain an order from a Division Bench of the High Court to set aside the order in the course of its extraordinary powers under s. 15 of the Charter Act, the defendants, on the 11th September 1879, petitioned the High Court to admit an appeal from the finding of the 18th June 1879. As the right of appeal was doubtful, the Division Bench of the High Court, before admitting an appeal, granted a rule in order to give the respondents an opportunity of showing cause against it. In showing cause against this rule, it was urged, first, that the decisions of the Sonthal Officers, vested with powers of Courts under Act VI of 1871, were not appealable to the High Court; and, next, that the order of the 18th June 1879 was not a decree appealable under Act X of 1877. The Court held, that an appeal from judgments of the Civil Court on cases properly certified under s. 5 of the Regulation, would lie to the High Court, and expressing a doubt as to the legality of the reference made in the present instance by the Settlement Officer, which led to the finding of the 18th June 1879, left that question open for decision on the hearing of the appeal.

That appeal accordingly now came on to be heard.

Baboo *Mohun Mohun Roy* and Babo *Hurry Mohun Chuckerbutty* for the appellants.

Baboo *Sreenath Das*, Baboo *Chundra Madhub Ghose*, and Baboo *Koroona Sindhu Mookerjee* for the respondents.

The judgment of the Court (CUNNINGHAM and PRINSEP, JJ.) was delivered by

**Cunningham, J.** (who, after stating the facts as above, con-[380] tinued).—The first question which calls for consideration is, whether we can regard the decision of the Deputy Commissioner of 18th June 1897 as a finding of a Civil Court on a case properly certified under s. 5 of the Regulation.

By Reg. III of 1872, s. 5, it was provided that, pending the settlement, suits regarding land and rent should be excluded from the ordinary jurisdiction of the Civil Courts established under Act VI of 1871. "Such suits," it was provided, "shall be heard and determined by the officers appointed by the Lieutenant-Governor under s. 2, Act XXXVII of 1855, or by the Settlement Officers hereinafter mentioned, according as the Lieutenant-Governor shall from time to time direct."

By a notification of the 7th May 1872 the Lieutenant-Governor directed that, until further orders, the officers appointed under s. 2 of Act XXXVII of 1855, should entertain and adjudicate suits for land under s. 5 of the Regulation. According to this notification the officers appointed under s. 2 of Act XXXVII



of 1855, and not the Settlement Officers as such, are the persons empowered to try suits, and consequently to certify issues to the Civil Courts under s. 5 of Reg. III of 1872. We are not aware of the grounds on which the Commissioner finds that, under a Resolution of the Lieutenant-Governor "the Settlement Officers are selected to deal with cases under s. 5," and consequently to certify under that section. No such Resolution has been brought to our notice, nor upon inquiries directed by ourselves could any such Resolution be found; we are, therefore, constrained to hold that the notification of the 7th May 1872 is still in force, and that no such power has been conferred on the Settlement Officers. So far, then, as he was acting as a Civil Court, the Deputy Commissioner, Mr. Oldham, had no jurisdiction to try the issues sent to him. It appears, however, that he was vested with powers as a Settlement Officer, and as such would be fully competent to deal with the case himself. Regarding, therefore, all proceedings taken as purely settlement-proceedings, we do not think that the parties can in any way be prejudiced by the irregularity committed in sending the case to him under s. 5. But if he has been acting as a Settlement Officer, we have no jurisdiction to hear any appeal from [381] his orders. Such orders are appealable elsewhere, and provision has been made by the Regulation for enabling them to be questioned in a civil suit by the party injuriously affected.

We accordingly dismiss this appeal with costs.

*Appeal dismissed.*

[7 Cal 381]

*The 28th April, 1881.*

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Gunga Bishen Bhugut and others.....Defendants

*versus*

Raghoonath Ojha.....Plaintiff.\*

*Suit for Possession—Res Judicata—Finality of Decision—Civil Procedure Code (Act X of 1877), s. 13.†*

In a suit to recover possession of certain land, where it appeared that there has been a previous suit between the same parties with respect to the same land, in which the then plaintiffs sought to have their possession confirmed, and that in that suit the lower Courts had decided the case both on the question of title and of possession, but on special appeal the High Court had dealt only with the question of possession, and in dismissing the appeal had not gone into the question of title and the defendant in that suit subsequently sued to recover possession of the land.—

*Held*, that the question of title was still open between the parties, and had not been heard and finally decided by a Court of competent jurisdiction in a former suit within the meaning of s. 13 of Act X of 1877 (Civil Procedure Code).

\* Appeal from Appellate Decrees, Nos. 2099 and 2100 of 1879, against the decree of A. V. Palmer, Esq., Judge of Shahabad, dated the 14th June 1879, affirming the decree of Baboo Nepal Chunder Bose, Second Munsif of Buxar, dated the 23rd of December 1878.

† [q. v. *supra*, 7 Cal. 23.]

*THIS was a suit brought to recover possession of five bighas of land. The plaintiff alleged that the land in dispute was the property of one Phagoo Dobey, and that he had become the purchaser of it at an auction-sale on the 20th March 1874, such sale being held in execution of a decree which he had obtained against Phagoo Dobey; that he had obtained the sale-certificate on the 4th June 1874, and that delivery of possession by the execution Court was effected on the 27th June of the [382] same year, but that the defendants had resisted him in taking possession. He further stated that the defendants had subsequently brought a suit for confirmation of their possession, alleging that the land in dispute did not belong to Phagoo Dobey, but to one Bishen Dyal Dobey, and that they were in possession of it, having purchased it at an auction-sale, in execution of a mortgage-decree, in the year 1867; but that that suit had been dismissed from the first to the final Court of appeal. He, therefore, now contended that the question of title to the land had been decided in that suit, and that he was entitled to recover possession thereof.*

The defendants set up the same title in this suit as they had alleged in the former suit; and further stated, that the sale at which the plaintiff had become the purchaser was collusive, and that he had previously attempted to have the property sold, but on their objection the Court had ordered the property to be exempted from sale, holding that they, the defendants, were in possession. They also contended that the question of title had not been determined in the previous suit, and that it had been dismissed solely on the ground that they had been unable to prove their possession which they then sought to have confirmed.

It also appeared that the defendants had brought a suit for recovery of possession, but the question in both suits being the same, the Munsif decided that his judgment in this suit should govern that as well.

Both the lower Courts awarded a decree in favour of the plaintiff and refused to deal with the question of title, holding that it had been decided in the previous suit, the question having been adjudicated on by the Munsif's and the District Court, and the findings of those Courts had not been set aside, although the High Court had dismissed the special appeal on the ground of possession only.

Against this decree the defendants now specially appealed to the High Court.

*Baboo Taruck Nath Paulit* for the appellants.

*Mr. M. L. Sandel* for the respondent.

[383] The judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

**Mitter, J.**—This was a suit to recover possession of five bighas of land under the following circumstances. The plaintiff alleges that it was the property of one Phagoo Dobey, and that, in execution of a decree against him, it was sold and purchased by him on the 4th of June 1874, and possession was delivered by the execution Court on the 27th of June following; but the defendants having resisted the plaintiff in taking possession, he is obliged to bring this suit. It is also stated in the plaint that the defendants had brought a suit against the plaintiff for confirmation of their possession over, and declara-

tion of their title in respect of, the land in suit, and that that suit was dismissed from the first to the final Court of appeal. The plaintiff, therefore, contends that the question of title has been decided conclusively in a previous suit against the defendants and in his favour. The defendants deny that the question of title was finally decided in the previous suit. Then upon the merits they say, that the land in suit belonged to one Bishen Doyal, and that, in execution of a motagage-decree, it was sold and purchased by them in 1867; that, subsequently in 1873, when the plaintiff attempted to sell it in execution of his decree against Phagoo Dobey, they intervened, and their intervention was allowed; but in the next year—i.e., in 1874—the plaintiff managed to have the property sold again without their knowledge. The two Courts below have awarded a decree in favour of the plaintiff without deciding the question of conflicting titles to the land in suit arising between the contending parties. They are of opinion that the effect of the previous suit was to declare the plaintiff's title, and negative that of the defendants. It is contended before us in this appeal that the lower Courts are wrong in the view which they have taken of the effect of the previous litigation. We are of opinion that this contention is well founded. It appears that the former case was decided in favour of the plaintiff in the two Courts below. The decision was confirmed in special appeal to this Court. There was a further appeal to this Court under s. 15 [384] of the Letters Patent, and the final judgment was expressly based upon the ground that the plaintiff had failed to prove his possession. The learned Judges who decided the appeal say, "we consider, therefore, that this suit should be dismissed upon this ground only, that the plaintiff has not established that he is in possession of the land in question of which he seeks to be confirmed in possession." Therefore, the effect of that litigation was, that the final Court declared that the plaintiff's suit should be dismissed upon this ground only, viz., that he failed to prove his possession although he sought for confirmation of possession; and therefore in the view of the final Court of appeal, the decision upon the question of title between the parties was wholly unnecessary. That being so, it cannot be said that this case comes within the provisions of s. 13 of the Code of Civil Procedure. That section says, that no Court shall try any suit or issue in which the matter directly and substantially in issue has been heard and finally decided by a Court of competent jurisdiction in a former suit. In this case, supposing that there was a decision by the Courts below in the previous suit on the question of title, it was not a *final* decision, as it was brought up in appeal before the High Court, and that Court, in dismissing the plaintiff's suit, decided that it was not necessary to go into the question of title, and based its decision entirely on the ground that the plaintiff had failed to prove his possession. That being so, we think that the question of title is still open between the parties. The decisions of the lower Courts are, therefore, erroneous, and must be set aside. The case will go back to the Court of first instance for the determination of the question of title, that question being whether the lands in suit belonged to Phagoo Dobey as alleged by the plaintiff, or to Bishen Doyal Dobey as alleged by the defendants. Costs to abide the result.

*Case remanded.*

#### NOTES.

##### [RES JUDICATA—FINAL JUDGMENT.—

8 Cal. 681 is a decision that is similar. See also (1907) 5 C. L. J. 658; (1900) 25 Bom. 115; (1899) 3 O. C. 273.]

## [385] APPELLATE CRIMINAL.

*The 27th May, 1881.*

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Damodur Biddyadhur Mohapatro and another.....Petitioners

*versus*

Syamanund Dey.....Opposite party.\*

*Breach of the Peace—Criminal Procedure Code (Act X of 1872), s. 530—†**Omission of Magistrate to record Preliminary Proceeding.*

In order to justify a Magistrate in interfering under s. 530 of the Criminal Procedure Code, it is necessary that he should be satisfied that there exists a dispute concerning land which is *likely to induce a breach of the peace*—i.e., there must be a reasonable apprehension that a disturbance of the peace is likely to occur, rendering it necessary for him to take immediate steps to prevent it, and not merely that it is *probable* a breach of the peace *may* occur, if proceedings under s. 530 be not taken.

*Quære.*—Whether it is necessary that a preliminary proceeding should first be recorded to give the Magistrate jurisdiction?

THIS rule arose out of a proceeding under s. 530 of the Criminal Procedure Code. It appeared that the Magistrate had, in the first instance, omitted to record a preliminary proceeding, as required by that section, stating the grounds of his being satisfied that a dispute likely to induce a breach of the peace existed. But in his final judgment he stated that he was satisfied that there was a dispute going on, that there had been criminal cases during the past few months between the two parties in connection with the disputed land; and that it was not, therefore, unlikely that, under the circumstances, there might be a breach of the peace. He, accordingly, declared that Rajah Syamanund Dey was entitled to retain possession of the disputed land until ousted by due course of law. The petitioners, accordingly, obtained a rule from the High Court calling on the opposite party to show cause why the order of the Magistrate should not be set aside.

[386] Mr. Branson and Baboo Umbica Churn Bose in support of the rule.

Mr. M. M. Ghose and Baboo Obhoy Churn Bose showed cause.

The judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

**Mitter, J.**—In a proceeding under s. 530 of the Criminal Procedure Code between the petitioner and the opposite party regarding the possession of 1,100 mans of julpai lands, the Deputy Magistrate of Balasore, on the 14th February last, confirmed the opposite party in possession. The record shows that no

\* Criminal Motion, No. 109 of 1881, against the order of Baboo Gopal Chunder Mookerjee, Deputy Magistrate of Balasore, dated the 14th February 1881.

†[*q. v. supra*, 7 Cal. 47.]

preliminary proceeding, stating the grounds upon which the Magistrate was satisfied that a dispute likely to induce a breach of the peace existed, was recorded. Probably on this ground, at the final hearing, objection was taken to the jurisdiction of the Magistrate, and he deals with this question in the final judgment.

One of the grounds upon which this rule was obtained was, that the Magistrate having omitted to record the preliminary proceeding referred to above, the whole proceeding was *ultra vires*, and therefore should be set aside. It has been contended on behalf of the opposite party that, as the final judgment shows that the Magistrate was satisfied of a dispute likely to induce a breach of the peace existing, the mere omission to record a preliminary proceeding, as is required by the 2nd para. of s. 530, is an immaterial irregularity, which would not warrant this Court, under s. 283<sup>2</sup> of the Criminal Procedure Code, to quash the proceedings of the lower Court. On the other hand, it was broadly contended, that the omission to record this proceeding is, under *all circumstances*, a fatal error which would justify this Court in setting aside the proceeding, the provisions of s. 283 notwithstanding. The decision cited before us, *Sheikh Munglo v. Durga Narain Nag* (25 W. R., Cr., 74), certainly supports this contention. But there is a decision, *Gour Mohun Majee v. Doolubh Majee* (22 W. R., Cr., 81), which rules the contrary.

[387] Whether the one or the other contention is correct, it is clear to us, upon the authority of the cases cited below, that a Magistrate would have no jurisdiction under s. 530 unless he was satisfied that there exists a dispute concerning land, and which dispute is *likely to induce a breach of the peace*,—i.e., there must be a reasonable apprehension that a disturbance of the peace is likely to occur rendering it necessary for the Magistrate to take immediate action under s. 530 to prevent the apprehended breach of the peace—*Harvey v. Brice* (4 W. R., Cr., 26), *Dewan Elahee Newoz Khan v. Suburumissa* (5 W. R., Cr., 14), *Mussamut Anundee Kooer v. Ranees Soonnet Kooer*, (9 W. R., Cr., 64), *Kashi Kishor Roy v. Tarinee Kant Lahori* (3 B. L. R., Cr., 76), *In re Sutherland* (9 B. L. R., 229) *Gour Mohun Majee v. Doolubh Majee*, (22 W. R., Cr., 81), *In re Mussamut Zuhoorun* (6 W. R., Cr., 4), *Raneegunge Coal Association Limited v. Hem Lall Ghatwal* (24 W. R., Cr., 17).

We have considered the finding of the Deputy Magistrate upon this point in his final judgment, and we are of opinion that it is not sufficient to give him jurisdiction under s. 530. It seems to us that what he says is, that it is *probable* that a breach of the peace will occur if a proceeding under s. 530 be not taken. This finding would not give him jurisdiction.

\*[Sec. 283 :—No finding or sentence passed by a court of competent jurisdiction shall be reversed or altered on appeal on account of any error or defect, either in the charge or in the proceedings on or before trial, or on account of the improper admission or rejection of any evidence, or by any misdirection in any charge to a jury, unless such error or defect has occasioned a failure of justice, either by affecting the due conduct of the prosecution, or by prejudicing the prisoner

in his defence.

No irregularity in the proceedings up to trial is a sufficient ground for reversing any judgment, sentence or order made or passed in a trial properly held.

In case the accused person has been sentenced to a larger amount of punishment than could have been awarded for the offence which, in the judgment of the Appellate Court, is proved by the evidence, the Appellate Court may reduce the punishment within the limits prescribed by the Indian Penal Code or any law for the time being in force for such offence].

We, therefore, set aside his order and make the rule absolute.

*Rule made absolute.*

**NOTES.**

**[BREACH OF THE PEACE.—**

The necessity of there being a breach of the peace in order to justify the Magistrate in interfering was laid down also in (1896) 23 Cal. 557 ; (1905) 33 Cal. 33 = 10 C. W. N. 257 = 2 C. L. J. 271.]

**[388] PRIVY COUNCIL.**

*The 9th March, 1881.*

**PRESENT :**

SIR B. PEACOCK, SIR M. E. SMITH, SIR R. COUCH, AND SIR A. HOBHOUSE.

Raja Nilmoni Singh Deo Bahadur.....Plaintiff

*versus*

Ram Bandhu Rai and others.....Defendants.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

*Proceedings under the Land Acquisition Act (X of 1870), ss. 38, and 39,—*

*Finality.*

In proceedings under the Land Acquisition Act (X of 1870), ss. 38\* and 39†, the persons entitled to take land compulsorily, deal only with those who are in possession of it, or who are ostensibly its owners. It may happen that the real owner, being an infant, or a person otherwise under disability, does not appear, and is not dealt with in the first instance. There is, therefore, a proviso in s. 40‡ to the effect that nothing contained in that or the preceding sections "shall affect the liability of any person who may receive the whole, or any part of any compensation awarded under the Act to pay the same to the person lawfully entitled

\*[Sec. 38 :—When the amount of compensation has been settled under section fourteen, if any dispute arises as to the apportionment of the same or any part thereof, the Collector shall refer such dispute to the decision of the Court.]

†[Sec. 39 :—When the amount of compensation has been settled by the Court, and there is any dispute as to the apportionment thereof, or when a reference to the Court has been made under section thirty eight, the Judge sitting alone shall decide the proportions in which the persons interested are entitled to share in such amount.

An appeal shall lie from such decision to the High Court, unless the Judge whose decision is appealed from is not the District Judge, in which case the appeal shall lie in the first instance to the District Judge.

Every appeal under this section shall be presented within the time and in manner provided by the Code of Civil Procedure for regular appeals in suits].

‡[S. 40 :—Payment of the compensation shall be made by the Collector according to the award to the persons named therein, or in the case of an appeal under section thirty-nine, according to the decision on such appeal.

Provided that nothing herein contained shall affect the liability of any person who may receive the whole or any part of any compensation awarded under this Act, to pay the same to the person lawfully entitled thereto.

Proviso.

thereto." This applies only to persons whose rights have not been dealt with in adjudications in pursuance of ss. 38, 39, and 40; and does not permit a person whose claim has been disposed of in the manner pointed out in the Act, to have that claim re-opened, and again heard, in another suit.

APPEAL from a decree of a Divisional Bench of the High Court of Bengal (6th June 1878) confirming a decree of the Court of the District Judge of East Burdwan (12th May 1877).

The object of this suit was to establish the appellant's right as proprietor of certain village lands, fifty-eight bighas of which had been taken by the Government of Bengal under the Land Acquisition Act, X of 1870; and his consequent right to receive the sum of Rs. 13,543 awarded as compensation. The land formed part of a parganna within a zamindari, in Manbhuan, belonging to the appellant as Raja of Pachete. In the same land the respondents claimed to hold certain hereditary tenancies, called in the locality 'jagir,' which were ancestral [389] tenures at a fixed rent. Upon proceedings being taken under the Land Acquisition Act, X of 1870, by the Government of Bengal, to acquire the holdings of certain of these alleged 'jagirdars' for railway purposes, their value was fixed, without dispute, at Rs. 15,681; but a question arose as to the apportionment of the compensation between the Raja and the tenants, or 'jagirdars.' The Raja claimed Rs. 13,627. The dispute was referred by the Collector of the district of East Burdwan to the District Judge, under Act X of 1870, s. 38, the Raja denying the title of the tenants as 'jagirdars' to the amount claimed by them. The question as to the proportionate amount of compensation to be awarded to the latter, was decided in their favour on the 31st July 1876, the Raja receiving only Rs. 84.

He did not appeal to the High Court from the Judge's decision; but instituted the suit, out of which the present appeal arose, in the Court of the Subordinate Judge, whence it was transferred to that of the District Judge. The defendants contended (*inter alia*), that the suit was barred under s. 2 of the Code of Civil Procedure by the decision of the 31st July 1876. On an issue on this point, the District Judge held, that the question of title having been already decided on a reference made under the Land Acquisition Act, X of 1870, ss. 38 and 39, the judgment of a competent Court barred this suit.

On appeal to the High Court, this decision was upheld by a Divisional Bench.

The judgment of the Court (JACKSON and TOTTENHAM, JJ.) was as follows:—

"The appellant before us contends, that the power to question such decision by a regular suit is expressly reserved to him by the proviso to s. 40. He urges that the 58th section\* of the Act, on which the Judge relies, has no reference to the present question. As to s. 58, we are inclined to think that it has no direct reference to the question before us. It excludes suits to set aside

Bar of suits to set aside awards under Act.

\*[Sec. 58:—No suit shall be brought to set aside an award under this Act.

And no suit or other proceeding shall be commenced or prosecuted against any person for anything done in pursuance of this Act, without giving to such person a month's previous notice in writing of the intended proceeding, and of the cause thereof, nor after tender of sufficient amends, nor after the expiration of three months from the accrual of the cause of suit or other proceeding.]

Limitation of suits for anything done in pursuance of Act.

an award under the Act, and we think the term 'award,' there used, does not include the decision of the Court under s. 39; but, at all events, it is so far useful in considering this question, that it indicates the intention of the Legislature [390] to make proceedings under this Act final, and to make the mode of dealing with the questions to be raised under this Act exhaustive and self-contained. The proviso in s. 40 follows a declaration, that "payment of the compensation shall be made by the Collector, according to the award, to the persons named therein, or, in the case of an appeal under s. 39, according to the decision on such appeal." That, no doubt, is intended to include the case of a decision under s. 39. It provides, that any person, who may receive the whole or any part of the compensation awarded under this Act, shall be liable to pay the same, and, no doubt, compellable by suit to pay the same, to the person lawfully entitled thereto, just in the same manner as a person who may have received a certificate under Act XXVII of 1860 is compellable by suit to pay any money which may have come into his hands under that certificate, to the person entitled, thereto; and what the Legislature had in view, we think, was, that if any person, by virtue of a particular title, which was not really vested in him at the time, should prevail, against any person claiming under a different title before the Court upon the question of apportionment, he should be liable and compellable to pay over the money which he might have received under that decision, to some other person, not a party to the proceedings, in whom that title really vested; not that it should be competent to the parties, after a full investigation before the Court under s. 39, and after an appeal as allowed by that section, to bring a regular suit and re-open the identical question before a different Court. If that were so, as observed by the District Court, we might have a decision arrived at by the District Judge after an investigation conducted with all the formalities prescribed by the law, and under the procedure of the Code, whether it is called a decree or not, and a formal decision by the High Court on appeal from that decision, liable to be set aside upon a further suit in a Munsif's Court, and, in certain circumstances, the decision of the Munsif in such suit might become final. Some stress was laid by the appellant upon the fact that s. 37\*, in express terms, gives finality to certain awards, and declares that, as between the persons interested, who may agree in the apportionment of the [391] compensation, the award shall be conclusive evidence of the correctness of the apportionment, and it was said that if the Legislature had intended to give finality to the decision of the Civil Court under s. 39, the intention would have been expressed in distinct terms; and a somewhat similar use was made of the terms of s. 58 itself, viz., it was contended, that, whereas that section forbids the bringing of a suit to set aside an award under the Act, it does not forbid the bringing of a suit to set aside the decision of a Court. We apprehend that what is intended by the terms of s. 57 or of s. 58, is nothing more than this, that it places awards made under the Act by express legislation upon the same footing of finality as a decision of the Court under s. 39 is by the ordinary principles of law."

On this appeal,

Mr. R. V. Doyle appeared for the appellant.

Mr. Leith, Q. C., for the respondents, was not called upon.

\*[Sec. 37 :—Where there are several persons interested, if such persons agree in the apportionment of the compensation, the particulars of such apportionment shall be specified in the award, and as between such persons the award shall be conclusive evidence of the correctness of the apportionment.]

Particulars of apportionment to be specified.



Their Lordships judgment was delivered by

**Sir R. P. Collier.**—The history of this case, as far as it is material to the judgment, is as follows:—The Government of India, requiring land for a public purpose under the provisions of Act X of 1870, gave the requisite notices, and proceeded to take fifty-eight bighas of land within the zamindari of the Raja of Pachete. These fifty-eight bighas were occupied by persons who held under the title of jagirdars, but were undoubtedly subject to the superior tenure of the Raja, and may be described as mal lands of his zamindari. The Act referred to, No. X of 1870, contains a number of elaborate provisions applicable to the acquisition of lands and the payment of the purchase-money for them. Under the circumstances of this case it will be enough to refer to three of the clauses. It appears that, in certain cases, an award of compensation may be made by the Collector, as between the Government and the claimants. Section 14 is in these terms:—"If the Collector and the persons interested agree as to the amount of compensation to be allowed, the Collector shall make an award under his hand for the same;" and then follow provisions that it shall be final. Clause 38 is in these terms:—"When the amount of compensation has been settled under s. 14, if any dispute [392] arises as to the apportionment of the same, or any part thereof, the Collector shall refer such dispute to the decision of the Court." Section 39 goes on to say:—"When a reference to the Court has been made under s. 38, the Judge sitting alone shall decide the proportions in which the persons interested are entitled to share in such amount." It further provides, that "an appeal shall lie from such decision to the High Court, unless the Judge whose decision is appealed from is not the District Judge, in which case the appeal shall lie in the first instance to the District Judge."

The proceedings in this case were under these sections. Under s. 14, the Collector made an award for the whole amount of the compensation, which was, in round numbers, Rs. 15,000. There was a dispute between the Raja and the tenants, as they may be called, with reference to the apportionment of the amount between them. The question was duly referred to a Judge sitting alone, to decide the proportions in which the persons interested were entitled to share, and that Judge made a decision in pursuance of such reference, whereby he awarded to the Raja Rs. 84, and to the other claimants, of whom there are a great number, the rest of the compensation money. The Raja did not appeal from this decision, as he had a right to do, but he brings the present suit for the purpose of, in effect, setting it aside. In his plaint he characterises his suit as "a suit to recover Rs. 13,000 in deposit in the Collectorate of this district, on account of compensation for fifty-eight bighas five cottas," and he contends that he is entitled to a far larger amount than that which has been awarded to him. In other words, he brings the suit for the purpose of determining the very question which had been determined according to special statutory process by a Judge from whose decision he did not appeal.

It has been very fairly admitted by Mr. Doyne that, unless he can avail himself of s. 40, the proceedings which have been taken are conclusive as to the amount and apportionment of the compensation. Section 40 is in these terms:—"Payment of the compensation shall be made by the Collector, according to the award, to the persons named therein, or, in the case of an appeal under s. 39, according to the decision on such appeal; [393] provided"—and this is the part of the section on which he relies—"that nothing herein contained shall affect the liability of any person who may receive the whole or any part of any compensation awarded under this Act to pay the

same to the person lawfully entitled thereto." He contends that, under that proviso, the Raja is entitled to bring this suit. It appears to their Lordships that the proviso has no such effect. Such a proviso, which appears to have been but a repetition of a provision in a previous Act *in pari materia*, is necessary in this, as in almost all Acts of a similar character. It is necessary for the Government, or the persons or company entitled to take property compulsorily, to deal with those who are in possession, or ostensibly the owners; but it may happen, and frequently does happen, that the real owners, possibly being infants or persons under disability, do not appear, and are not dealt with in the first instance; and therefore a provision of this sort is necessary for the purpose of enabling the parties who have a real title to obtain the compensation money.

Their Lordships are of opinion that the Courts in India, who both concur on this point, have rightly held that this proviso applies only to persons whose rights have not been adjudicated upon in pursuance of the sections (38 and 39), and that it has not the effect, which it would certainly not be reasonable to attribute to it, of permitting a person whose claim has been adjudicated upon in the manner pointed out by the Act to have that claim reopened and again heard in another suit. Their Lordships are of opinion that the provisions in this Act for the settling of compensation are intended to be final; and that the amount and distribution of the compensation having been settled in this case by a competent Court, and the decision not having been appealed against, the settlement is final, and the present suit cannot be maintained. They will, therefore, humbly advise Her Majesty that this judgment be affirmed, and the appeal dismissed with costs.

*Appeal dismissed.*

Solicitors for the appellant : Messrs. *Lambert, Petch, and Shakespear.*

Solicitors for the respondents : Messrs. *Barrow and Rogers.*

## [395] APPELLATE CIVIL.

*The 16th December, 1880.*

MR. JUSTICE PONTIFEX AND MR. JUSTICE McDONELL.

Manly.....Defendant.

versus

Patterson.....Plaintiff.\*

\* *Mortgage—Sale or Foreclosure—Limitation—Adverse Possession.*

In 1823 the trustees of a marriage settlement invested the trust-funds in the mortgage of a house and premises at Entally in the neighbourhood of Calcutta. The mortgagor was the first tenant-for-life under the settlement, and it was agreed that he should be entitled to remain in the house as long as he pleased, the rent of the premises being set-off against the income of the trust-funds to which he was entitled under the settlement. In execution of a money-decree against the mortgagor, his right, title, and interest in the premises were purchased by the judgment-creditor, a lady who, at the time of execution and sale, lived in the mortgagor's house. After the purchase, all parties continued to live in the house as before. The mortgagor died on the 14th of August 1867, and on the 13th of August 1869, the present suit for sale or foreclosure was instituted by the plaintiff, in whom the legal and beneficial interest in the trust-funds had become invested.

*Held*, that the position of the judgment-creditor under the sale of 1866 was not adverse to the plaintiff or those under whom he claimed; that the suit was not barred by limitation, and that plaintiff was entitled to a decree for sale.

*Anundo Moyee Dossee v. Dhondro Chunder Mookerjee* (14 Moo. I. A., 101), distinguished.

Form of decree in a suit for foreclosure or sale in the mofussil, where the mortgage is in the English form, and all parties concerned are English.

BY an indenture of postnuptial settlement, dated the 6th of September 1823, between Robert Manly of Calcutta, of the first part, Sarah Manly his wife, of the second part, and John Palmer and William Anderson Livingstone, of the third part, it was witnessed that, in pursuance of an antenuptial agreement, Robert Manly assigned to Palmer and Livingstone, the sum of Rs. 10,000, in trust, to invest and pay the interest thereof to [395] Robert Manly for life, and from and after his death to Sarah Manly for her life, and after her decease, in trust for the issue of the marriage. The deed conferred on Robert Manly and his wife, or the survivor of them, a power of appointment by deed or will among the issue of the marriage, and failing issue, in favour of the person or persons entitled in default of appointment. The deed also contained the usual clauses authorizing investment in real securities and Government stock, and the appointment of new trustees, &c.

By indentures of lease and release in fee, dated the 30th and 31st of December 1823, respectively, the latter of which recited the provisions of the deed of the previous September, Robert Manly, in consideration of an advance

\* Appeal from Original Decree, No. 120 of 1880, against the decree of Baboo Kristo Mohun Mukerjee, Second Subordinate Judge of the 24-Pargannas, dated the 12th of April, 1880.

of "the said Rs. 10,000," conveyed to Palmer and Livingstone the house and premises which were in dispute in this suit, and which were situated at Entally in the neighbourhood of Calcutta. It was declared, that the property conveyed should be subject to the trusts of the Rs. 10,000 declared by the deed of September 1823; and it was provided, "that if the said Robert Manly, his heirs or assigns, do and shall, as and when the said trusts in and by " the deed of September 1823 " created, or some or one of them shall, required the said principal sum of sicca rupees ten thousand to be repaid, well and truly pay, or cause to be paid, unto the said John Palmer and William Anderson Livingstone or unto the survivor of them, or unto any new succeeding trustees or trustee who may be nominated and appointed in and by the " deed of September 1823 " to act in the trusts thereby created, " or " some or one of them, the said sum of sicca rupees ten thousand of lawful money of Bengal, together with lawful interest for the same from the time when the same, shall be, by the said trustees, or some or one of them, found necessary to be paid, to the day whereon the same shall actually be paid as aforesaid, by the said Robert Manly, his heirs or assigns; then, that upon such payment as aforesaid, these presents and every matter and thing herein contained shall cease, determine, and become and be absolutely void and voidable, anything hereinbefore contained to the contrary in anywise notwithstanding." The deed went on to declare, that it was the true intent and meaning thereof, [396] and of the parties thereto, that "Robert Manly, his heirs or assigns, or his or their tenants, or undertenants, should hold, use, and occupy, possess, and enjoy" the property conveyed "and to have, receive, and take to his or their own use and uses the rents, issues, and profits, thereof, and every part thereof, without any lawful let, suit, trouble, molestation, eviction, hindrance or disturbance of, from or by them, the said John Palmer and William Anderson Livingstone, or the survivor of them," or any succeeding trustees or trustee. The deed contained no covenant for the repayment of the money. There were several children of the marriage, one of whom, Alexander Manly, married the daughter of one Mrs. Verplough, a widow lady, who took up her residence with Robert Manly and his family, in the house at Entally, sometime previous to the year 1865. It appeared from the evidence that Robert Manly, in the year 1856, had borrowed Rs. 2,800 from Mrs. Verplough, for which he gave a bond. Mrs. Verplough instituted a suit on this bond and obtained a decree, in execution of which she, in the early part of 1866, caused to be sold the house and premises at Entally, and became herself the purchaser for—the plaint alleged—a sum of Rs. 420. After this sale, the Manly and Mrs. Verplough continued to live in the house at Entally as before. Mrs. Verplough died in December 1866, leaving the defendant, Jane Manly, her sole heiress and legal representative. Robert Manly died on the 14th of August 1867.

By a deed of appointment, dated the 16th June 1879, Sarah Manly exercised her power of appointment in favour of her daughter, Mrs. Woodley; and by an indenture, dated the 8th of July 1879, between the then trustees of the settlement of 1823 of the first part, Sarah Manly of the second part, Mrs. Woodley of the third part, and the plaintiff Patterson of the fourth part, the sum of Rs. 10,000, with all interest thereon, and benefit thereof, together with the premises at Entally, were assigned and sold to the plaintiff for a sum of Rs. 7,000.

On the 12th of July 1879, the plaintiff's attorney wrote to Mrs. Jane Manly, who resided in Rajputana, and to David Manly, one of the sons of Robert Manly, (and who was in sole possession of the house and premises at

Entally), calling upon [397] them for payment of the Rs. 10,000 with interest at 6 per cent. per annum, and stating that, in default of payment, the plaintiff would institute a suit for a sale or foreclosure of the premises. His demand not being complied with, the present suit was instituted on the 15th of August 1879 in the Court of the First Subordinate Judge of the District of the 24-Pargannas, praying a decree for payment of the Rs. 10,000 and interest, and in case of default, for foreclosure or sale, and should the proceeds of sale be insufficient, then for a personal decree against the defendants for the amount of the deficiency.

The defence was, that the assignment to the plaintiff was collusive and fraudulent; that the suit was improperly framed; and that it was barred by limitation. The Court held that though the plaintiff was not entitled to a decree for foreclosure, yet he was entitled to a decree for sale, which was directed; and, in case the proceeds of the sale should prove insufficient, the Court gave a personal decree for the deficiency against the defendant Mrs. Jane Manly, on the ground that being the sole heiress and legal representative of Mrs. Verplough, the purchaser of the equity of redemption, she stood in the shoes of the mortgagor.

The defendant Jane Manly appealed.

Mr. Evans and Mr. Twidale for the appellant.

Mr. Evans.—The circumstances attending the transfer to the plaintiff are extremely suspicious, and there is no trustworthy evidence that any consideration whatever has been paid. Again, no decree can be passed in a suit framed as this is. A suit on a mortgage for property situated in the mofussil must be brought under Reg. XVII of 1806. Before the Foreclosure Regulations were passed, a conditional sale, which in effect is the same as an English mortgage, became absolute on non-payment at the time appointed. Those Regulations supply the only remedy in use in the mofussil, and no Court has power to go outside or beyond them—*Thumbusawmy Moodelly v. Hussain Rowthen* (I.L.R. 1 Mad., 1). There is no power of sale contained in this mortgage, and if there was, the Court would not give effect to it; [398] the only remedy is foreclosure—*Arman Pande v. Nouruttun Koonwur* (3 Sel. Rep., 78), and *Bhuwanee Churn Mitr v. Jokishen Mitr* (S. D. A., 1847 P. 354), [PONTIFEX, J.—Those cases dealt with Hindus. Here all the parties concerned are English.] Again, this suit is premature. The period fixed for redemption is when the trusts require the moneys to be called in. That can only be on the death of Mrs. Sarah Manly, who was alive at the institution of the suit. The deed gives no power to the trustees to call in the money when they please; but if your Lordships be against me on that contention, then they should have called it in long ago. The evidence is, that after Mrs. Verplough purchased the house in execution of her own decree in the early part of 1876, she allowed Robert Manly and his family to remain, because she did not wish to put them to inconvenience. She alone was in possession as owner, and being a judgment-creditor, her possession became at once adverse to the trustees, and the suit is, therefore, barred by limitation—*Anundo Moyee Dossee v. Dhonendro Chunder Mookerjee* (14 Moore's I. A., 101).

Mr. Bonnerjee, Mr. Braunfeld, and Moonshree Mahomed Yusuf for the respondent.

The judgment of the Court (PONTIFEX and McDONELL, JJ.) was delivered by

**Pontifex, J.**—This case arises under somewhat singular circumstances. About the year 1823, a sum of Rs. 10,000 was settled in trust for Mr. Robert Manly for life, with remainder to his wife for life, with remainder for the children of the marriage, as Robert Manly and his wife or the survivor of them should appoint, and in default of appointment, for the children. Shortly after the settlement, the husband, Mr. Manly, being possessed of a piece of land, persuaded the trustees to advance him the Rs. 10,000 in order to build a house upon it.

The deed under which the Rs. 10,000 was advanced was drawn in the form of an absolute conveyance to the trustees without any proper proviso for redemption, and without any covenant for payment of the money to the trustees. The conveyance was to the trustees of the settlement and the succeeded-[399] ing trustees to be appointed thereunder, to be held upon and subject to the several trusts of the settlement, and thus an express trust was impressed on the property. There was a proviso in the deed that the tenant-for-life, Robert Manly, should be entitled to the use and enjoyment of the house at all events, during his life, though the terms of the clause are rather vague. Of course, during his life, he being entitled to the interest of the trust-money, it was immaterial whether interest was paid to him or whether he enjoyed possession of the house. A decree by a stranger to the settlement having been obtained against Robert Manly, execution was taken out against him in the year 1866, and all his right, title and interest in the house was sold and purchased by Mrs. Verplough. The defendant, Jane Manly, who is the present appellant, represents Mrs. Verplough, and is now entitled, by virtue of such sale and representation, to the equity of redemption. Notwithstanding the purchase by Mrs. Verplough, Robert Manly was allowed to remain in possession of the house, and was ostensibly in possession of it up to his death in 1867. This suit is instituted within twelve years from the date of his death. The trustees having died, new trustees were appointed; and the survivor of them, with the concurrence of Sarah Manly and her daughter, to whom the Rs. 10,000 had been apportioned, conveyed to the present plaintiff all their rights in the house. There are some suggestions in these proceedings that the conveyance was not a *bond fide* conveyance; but we think it does not lie in the mouth, at all events of the present appellant, to take that objection. It has been objected on behalf of the present appellant, that the plaintiff is barred by limitation, and the case of *Anundo Moyee Dossee v. Dhonendro Chunder Mookerjee* (14 Moore's I. A., 101), has been cited, in which the Privy Council seem to have laid down, that when, by an act of law, there has been an alienation from a mortgagor to a third person, the limitation law applicable between mortgagor and mortgagee ceases to apply, and the ordinary limitation thenceforward applies. That seems to have been decided under the Limitation Act of 1859. Whatever may have been the principle on which that case was decided, it is sufficient to say that it does not [400] apply here, because (even if the property was not impressed with a trust) the tenant-for-life under the deed was entitled to possession of the house during his life, and having been in ostensible possession until the time of his death, there was nothing to show that the property had passed to a stranger; and we are of opinion that limitation, at all events, would not run until the death of the tenant-for-life, and that would be within twelve years of the institution of this suit. We think, therefore, that the suit is not barred by limitation.

The plaintiff has sued the present defendant Jane Manly, who is the owner of the equity of redemption, and also Mr. D. W. Manly, who seems

to have been in possession of this house so far as we can see, as a trespasser. The Subordinate Judge has decreed, that the principal money, with interest at the rate of Rs. 6 per cent. per annum from the date of demand, should be paid by the sale of the property, and that any deficiency should be borne by the present appellant, Jane Manly, the owner of the equity of redemption, and that both the defendants should pay the costs of the suit.

Now, we are of opinion that this decree in some respects is improper. We think that the owner of the equity of redemption ought not to be directed to pay any deficiency of principal and interest moneys and costs, which the moneys to arise from the sale may be insufficient to meet, this suit being in the nature of a foreclosure suit. We also think that the plaintiff is not entitled to interest from the date of demand, at all events as against Jane Manly, the present appellant, inasmuch as Jane Manly has not been in possession of the property and offered no obstacle to the plaintiff entering into possession and receiving the profits of the property. We also think that the decree was wrong in ordering an immediate sale. We think that Jane Manly, the owner of the equity of redemption, ought to have been afforded time for the purpose of raising money, if possible, to redeem the estate, if so advised. In the mofussil; under the Regulations, a year is the time allowed before foreclosure becomes absolute, and we think by analogy that that period ought to have been allowed to the present appellant. The decree was passed on the 22nd April 1880; the year would, therefore, expire on the [401] 21st April 1881. We shall, therefore, modify the decree of the Subordinate Judge in so far as it concerns the present appellant, and declare that, unless the appellant, Jane Manly, pays the 10,000 sicca rupees secured by the deed, together with interest at 6 per cent. per annum from the 22nd April 1880, the date of the decree of the Court below, on or before the 21st April, 1881, the property shall be sold, and out of the proceeds of the sale, if sufficient (but not otherwise), the plaintiff will be entitled to 10,000 sicca rupees and the interest and the costs of suit both in this Court and in the Court below. The decree as against the other defendant will stand. If, however, the appellant, Jane Manly, does, on or before the 21st April 1881, pay the principal sum of 10,000 sicca rupees with one year's interest and the costs of the suit both in this Court and the Court below, the plaintiff shall execute a conveyance free from all encumbrances to the said Jane Manly:

The appellant Jane Manly will be entitled to a refund of the money paid by her into this Court as security for costs.

*Appeal allowed.*

**[7 Cal. 401]**  
**ORIGINAL CIVIL.**

*The 6th, 7th July, 1881.*

**PRESENT :**

**MR. JUSTICE CUNNINGHAM.**

Shaik Domun

*versus*

Shaik Emaum Ally.

*Practice—Costs—Order directing Client to Pay Costs.*

It is not the practice to make an order directing a client to pay his attorney the costs of suit when taxed. Such an order can only be made in a regular suit by the attorney against his client.

*Iswar Chandra Dutt v. Iswar Chandra Ghose* (9 B.L.R., App., 19) not followed.

IN this case the plaintiff applied to be allowed to withdraw his suit on the terms of each party paying his own costs.

Mr. *Trevelyan*, for the plaintiff, asked the Court to fix the scale on which the costs should be taxed.

Mr. *Mitter*, for the defendant, consented to the application, and asked for an order directing the defendant to pay the attorney's costs of suit when taxed, and referred to *Iswar Chandra Dutt v. Iswar Chandra Ghose* (9 B. L. R., App. 19), Mr. Belchambers, the Registrar of the Court, stated that that case had not been [402] correctly reported, and that it was not the practice to make an order for payment of costs as between attorney and client, except in a regular suit against the client.

CUNNINGHAM, J., asked the Registrar to furnish a note as to the practice.

**Cunningham, J.**—The Registrar has furnished the following note :

“ The order asked for by Mr. Mitter was an order against his own client. The effect of such an order would be to place the client at a disadvantage, for it would deprive him of the opportunity afforded him, when sued for costs, of raising questions of negligence, which are altogether excluded from the adjudication of the Taxing Master, and questions of set-off, which are beyond the functions of that officer to decide, except under a special reference to him ; and would render the client liable to immediate execution in respect of the amount allowed on taxation, although there might be a good defence to the whole or a part of the claim. This suggestion, of what would be the position of the client if proceeded against summarily, furnishes a sufficient reason for the practice which exists, and has always existed, of not directing the payment of costs as between attorney and client, except in a regular suit against the client. I am not aware of any instance in which this practice has been departed from. It was certainly not departed from in the case of *Iswar Chandra Dutt v. Iswar Chandra Ghose* (9 B. L. R., App., 19), cited by Mr. Mitter, although in that case the client compromised without the intervention or knowledge of his attorney, then refused to pay his attorney's costs, and finally failed to appear



upon the application made against him upon notice. The order, as drawn up in that case, directs the taxation of costs, but does not direct payment, thus leaving the attorney to his ordinary remedy by suit."

It is clear that, upon this statement of the practice, Mr. Mitter's application cannot be granted. The order will be for taxation of costs on scale No. 2.

Attorney for the plaintiff: Baboo Aushotosh Dhur.

Attorney for the defendant: Baboo Nobin Chunder Bural.

# NOTES.

## [CLIENT AND ATTORNEY—COSTS]

Even where the attorney has, by way of securing his costs taken a deposit of title deeds, this equitable lien cannot be enforced by a summary application, but only in a regular suit by him against the client—21 Cal. 85.

But where the plaintiff and defendant compromise the suit collusively with a view to deprive the attorney of his costs, or where the defendant satisfies the plaintiff's claim to the prejudice of the attorney's claim after notice of it has been given to the party making the satisfaction, it is open to the Court to deal with the matter on a summary application—25 Cal. 887. But contra 27 Cal. 269 where the cases in 7 Cal. 401, and 21 Cal. 85 were followed.

In Bombay, however, the practice is different and allows of an order for payment of attorney's costs being made on a summary application—1 Bom. 253, 16 Bom. 152.

The practice in England is the same as in Bombay. See Seton on Judgments and Orders, p. 605.]

## [403] APPELLATE CIVIL.

*The 13th March, 1881.*

PRESENT :

MR. JUSTICE PONTIFEX AND MR. JUSTICE FIELD.

Rashbehary Mookhopadhyaya and another (objectors)

*versus.*

Maharani Surnomoyee (Decree-holder).<sup>\*</sup>

*Appeal—Representatives—Civil Procedure Code (Act X of 1877),  
s. 244, cl. (c), & 278, 283.*

The holders of a taluq hypothecated certain other property belonging to them as security for the rent. A decree for rent was obtained against them. Prior to attachment, the taluqdars assigned their interest in eight annas of the hypothecated property to A, and made a mourosi lease of the remaining eight annas to him. The decree-holder then obtained an order for summary sale for the rent due for 1876-77. She then attempted to sell the property hypothecated to her. An objection by A was allowed. A regular suit was then instituted by the decree-holder against A, and it was declared that she was, after selling the taluq, entitled to sell the hypothecated property. The decree-holder again attempted to execute her rent-decree by attaching and selling the hypothecated property, and an objection by A was disallowed.

<sup>\*</sup> Appeal from Order, No. 106 of 1881, against the order of Baboo Kristo Mohen Mookerjee, Second Subordinate Judge of the 24-Pargannas, dated the 19th February 1881.

*Held*, that no appeal lay from the order disallowing the objection, as A could not be considered to be a 'representative' of the taluqdars within the meaning of s. 244, cl. (c)\* of the Civil Procedure Code; and was, therefore, debarred from appealing under ss. 278† and 283‡.

Baboo *Rashbehary Ghose*, Baboo *Prannath Pundit*, and Baboo *Biprodas Mookerjee* for the appellants.

Baboo *Sreenath Dass* and Baboo *Gurudas Banerjee* for the respondent.

The facts of this case fully appear from the **judgment** of the Court (PONTIFEX and FIELD, JJ.), which was delivered by

**Pontifex, J.**—In this case certain Chowdhries held a taluq under Maharani Surnomoyee; and by an ekrar they hypothecated certain other property belonging to them as secu-**[404]**rity for the rent of the taluq. The Maharani instituted a suit against them for the rents of the taluq from Kartick to Cheyt 1281, amounting to about Rs. 9,000, and obtained a decree. Under the ekrar, the property hypothecated by them would be liable, no doubt, to satisfy that decree; but subsequently to the execution of the ekrar, and prior to any attachment by the Maharani under her rent-decree, the Chowdhries assigned all their interest in eight annas of the property hypothecated to Rashbehary Mookerjee and another; and with respect to the other eight annas made a *mourosi* lease thereof to the same persons. Subsequently the Maharani, under Reg. VIII of 1819, obtained an order for summary sale for the rents from Srabun to Cheyt 1283, and the property was sold; but it is alleged by the applicant before us that such sale was invalid, inasmuch as the taluq was purchased by the taluqdars themselves. For the purposes of this judgment it is not necessary for us to decide any question as to that, as in consequence of a preliminary objection by the respondent, we are unable to go into the merits of the case. In execution of her rent-decree, Maharani Surnomoyee subsequently attempted to bring to sale the property that had been hypothecated by the Chowdhries to her under the ekrar. In such execution-proceedings, Rashbehari Mookerjee and his co-proprietor appeared as objectors, and alleging that there had been a subsequent assignment of the Chowdhries' interests to them, disputed the right of the Maharani to sell this property in execution of her rent-decree. This objection was properly allowed; whereupon the Maharani instituted a regular suit against

Questions to be decided by Court executing decree. \***[Sec. 244.—The following questions shall be determined by order of the Court executing a decree and not by separate suit (namely)—**

(c.) Any other questions arising between the parties to the suit in which the decree was passed; or their representatives, and relating to the execution of the decree—]

†**[Sec. 278.—If any claim be preferred to, or any objection be made to the attachment of, any property attached in execution of a decree, on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit.**

Investigation of claims to and objections to attachment of attached property.

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

If the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection.]

Postponement of sale.

Saving of suits to establish right to attached property.

‡**[Sec. 283.—The party against whom an order, under section 280, 281 or 282 is passed may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive.]**

Rashbehary Mookerjee and his co-proprietor, and by the decree in that suit it was declared, that the Maharani had a right to bring the property contained in the ekrar to sale for the purpose of realizing her rent-decree ; but that, as a condition precedent, she was bound, first of all, to sell the taluq itself for the purpose of satisfying her rent-decree. Subsequently to that decree and to the summary sale, the Maharani has again attempted to execute her rent-decree by attaching and bringing to sale the property comprised in the ekrar, and Rashbehari Mookerjee and his co-proprietor have again intervened as objectors in the execution-[405] proceedings. It has been decided by the Subordinate Judge upon the evidence, that the Maharani, notwithstanding the objection of Rashbehary Mookerjee and his co-proprietor, is entitled to proceed to sell all the properties comprised in the ekrar. Rashbehari Mookerjee and his co-proprietor, being dissatisfied with that order, have appealed to us ; but a preliminary objection has been taken on the part of the Maharani that the appellants have no right of appeal to this Court, inasmuch as being merely objectors, they are barred by ss. 278 and 283\* of the Procedure Code from appealing to this Court. We are referred by the appellants' vakeel to s. 244, cl. (c)\* in support of their right of appeal. In that clause it is enacted that "any other questions arising between the parties to the suit in which the decree was passed, or *their representatives*, and relating to the execution, discharge or satisfaction of the decree," shall be determined by order of the Court executing the decree ; and it is urged on behalf of the appellants, that they are representatives of the Chowdhries within the meaning of that clause. Now, we think, that though the word representatives in that clause may include subsequent representatives in point of interest, and is not confined only to heirs or executors, yet, inasmuch as Rashbehary Mookerjee and his co-proprietor had become assignees of the taluqdars before the rent-suit was instituted by the Maharani, they cannot, within the terms of that clause, be considered as representatives of the taluqdars. Their interest, in fact, came into existence before the suit against the taluqdars, and they can, therefore, scarcely be considered in that suit as representatives of the taluqdars, the judgment-debtors. We think, therefore, that the preliminary objection that has been taken by the Maharani must prevail, that Rashbehary Mookerjee and his co-proprietor are not entitled to appeal on the merits to this Court ; and we are, therefore, unable to go into the merits, and decide between the parties whether the Maharani is now entitled to proceed against the property, which was hypothecated to her by the ekrar, in order to realize the amount of decree in the rent-suit.

*Appeal dismissed.*

#### NOTES.

#### [AUCTION PURCHASER—HOW FAR REPRESENTATIVE OF JUDGMENT-DEBTOR—

The principle that the purchaser of the interest of a Judgment-debtor at a private or auction sale is his 'representative' under section 244 of the Code of Civil Procedure 1882, only if he is, so far as such interest is considered, bound by the decree, was subsequently affirmed by the Full Bench in 24 Cal. 62, and 26 All. 447. F. B.]

\*[*q. v. supra*, 7 Cal. 403.]

[406] *The 20th May, 1881.*

PRESENT :

MR. JUSTICE PONTIFEX AND MR. JUSTICE FIELD.

Nobodeep Chunder Chowdhry.....Defendant.

*versus*

Brojendro Lall Roy and others.....Plaintiffs.\*

*Land Acquisition Act (X of 1870), s. 39†—Title—Res Judicata.*

Under s. 39 of the Land Acquisition Act, it is the duty of the Judge, in apportioning the compensation-money which he is directed to apportion, to decide the question of title between all persons claiming a share of the money.

*Semle.*—No decision under the Land Acquisition Act should be treated as *res judicata* with respect to the title to other parts of the property belonging to persons who may come before the Judge under s. 39.

IN appeal No. 14.—Mr. *R. E. Twidale* for the appellant, and Baboo *Ishur Chunder Chuckerbutty* for the respondents.

Nos. 121 to 124.—Baboo *Ishur Chunder Chuckerbutty* for the appellant, and Mr. *R. E. Twidale* for the respondents.

Nos. 95 to 97.—Baboo *Gurudas Banerjee* and Baboo *Kishory Mohun Roy* for the appellant, and Baboo *Boido Nath Dutt* for the respondents.

The facts of these cases fully appear from the **judgments** of the Court (PONTIFEX and FIELD, JJ.), which were delivered as follows:—

**Pontifex, J.**—The compensation case under the Land Acquisition Act, out of which appeal No. 14 of 1879 arises, was tried by Mr. Verner, who had to decide as to the manner in which the sum of Rs. 99 should be apportioned amongst certain persons claiming to be joint mourosidars. Mr. Verner decided that only one of these persons was entitled as mourosidar to compensation for the particular land taken under the Act [407] in that case; and he directed that the amount should be paid to him. Against that decision, appeal No. 14 of 1879 has been preferred. The cases of compensation, out of which appeals Nos. 121, 122, 123, and 124 of 1879 arise, were tried by Mr. Tottenham for apportioning compensation in those four cases, amounting respectively to Rs. 9, 18, 20 and 37, between the same mourosidars as claimants. He came to the conclusion that the person to whom Mr. Verner had directed, in appeal No. 14 of 1879, that the compensation should be paid, did not prove his exclusive title to the money, but that he was jointly entitled with the other mourosidars. He, therefore, directed that the several amounts of compensation should be divided among them according to their respective shares.

Now, Mr. Verner, in trying the case before him, seems to have considered, that, under s. 39 of the Land Acquisition Act, it was not necessary for him to

\* Appeals from Original decrees, Nos. 14, 95, 96, 97, 121, 122, 123, and 124, of 1879, against the decree of W. Verner, Esq., Additional Judge of Nuddea, dated the 23rd of September 1878.

†[*q. v. supra*, 7 Cal. 388.]

decide the question of title ; and he expressly states in his judgment that he had no materials before him to decide the question of title. He, therefore, decided the case solely on the evidence as to possession. Mr. Tottenham, on the other hand, decided, in all the cases before him, the question of title. We think it right to say that, under s. 39, it is the duty of the Judge, in apportioning the compensation-money which he is directed to apportion, to decide the question of title between all persons claiming a share of the money. These cases having come before us at the same time, we think that the judgment of Mr. Tottenham in Appeals Nos. 121, 122, 123, and 124 must be affirmed. He has taken a right view of the evidence in holding that the person to whom Mr. Verner directed the compensation-money to be paid did not prove an exclusive title thereto. We think, therefore, that Mr. Tottenham's order, that the amounts should be divided amongst the several claimants, was correct.

In respect to appeal No. 14 from the judgment of Mr. Verner, we think we are entitled to decide it upon the evidence already taken in the case ; for although Mr. Verner seems to have been under the impression that, under s. 39, he was not bound to decide the question of title, yet the parties could not be aware that such would be his decision, and they were bound [408] to adduce evidence both on the question of possession and title. As the party to whom Mr. Verner has directed the compensation-money to be paid exclusively has furnished no evidence, which in our opinion proves his exclusive title, we set aside Mr. Verner's order, and direct that the amount of compensation given in appeal No. 14 of 1879 be divided amongst the several claimants in the same proportion as in appeals Nos. 121, 122, 123, and 124 of 1879.

We now come to the other appeals by the dur-mourosidars, viz., appeals Nos. 95, 96, and 97, of 1879. All these cases were tried by Mr. Tottenham. Claims were made much in the same way as the claims to the compensation for the mourosi tenure. One of the dur-mourosidars claimed to be exclusively entitled to the money awarded for the dur-mourosi tenure. But Mr. Tottenham, upon the evidence, came to the conclusion that he failed to prove such exclusive title ; and therefore, he held that all the dur-mourosidars were entitled to have the money awarded distributed amongst them according to their respective shares. We agree with Mr. Tottenham in the conclusion which, upon the evidence, he has come to in the matter. But an objection has been taken that, in a case (No. 68), which was for compensation-money paid for certain other portions of land belonging to these very dur-mourosidars, and held upon the same title, and which was tried before Mr. Verner, Mr. Verner decided that one of these dur-mourosidars was entitled exclusively to the compensation-money so awarded, against which decision there has been no appeal, and it is argued before us that the decision of Mr. Verner, which has not been appealed against, must be treated as *res judicata* affecting these appeals, the land being held under the same dur-mourosi title, and the parties being the same. Now, for my part, and speaking for myself, I should be extremely reluctant to hold that any decision under the Land Acquisition Act should be treated as *res judicata* with respect to the title to other parts of the property belonging to persons who may come before the Judge under s. 39, because although a decision under s. 39\* with respect to the particular money then before the Court is a decision which is final with respect thereto unless appealed from, and any party who [409] has been summoned before the Judge and has not appeared is bound by such decision, I do not think that a decision of the Judge with respect

\* [q. v. *supra*, 7 Cal. 888.]

to compensation-money, where the amount may be extremely unimportant (as in one of these cases it is only Rs. 9), and where the parties, although summoned, may not think it worth their while to set up a claim to a share, should be treated as *res judicata* affecting other parts of the claimant's property held under the same title. For it must be remembered that the parties are brought before the Judge compulsorily; and the proceedings differ considerably from a regular suit. However, in these cases we think, that the decision of Mr. Verner, in case No. 68 before him, cannot otherwise be treated as *res judicata*, for this reason that in his judgment he expressly states that he has not tried the question of title, and if he has not tried the question of title, his judgment cannot possibly be treated as *res judicata* in these appeals, Nos. 95, 96, and 97, in which the question of title has been raised and tried. We are of opinion, therefore, that appeal No. 14 of 1879 must succeed; that appeals Nos. 121, 122, 123, and 124 of 1879 must fail, and appeals Nos. 95, 96, and 97 of 1879 must also fail. We do not think it proper to give any costs in any of these appeals.

**Field, J.**—I concur in this judgment, but as to the question of *res judicata*, I think it unnecessary to decide what would be the effect of the former decision in the case under the Land Acquisition Act if the question of title had been put in issue and fairly tried. As Mr. Verner expressly refrained from trying this question, it was not heard and determined: and therefore the former judgment cannot have the effect of *res judicata* upon the title of the parties.

#### NOTES.

##### [LAND ACQUISITION PROCEEDINGS: RES JUDICATA]

The question as to whether in proceedings under the Land Acquisition Act 1870 to apportion compensation payable, the decision by the Judge on a question of title does not operate as *res judicata*, which did not arise directly in the main case and on which Pontifex, J. merely expressed an opinion, was actually decided in 20 Mad. 269, where it was held that such decision is not *res judicata*, the ground of the decision being that the proceeding is not a 'suit.'

Hence where a party institutes a suit for apportionment of the compensation, independently of the Land Acquisition Act, the decision in such suit on a question of title will be *res judicata* between the parties. See 12 Cal. 484, and the Reporter's note under 20 Mad. 269.]

[410] *The 12th May, 1881.*

PRESENT:

MR. JUSTICE PONTIFEX AND MR. JUSTICE FIELD.

Obhoy Churn Coondoo and another.....Plaintiffs

*versus*Golam Ali, *alias* Nocoury Meah.....Defendant.\*

*Jurisdiction—Act VI of 1871, s. 18—Sale in Execution of Decree—  
Civil Procedure Code (Act X of 1877), s. 285.*

A, who had obtained a decree in the Court of the Second Munsif of B, in September 1877, attached certain property within the jurisdiction which had been assigned to the Munsif by the District Judge, under s. 18 of Act VI of 1871†. In the previous month, C, who had obtained a decree in the Court of the Additional Munsif of B (to whom jurisdiction had similarly been assigned), had attached the same property. The sale in execution of A's decree took place first, and A became the purchaser. A then objected in the Court of the Additional Munsif that the property could not again be sold, but his objection was overruled, and two days subsequently, the property was again put up for sale in execution of C's decree, and he became the purchaser. A brought various suits against the tenants for arrears of rent, in which C intervened.

*Held*, that the jurisdictions of the Munsifs were confined to the particular limits assigned to them, and that, as the property was situate within the limits assigned to the Second Munsif, the additional Munsif had no jurisdiction to attach or sell it, and that the attachment by C was made improperly and without jurisdiction.

*Quære* —Whether s. 285 of the Civil Procedure Code applies to immoveable property?

THIS was a suit for the recovery of arrears of rent in respect of land situated within the jurisdiction of the Second Munsif of Barisal. The land had formerly belonged to one Ram Kanhye Shaha, against whom the plaintiffs obtained a decree in the Court of the Second Munsif of Barisal. One Golam Ali had also obtained a decree against Ram Kanhye Shaha, but in the Court of the Additional Munsif of Barisal, to whom another thana had been assigned by the District Judge. Both the plaintiffs and Golam Ali attached the property in [411] execution of their decrees; Golam Ali in August 1877, and the plaintiffs in September 1877. The same day was fixed for the sale, and it was held by the same officer. The properties advertised by the Second Munsif were sold first,

\* Appeal from Appellate Decrees, Nos. 2507 and 2466 of 1879, against the decree of Baboo Nuffer Chunder Bhutto, Second Subordinate Judge of Backergunge, dated the 30th July 1879, reversing the decree of Baboo Doorga Churn Sen, Munsif of Barisal, dated the 27th December 1878.

† [Sec. 18 :—The Local Government shall fix, and may, from time to time, vary the local limits of the jurisdiction of any Civil Court under this Act. Provided that where more than one Subordinate Judge is appointed to any District, and where more than one Munsif, is appointed to any Munsif, the Judge of the District Court may assign to each such Subordinate Judge or Munsif, the local limits of his particular jurisdiction within such District or Munsif, as the case may be.

The present local limits of the jurisdiction of every Civil Court (other than the High Court) shall be deemed to be fixed under this Act.]

and the plaintiffs themselves, on the 4th December 1877, purchased the property which they had attached. On the following day, the plaintiffs objected before the Additional Munsif, that the same property could not be sold again in his Court. The objection was overruled, on the ground that the plaintiffs' purchase was collusive, and the property was again put up to sale, and was purchased by Golam Ali on the 6th December. The plaintiffs took formal possession through the Court, and subsequently Golam Ali also took formal possession through the Court. The plaintiffs then brought several suits for rent against the ryots, in which Golam Ali intervened. The Munsif of Barisal gave the plaintiffs a decree, which was reversed by the Subordinate Judge.

The plaintiffs appealed to the High Court.

Baboo *Aushootosh Dhur* and Baboo *Byddonath Dutt* for the appellants.

Mr. *W. M. Dass* and Baboo *Ramachurn Banerjee* for the respondent.

The judgment of the Court (PONTIFEX and FIELD, JJ.) was delivered by

**Pontifex, J.**—The plaintiffs in this case having obtained a decree in the Court of the Second Munsif of Barisal, attached certain property within the jurisdiction of the Second Munsif. That attachment was made in September 1877. But one Golam Ali had obtained a decree in the Court of the Additional Munsif of Barisal, and had, under such decree, directly attached the same property prior to the plaintiffs' attachment, viz. in August 1877. A sale took place under the plaintiffs' attachment first, and the plaintiffs purchased on the 4th December in execution of their own decree. Subsequently, a sale took place on the 6th December under Golam Ali's attachment, and he purchased in execution of his decree. The plaintiff afterwards brought several rent-suits against the ryots occupying [412] the land, and Golam Ali intervened in those suits. Two of those suits have now come on appeal before us, and the question to be decided in these appeals is, whether the plaintiffs are entitled to recover rent from the ryots. Now, the Subordinate Judge has held, that inasmuch as the plaintiffs' purchase took place under an attachment later in point of date than the attachment by Golam Ali, nothing passed to the plaintiffs at the sale in execution of their decree; and he, therefore, dismissed their suits. It was argued before the Subordinate Judge that, inasmuch as, under s. 18, Act VI of 1871\*, the District Judge had assigned to the three separate Munsifs, in his district certain local limits, and inasmuch as this particular land was situate within the limits assigned to the Second Munsif, the Additional Munsif had no authority to attach this particular land directly, it not being within the limits of his jurisdiction; and that, in accordance with s. 286 of Act VIII of 1859†, he ought to have transmitted Golam Ali's decree for execution and attachment by the Second Munsif. That the Additional Munsif having no

\*[*q. v. supra*, 7 Cal 410.]

†[Sec. 286 :—The Court, unless there be any sufficient reason to the contrary, shall cause such copies and certificate to be prepared; and the same, after being signed by the Judge and sealed with the seal of the Court, shall be transmitted to the Court indicated by the applicant if that Court be within the same District, otherwise to the principal Civil Court of Original Jurisdiction in the District in which the

applicant may wish the decree to be executed; and the Court to which such copies and certificates are transmitted shall cause the same to be filed therein, without any proof of the judgment or order for execution, or of the copies thereof, or of the seal or jurisdiction of any Court, or of the signature of any judge, unless it shall under any peculiar circumstances, to be specified in an order, require such proof.]



jurisdiction to attach, he had no jurisdiction to bring this property to sale, although the attachment made under Golam Ali's decree was earlier in point of date than the attachment under which the plaintiffs claimed. The Subordinate Judge decided, that, under s. 18 of Act VI of 1871, the assignment of limits to the separate Munsifs by the District Judge is only material with respect to the institution of regular suits. We think he is wrong in that conclusion. There is nothing in s. 18 to limit the purposes for which local jurisdictions are assigned to each Munsif; and we are of opinion, that when the District Judge assigned limits to each Munsif, the jurisdiction of each Munsif was confined to the particular limits assigned to him. And as the land in question is situate within the limits assigned to the Second Munsif, we think the Additional Munsif had no jurisdiction to attach or sell this land, which was within the jurisdiction of the Second Munsif. Therefore, in our opinion, the attachment by Golam Ali was made improperly and without jurisdiction. The Subordinate Judge has also held that s. 285\* of the present Procedure Code applies to this case, that is, of course, assuming that the Additional Munsif had jurisdiction [413] to attach and sell this property. It appears to us extremely doubtful whether s. 285\* applies to immoveable property at all. The words of it—"where property not in the custody of any Court has been attached in execution, the Court which shall *receive or realize* such property," &c.—seem to us to be more applicable to moveable than to immoveable property. But even assuming that the section does apply to immoveable property, there is nothing in it, so far as we can see, which would absolutely destroy the validity of a sale already made, provided the proceeds of such sale were paid into the Court under whose decree the property was just attached. Now, the circumstances of this case are, that the plaintiffs' sale and Golam Ali's sale were, according to the practice which governs such matters, both conducted by the same officer of the Judge's Court, and the same date was fixed for the two sales. Probably, by accident, the sale under the plaintiffs' decree and attachment was first proceeded with; and after their sale was concluded, they took objection in the Additional Munsif's Court that the sale in execution of Golam Ali's decree should be stopped. That objection must have been taken in the presence of Golam Ali. The objection was not allowed, but the Additional Munsif made an order that the sale under Golam Ali's decree and attachment should proceed, subject to the validity of the prior sale under the plaintiffs' decree and attachment if such sale was valid, and the sale was proceeded with and Golam Ali purchased it. But, as a matter of fact, inasmuch as these attachments were made in August and September 1877, the procedure will be governed by the old Code, and not by the present Code; for, by s. 3 of the present Code, it is provided, that nothing in the new Code, contained "shall affect any proceedings after decree that may have been commenced and were still pending at that date." Now, the attachments under both these decrees were pending at the time when the new Code came into operation. They would, therefore, be governed by the practice under the old Code and for the reasons stated by me in the case of *Chutka Panda v. Goburdhone Dass* (6 C.L.R., 85), it appears that, under the old Code, it was held, that a sale [414] under a second attachment was valid, and would prevail over a

\*[Sec. 285 :—Where property not in the custody of any Court has been attached in execution of decrees of more Courts than one, the Court which shall

Property attached in execution of decrees of several Courts.

receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade, or where there is no difference in grade between such Courts, the Court under whose decree the property was

first attached.]

sale subsequently held under a prior attachment. Under these circumstances, therefore, we are of opinion that the plaintiffs are entitled to recover in this suit; but inasmuch as the Subordinate Judge reserved for trial in a regular suit the question of title between the plaintiffs and Golam Ali, and as there are circumstances connected with the plaintiffs' purchase, as for example, the very inadequate price paid by the plaintiffs on the sale to them, which render it desirable that the question should be left open, we reserve liberty to Golam Ali to institute any suit with respect to the title to this land that he may be advised to bring against the plaintiffs. The appeal will be allowed with costs, the judgment of the Munsif being restored. This judgment will apply to No. 2466.

*Appeal allowed.*

### NOTES.

#### [STATUTORY MODIFICATION.—

The opinion expressed in the above case that a sale held in contravention of section 285 is not invalid is expressly affirmed by the Legislature in the Code of Civil Procedure 1908, section 68 (2).

It is also settled that the section 285 applies to immoveable properties also. See 4 All. 395; 29 Cal. 773; 34 Cal. 836.]

[7 Cal. 414]

*The 26th April, 1881.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE McDONELL.

Radha Proshad Wasti and others.....Plaintiffs

*versus*

Esuf and others.....Defendants.\*

#### *Ejectment—Co-sharers—Trespassers—Co-sharer's Right.*

Where a tenant has been put into possession of *ijmah* property with the consent of all the co-sharers, no one or more of the co-sharers can turn the tenant out without the consent of the others; but no person has a right to intrude upon *ijmah* property against the will of the co-sharers or any of them; if he does so, he may be ejected without notice, either altogether, if all the co-sharers join in the suit, or partially, if only some wish to eject him; and the legal means by which such a partial ejectment is effected, is by giving the plaintiffs possession of their shares jointly with the intruder, as explained in the case of *Hulodhur Sen v. Gooroodoss Roy*. (20 W. R., 126).

THE plaintiffs purchased at an execution-sale, in 1869, a twelve-anna share in a certain taluq, formerly belonging to one [415] Akramuddin. Pending execution-proceedings, one Reazuddin intervened, claiming the twelve-anna share as his own: this claim was rejected, as was also a suit brought to have his title declared to the property. The plaintiffs took possession of this property in 1871; and in 1872, they and their co-sharer in the whole sixteen annas

\* Appeal from Appellate Decrees, Nos. 2147, 2148, and 2149 of 1879, against the decree of F. McLaughlin, Esq., Officiating Judge of Noakhali, dated the 2nd June 1879, reversing the decree of Baboo K. D. Chatterjee, Second Munsif of Soodaram, dated the 7th September 1878

were dispossessed by the Collector of Noakhali, whereupon they jointly brought a suit under Act XIV of 1859 against Government, and recovered possession. During the time the plaintiffs and their co-sharer were put out of possession, the Collector let into occupation, of four kanis of land within the taluq, certain persons, Esuf and Gar Banu (the defendants Nos. 1 and 2). The plaintiff, thereupon, served on these persons notices to quit; but on their refusing to do so, they brought this suit against the defendants Nos. 1 and 2 (making their co-sharer a *pro forma* defendant) to obtain khas possession of the four kanis of land to the extent of their twelve-anna share, claiming mesne profits for the time the defendants were so in possession.

The defendants Nos. 1 and 2 contended, that they were in possession of the land in question before the Collector took possession of the taluq, and that they held the land under howladars; and the *pro forma* defendant (the co-sharer of the plaintiff) supported their contention.

The Munsif decided in favor of the plaintiffs, and gave them 1½ mali khas possession of their twelve-anna share, and ordered the defendants Nos. 1 and 2 to pay mesne profits and costs.

These defendants appealed to the District Judge, who, without going into the merits of the case, decided that the plaintiffs, being sharers only in the property, could not bring this suit without joining their co-sharer, and that, inasmuch as this co-sharer was adverse to the suit, the plaintiff's remedy was either to obtain a partition, or induce their co-sharer to join in the suit, he therefore allowed the appeal.

The plaintiffs appealed to the High Court.

Baboo *Doorga Mohun Das* for the appellants.

Baboo *Sreenath Bonnerjee* for the respondents.

[416] The judgment of the Court (GARTH, C. J., and McDONELL, J.) was delivered by

**Garth, C. J.**—In this case the District Judge has, unfortunately, made a mistake. According to the view which he has taken of the law, the plaintiffs, however just their claim may be, cannot possibly obtain redress except by a partition.

Their case is, that they are the twelve annas shareholders of a certain shikmi taluq, the remaining four annas share belonging to the defendant No. 4. They say that the Collector of Noakhali unjustly dispossessed them of this taluq; whereupon they and the defendant No. 4 brought a suit against him under s. 15, Act XIV of 1859, and obtained a decree for possession.

Meanwhile, the principal defendants, Nos. 1 and 2, had been let into occupation through the Collector, of four kanis of land within the taluq; and as the Collector himself was a trespasser, the plaintiffs say that these defendants are also trespassers. They, therefore, bring this suit to obtain khas possession of the four kanis of the land to the extent of their twelve annas share jointly with the defendants, and also mesne profits for the time during which the latter have held the twelve-annas share unlawfully.

The case of the principal defendants is, that they were rightfully occupying the land as tenants before the Collector took possession of the taluq; and the

defendant No. 4 supports their case, and desires to retain them upon the property.

The Munsif found entirely in favor of the plaintiffs, and gave them a decree for ijmali possession of the land to the extent of their twelve annas share, with mesne profits and costs.

The District Judge has taken a different view. He has dismissed the suit, upon the ground that, even if the plaintiffs' case be well founded as to the principal defendants having been let into possession by the Collector, they cannot bring a suit of this kind without joining their co-sharer as a plaintiff; which means, of course, that they cannot sue at all, because their co-sharer, the defendant No. 4, is adverse to the suit.

If the Judge were right in this, one shareholder out of many might always set his co-sharers at defiance, by introducing [417] objectionable persons upon the joint property against the wishes of his co-sharers; and the latter would have no remedy, except by obtaining a partition.

We know of no authority which justifies such a view of the law; and it seems to us, that the District Judge has quite misunderstood the meaning of the cases to which he refers.

The plaintiffs' case is, that the principal defendants are trespassers, because they were introduced upon the land by the Collector, who was himself a trespasser; and if the plaintiffs are right in this, and if they have not since recognized the defendants as their tenants, it is clear, that as against the plaintiffs they are trespassers; and no consent to their occupation by the other defendant, No. 4, will make them any other than trespassers as regards the plaintiffs' twelve annas share.

If the defendant No. 4 has given the other defendants permission to occupy the land to the extent of her share, the decree to which the plaintiffs are entitled, assuming that they prove their case, is that which they ask for in the plaint, and which the Munsif has given them,—that is to say, a decree for khas possession of the four kanis jointly with the defendants to extent of their twelve annas share.

A similar decree was made in favor of the plaintiffs by the High Court in the case to which the Judge refers: *Hulodhur Sen v. Goordodoss Roy* (20 W. R., 126). The other case which he cites, *Balaji Borkaji v. Gopal Bin Raghu Kuli* (I. L. R., 3 Bomb., 23), relates to a tenant, not a trespasser.

The view which the Munsif has taken of the law appears to us perfectly correct.

When a tenant has been put into possession of ijmali property with the consent of all the sharers, or what is the same thing, has been placed there by the managing shareholder, who has authority to act for the rest, no one or more of the co-sharers can turn the tenant out without the consent of the others. But no man has a right to intrude upon ijmali property against the will of the co-sharers or of any of them. If he does so, he may be ejected without notice, either altogether, if all the co-sharers join in the suit, or partially, if only some of [418] the co-sharers wish to eject him; and the legal means by which such a partial ejectment is effected, is by giving the plaintiffs possession of their shares jointly with the intruder, as explained in the case of *Hulodhur Sen v. Gooroodoss Roy* (20 W. R., 126), *per Jackson, J.*

The judgment of the lower Appellate Court must, therefore, be set aside ; and the case must go back to that Court for retrial in accordance with the view of the law which we have above explained.

The appellants will have their costs in this Court ; and the costs in the lower Court will abide the result.

Appeals Nos. 2148 and 2149 will be governed by this decision.

*Case remanded.*

### NOTES.

#### [JOINT TENANCY—RIGHTS EXERCISABLE BY WHOM—

The great mass of apparently conflicting cases may be reconciled if the following principles are kept in view.

(1) Where the tenancy is created by all the co-sharers or by one of them with the consent of the others, all must join to put an end to the tenancy.

(2) Where some only of the co-sharers have created the tenancy against the will of the others, any one of the latter may put an end to the tenancy and recover khas possession to the extent of his share.

(3) If any trespasser intrudes upon the joint property, he can be ejected by any one of the joint tenants to the extent of his share, if the others do not wish to eject him.

(4) Where the tenancy created by all is put an end to by notice given by all, some of the co-sharers may recover their shares.

(5) Principle (1) has no application when the suit is for ejectment and partition and all the co-owners are made parties.

The following tabular statement of the case law on the subject illustrates the above principles.

Cases.	Nature of suit.	Result.
7 Cal. L. J. 486 ...	Suit for ejectment by one co-tenant when the other co-tenant does not join in determining tenancy	Suit not maintainable.
29 Mad. 29 ...	Suit for partition and ejectment and all the co-owners are parties to the suit as plaintiffs or defendants.	Suit can proceed
10 Cal. L. J. 103 ...	Suit for ejectment of tenant let into possession by some of the co-sharers without the consent of others.	Suit can proceed.
11 Ind. Cas. 84. ...	Suit for ejectment of a trespasser, by one of the co-owners only.	Suit can proceed.
11 Bom. 664 ...	Suit for ejectment after notice to quit by plaintiff, one of the co-sharers only.	Suit can proceed, the parties being Parsis and English law having to be applied.

(N. B.) In English law, one of the co-tenants may put an end to the tenancy without the consent of the others. See, 3 Taunton 119, 120 ; 1 B & Ad. 135, 7 M. & W. 141.

N. B. When khas possession is not sought for, one of the co-owners may sue :—2 C.W. N. 229.]

[7 Cal. 418]

*The 30th May, 1881.*

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE McDONELL.

Lokessur Koer.....Plaintiff

versus

Purgun Roy and others.....Defendants.\*

*Suit for Possession—Formal Possession—Transfer of Possession—Civil  
Procedure Code (Act VIII of 1859), ss. 223, 224.*

In a suit for possession, it appeared that, in 1863, the plaintiff had sued some of the present defendants for khas possession of the same land. In that suit the defendants pleaded that they were tenants of the plaintiff and entitled to hold under a patta, which they failed to prove, and the plaintiff obtained a decree. Three years afterwards the plaintiff was put in formal possession by the Court under s. 224 of Act VIII of 1859, instead of under s. 223.

*Held*, that as the plaintiff was put in possession under his decree by the officer of the Court, the form in which execution was given was immaterial.

The formal possession given by a Civil Court under an execution operates in point of law and fact, as between the parties, as a complete transfer of possession from the one party to the other.

THE plaintiff in this case sued to recover from the defendants possession of seventeen bighas of land. The plaintiff [419] obtained a decree in the first Court; but the lower Appellate Court dismissed the suit, upon the ground that the plaintiff had not been in possession for twelve years.

It appeared that, in the year 1863, the plaintiff brought a suit against the defendants Nos. 2 and 3, and the father of the defendant No. 1, to recover khas possession of the land, the subject of the present suit. The defendants at that time set up that they were tenants of the plaintiff, and entitled to hold the land as such under a certain patta. They failed, however, to prove their patta, and, consequently, the plaintiff obtained a decree against them for khas possession. Three years afterwards execution was taken out by the plaintiff under that decree, and he was put in possession by order of the Court. This happened within twelve years before the present suit. The Subordinate Judge, however, decided that, under the execution, the plaintiff did not obtain actual possession, but that he only obtained possession as malik; and from the return of the proceedings made by the officer on that occasion, it appeared that the plaintiff was professedly put into possession by proclamation and beat of drum under s. 224 of Act VIII of 1859, instead of under s. 223.

The plaintiff appealed to the High Court.

Mr. *Twidale* for the appellant.

Baboo *Nil Madhub Bose* for the respondents.

\* Appeal from Appellate Decrees, Nos. 1766 and 1767 of 1879, against the decree of Baboo Kally Prosonno Mokerjee, Additional Subordinate Judge of Sarun, dated the 25th April 1879, reversing the decree of Baboo Sarut Chunder Mookerjee, Munsif of Chumparun, dated the 17th November 1877.

The judgment of the Court (GARTH, C. J., and McDONELL, J.) was delivered by

**Garth, C. J.**, (who, after stating the facts as above, continued):—We are of opinion that as the plaintiff was put in possession under that decree by the officer of the Court, the form in which execution was given was quite immaterial. All that was necessary was for the officer of the Court to go upon a portion of the land, and give the plaintiff possession of that portion in respect of the whole; and any formal mistake which may have been made by the officer in the mode of giving possession could not prejudice the plaintiff. It does not appear [420] that the defendants resisted the officer when he gave possession, or that it became necessary to turn them out by main force.

The Subordinate Judge has, unfortunately, fallen into the common error which prevailed in the Mofussil Courts a few years ago, that the formal possession which the Civil Court gives under an execution is not actual possession; whereas, as between the parties, it operates, in point of law and in fact, as a complete transfer of actual possession from the one party to the other. It would not be so as against third parties of course; but, as between the parties to the suit, the formal delivery passes the actual possession as it can be passed. This has been decided by a Full Bench of this Court: *Juggobundhu Mookerjee v. Ram Chunder Bysack* (I. L. R., 5 Cal., 584).

The Subordinate Judge is quite in error in supposing that possession was given to the plaintiff as mulik only, and that the defendants continued to hold the actual possession, because this would have been entirely inconsistent with the decree pronounced by the Court. The defendants had set up that they were the plaintiff's tenants, and by the decree that defence was directly negatived.

The case will, therefore, go back to the Court below for retrial; and it must be taken for granted, that the plaintiff did obtain khas possession against the defendants within twelve years of the commencement of this suit. So that, unless the defendants can show that something has happened since that time to create a new tenancy between them and the plaintiff, or to justify them in some way in retaining possession as against the plaintiff, the latter must succeed in this suit.

The appellant must have his costs of this appeal, and the costs of the lower Court will abide the result of the new trial.

The appeal No. 1767 is admittedly governed by this decision, and will be remanded accordingly, the same order being made in that case as regards costs.

*Case remanded.*

### NOTES.

[As against Judgment-debtor or his representatives, the delivery of symbolic possession operates as the delivery of actual possession i.e., it amounts to a dispossession of the party previously in possession. Hence art. 144 of the Lim. Act applies to a suit for recovery of possession by a person to whom symbolic possession has been delivered—see 16 Cal. 530; 24 Cal. 715; 12 Bom. 678; 16 Bom. 722; 22 Bom. 667; 25 Bom. 275.

But as against third parties not bound by the decree but holding adversely to the Judgment-debtor and decree holder symbolical possession has been held not to avail and limitation continues to run in their favour, unaffected by the delivery of symbolic possession. See 18 Cal. 520.]

[421] INSOLVENCY.

*The 26th July, 1881.*

PRESENT:

MR. JUSTICE BROUGHTON.

In the Matter of T. H. Marshall, an Insolvent.

*Order and disposition of Insolvent—Indian Insolvent Act (and 12 Vict.,*

*c. 21), s. 23.*

Where goods are in the order and disposition of any person under such circumstances as to enable him by means of them to obtain false credit, then the owner of the goods, who has permitted him to obtain false credit, must suffer the penalty of losing such goods for the benefit of those who have given the credit.

In the month of February 1881, Mr. T. H. Marshall and Mr. Stevenson, who carried on business together as contractors and builders, agreed to dissolve partnership. At this time it appeared from the accounts that a sum of Rs. 5,500 was due from the firm to Stevenson. In order to pay off this debt, Marshall applied to one Theodore Boileau for a loan, and in consequence of such application, on the 10th March 1881, Boileau paid to Stevenson's attorney a sum of Rs. 5,000, which Stevenson agreed to accept as payment in full of the debt due to him; and on the 19th March 1881, a deed was executed by Boileau and Marshall, under which the latter, in consideration of an advance of Rs. 10,000 (Rs. 5,000 of which had already, on the 10th March, been advanced) assigned to Boileau, his executors, administrators, and assigns, as security for the loan, "all and singular the outstanding and book debts due to T. H. Marshall, and all and singular the securities for the said debts, and the benefit and advantage of all and singular the stock-in-trade, goods, wares, plant, machinery, and implements of his business, and all other goods, wares, machinery, and implements which did or might thereafter constitute the stock-in-trade of such business;" and it was further agreed between the parties, that Boileau should, until repayment, remain in possession of the stock-in-trade, wares, goods, machinery, and implements belonging to the business; and that nothing should be [422] removed from the premises without the consent of Boileau. Under this deed, Boileau was to be employed as superintendent and manager of the office of the business for one year at a monthly salary of Rs. 200.

This deed was duly executed on the 19th March 1881, and registered on the 24th, and the balance of the sum of Rs. 10,000 was paid to various creditors of the firm at Marshall's request. Boileau at this time was resident in Calcutta, and continued to be so until the 10th April 1881, when he removed to Barrackpore, placing two of his own durwans in possession, and himself attending to the business during office hours.

Marshall left Calcutta on the 23rd May, leaving Boileau in sole possession of the stock; and on the 26th May, a seizure of a portion of the stock-in-trade was made by the Small Cause Court on three decrees obtained against Marshall. On the 31st May, Marshall filed his petition in insolvency; Boileau meanwhile interpleaded in the Small Cause Court, but his claim was disallowed.



The Official Assignee, thereupon, took possession of the property, undertaking to sell and hold the proceeds to a separate account, subject to the order of the Court.

Certain creditors applied for and obtained an order for the examination of Boileau and Marshall, and the case came on for hearing, on the 12th July 1881, before Mr. Justice Broughton.

It appeared from the examination of Boileau and Marshall, that Marshall did all the outside work, whilst Boileau took the office work, making contracts and purchases in the name of Marshall Brothers, signing Marshall Brothers per T. Boileau. Marshall also purchased bricks, timber, and chunam, and gave other orders in the name of Marshall Brothers. It did not appear clearly that the creditors had notice of the assignment.

Mr. Trevelyan, for the creditors, admitted, the *bona fides* of the assignment; but contended that the goods were in the possession, order, and disposition of Marshall at the time he became insolvent within the meaning of the 23rd section of the Insolvent Act.

[423] Mr. Piffard for Marshall.

Mr. Allen for T. Boileau.

**Broughton, J.**—The insolvent in this case had assigned his goods to Mr. Boileau prior to his insolvency, and the question is, whether they were in his own possession, order, or disposition when he became insolvent, within the meaning of the 23rd section of the Insolvent Act, 11 and 12 Vict., c. 21. The petition of the insolvent was filed on the 31st May 1881. There is no question in this case as to the validity of the assignment, which was dated the 19th March, in favor of Mr. Boileau. It is shown to have been made more than two months before the filing of the petition, and for good consideration; and it is shown, that the money he advanced—Rs. 9,500—was applied partly in buying out a partner, who was paid Rs. 5,000, and the balance in paying the debts of the more pressing creditors of the insolvent. It was not an assignment in contemplation of insolvency, for the insolvent swears he did not know he was in difficulties. Mr. Boileau had no idea of it, or, as he says, he would not have paid Rs. 5,000 to a partner just retiring from an insolvent firm. Mr. Trevelyan does not seek to impeach this testimony, nor does he suggest that either the insolvent or Mr. Boileau did not fairly state the case.

Mr. Boileau was, under the assignment, to become the manager of the insolvent's business at a salary of Rs. 200 a month, and he immediately entered upon his functions as manager, and brought an assistant, named Mr. Depenny, to help him with the accounts. The business was that of a builder and contractor, and the insolvent attended to the outside work, coming only occasionally to the office, where Mr. Boileau saw the customers.

Mr. Boileau states—and this is an accepted statement—that, in taking over the management, he had in view the protection of his own interest in the property, which consisted of the stock-in-trade, at the same time assisting the insolvent, his brother-in-law, who, he says, would have lost credit had the business been carried on in another name. The deed itself provided that Mr. Boileau should remain in possession; that the property [424] should not be removed without his consent; and that any property sold should be replaced. Accordingly, the old name was used the contracts, pur-

chases, letters, and so on were signed by Mr. Boileau—"Marshall and Company, per T. B.," or "per T. Boileau." Mr. Boileau's *durwan* was, however, placed at the door, and the goods were not allowed to leave the premises for the purpose of the business without the order of Mr. Boileau given to the persons in charge of them and to the *durwan*, except that, on some occasions—the latest of which occurred some time before the filing of the petition—the insolvent himself was allowed to take goods when Mr. Boileau was not at the office. This happened for the most part in the early morning, before Mr. Boileau had arrived from Barrackpore, where he resided. When goods were so taken, the fact was reported to Mr. Boileau on his arrival, and he gave his sanction on this report. So the work went on for over two months, Mr. Marshall, being a practical builder, doing the outside work, and Mr. Boileau, with his staff of employes, doing the work at the office, making contracts and purchases, but in the name of "Marshall Brothers," and all the money passing through his hands. He opened an account in his own name, and made payments by his own cheques to various persons connected with the business. Mr. Allen points out that, among the payments made by Mr. Boileau on the making of the assignment, and with part of the money he advanced, was a payment to Hurrish Chandra Mittter, of Rs. 1,000 on the 19th of March, by a cheque signed "T. Boileau," in payment of a debt due by the insolvent to Hurrish Chandra for bricks and soorkie supplied to the business. Hurrish Chandra had, prior to the assignment, spoken to Mr. Boileau about the business, which he described as a profitable one, and advised him that he might make the advance: yet Hurrish Chandra now comes forward and claims that the stock-in-trade, which he knew was assigned to Mr. Boileau, was in the apparent ownership of the insolvent. But notice to one creditor is not notice to all.

A great many cases have been cited in argument, but questions arising upon this clause and the similar clauses contained in the English Bankruptcy Act depend so much upon their own [425] actual circumstances, that it is necessary to be very careful in applying these precedents. Among the cases which have been quoted, the case of *Agabeg* (2 Ind. Jur., 340), decided by Mr. Justice Phear in 1867 upon the same Statute, bears perhaps the closest resemblance to this. There, Messrs. Mackenzie, Lyall and Co., having an assignment of Mr. Agabeg's furniture, put a *durwan* at the gate, and sent a man to make a catalogue, with a view to the disposal of the furniture by public auction; and it was held, that the furniture, which Mr. Agabeg was allowed to use as before up to the date of his insolvency, was in his exclusive possession, and further that it was in his order and disposition.

But Mr. Boileau in the present instance, by the action I have already described, did a great deal more than Messrs. Mackenzie, Lyall, & Co., did in the case of Mr. Agabeg's furniture.

There has been, moreover, a recent decision of the Lords Justices upon the construction of the like section of the English Bankrupt Act (32 and 33 Vict., c. 71, s. 15), which seems to me to throw some doubt upon the decision in *Agabeg's case* (2 Ind. Jur., 340). In the case of *Ex parte National Guardian Assurance Company, In re Francis* (L. R., 10 Ch. Div., 408), a man was in friendly possession of a house and furniture which the bankrupt was allowed to enjoy; he was put there to get the goods out of the defendant's order and disposition, so as to avoid the effects of his bankruptcy. "The only question," said Lord Justice James, "is, whether possession was taken by the true owner the goods with the intention of asserting his rights;" and Lord Justice

Thesiger added, "the debtor had, as in *Vicarino v. Hollingsworth* (20 L. T., N. S., 362), the use of goods, but it was subject to the control of the man who was put in possession, and who was there to see that the use was in accordance with the rights of the bill-of-sale holder."

These cases, however, are very different from a case like the present, in which the property consists not of furniture which remains the same, but of goods to be used in the business, and daily altered in quantity and character.

[426] It appears to me that the goods were in the possession of Mr. Boileau and are *prima facie* his, unless it can be shown that they were in the order and disposition of the insolvent, for the Insolvent Act, like the more recent Bankruptcy Acts, uses the expression possession, order or disposition, unlike the Act of James the 1st, which uses the words possession, order, and disposition.

The principle upon which this section ought to be applied is very clearly stated in another recent case, *Ex parte Wingfield, In re Florence* (L. R., 10 Ch. Div., 591), by Lord Justice James:—"This section (32 and 33 Vic., c. 71, s. 16) must be read however, as the similar provision in the Bankruptcy Statutes from the time of James the 1st has always been read, with some attention to common sense. It has always been construed as meaning this:—that if goods are in a man's possession, order or disposition, under such circumstances as to enable him by means of them to obtain false credit, then the owner of the goods who has permitted him to obtain that false credit is to suffer the penalty of losing his goods for the benefit of those who have given the credit. But if no such credit has been given, then the maxim applies "*cessante ratone cessat ipsa lex*."

Applying this principle to the case before me, I find that Mr. Boileau stated in the course of his examination. "I sent notice to the debtors, I believe, on the 30th of May. The notice was written in the solicitor's office, &c." But this subject was not pursued, and it is not shown that the notice were ever issued. Mr. Boileau continued: "Mr. Leslie (his solicitor) suggested that I should give notice. I said it would be tantamount to shutting him up, as he depended upon the debtors for work—they were his customers. It was not to keep his customers from this knowledge, but simply that it might harm him individually. I expected his customers would withdraw their custom from him, because it would evidence that he was obliged to borrow money; besides people are generally very touchy about their bills being handed over to others. I did not wish to injure his credit."

Accordingly, when a debt due from one of the large customers—Mr. Ezra—had to be realized, it was realized by the insolvent personally, and the money was handed over to Mr. Boileau by him. This was on the very eve of the insolvency. The assignment was equally kept secret from the dealers in materials which had to be brought to carry on the works. Mr. Marshall himself says: "I purchased timber, bricks, and chunam for the business in the name of 'Marshall Brothers,' and any orders sent for materials were signed either by me as 'Marshall Brothers,' or by Mr. Boileau as 'Marshall Brothers per T. Boileau or per T. B.' This went on the usual course of business up to the time of my insolvency."

These persons, therefore, from whom goods were bought, were led to believe that their goods were bought by Marshall Brothers—not by Mr. Boileau or for his benefit, and Mr. Boileau's statement regarding the mode of dealing

with the goods, shows that they were allowed to leave the premises from time to time, as the insolvent directed, with the consent of Mr. Boileau.

Fresh goods were thus brought in from time to time for the purpose of the business, that is to say, that they might be used in the business, to earn funds for the business, which could be applied in payment for them, on the faith of the credit of Mr. Marshall, and not of Mr. Boileau.

It appears to me that the property was in the order and disposition of the insolvent, and that it would be unjust to apply the proceeds of these goods to satisfy the assignment to Mr. Boileau, which he himself says was kept secret.

It is agreed that the costs of both parties shall be paid out of the proceeds of the goods.

Attorneys for the insolvent. Messrs. *Barrow and Orr*.

Attorney for Boileau: Mr. *S. J. Leslie*.

Attorneys for the creditors: Messrs. *Swinhoe, Law, & Co*.

# [428] APPELLATE CIVIL.

*The 30th May, 1881.*

PRESENT:

MR. JUSTICE PONTIFEX AND MR. JUSTICE FIELD.

Ram Chunder Shaha and others.....Plaintiffs

*versus*

Manick Chunder Banikya and another.....Defendants.\*

*Partnership—Accounts—Frame of Suit—Procedure in Partnership Suit—Civil Procedure Code (Act X of 1877), sched. iv, forms 113, 132, 133—Costs.*

In a suit for an account of partnership transactions, the Subordinate Judge, in whose Court the suit was instituted, framed certain issues with the object of ascertaining who managed the business, with whom the partnership property was; whether the defendants ought to account; what was the capital, and what the expenditure and profits of the firm; and after taking evidence on these points, dismissed the suit.

*Held*, that the Subordinate Judge should have followed the course pointed out in forms 132 and 133 of sched. iv of the Civil Procedure Code, and at the first hearing should have determined whether there had been a partnership; what were its conditions; was it dissolved, or ought it to be dissolved; and who were the parties interested, and in what shares; and upon determining these questions, should have directed accounts to be taken; and after the accounts had been taken, should have made a final decree.

*Held* also, that the suit should not have been instituted in the Court of the Subordinate Judge, and the case was transferred to the Court of the District Judge.

\* Appeal from Original Decree, No. 275 of 1879, against the decree of Baboo Gungachurn Sircar, Subordinate Judge of Dacca, dated the 26th June 1879.

The plaint in a partnership suit ought to be framed on the lines of form 188 in sched. iv of the Code, and the accounts should be taken as prayed in that form.

Under ordinary circumstances, the costs of a partnership suit should be paid out of the assets of the partnership, or, in default of assets, by the partners in proportion to their respective shares, unless any partner denies the fact of a partnership, or opposes obstacles to the taking of the accounts, and so renders a suit necessary, when he is usually made to pay the costs up to the hearing.

THIS was a suit to recover an eight-anna share of the capital money and profits of a partnership business. The plaintiffs alleged that their ancestor, one Sorup Chunder Shaha, and one Ram Kristo Banikya, the father of the defendants, [429] started a joint karbar in 1251 (1844), which was carried on after the death of the original partners by the plaintiff's and defendants until Kartic 1280 (1873), when the partnership was dissolved. Disputes arose between the partners, and the matters in dispute were referred to arbitration; but no award was made. The plaintiffs then instituted a suit in the Court of the Subordinate Judge of Dacca, alleging that large sums were due to them from the defendants, and praying for an account. The defendants, by their written statement, on the other hand, contended, that the plaintiffs were indebted to them. The Subordinate Judge framed the following, among other issues:

"By whom the principal karbar, &c., the branch karbars in respect of which the plaintiff's sue for a nikas, were managed?

"With whom the money, papers, and stock appertaining thereto were kept, and in whose possession they are now?

"If it be proved that the karbar was managed by the defendants, and that the defendants used to keep the money and papers relating thereto, should they not be bound to render an account to the plaintiffs?

"What sums of money were supplied, and by whom, as capital money and as jogan money; and what was the amount of expenditure, as also the amount of profits down to the date of the dissolution of the partnership business?

"What sum has been appropriated by each of the parties from the fund of the karbar?

"Has there been a loss, and to what amount, and through whose fault?

"Agreeably to the findings on the above issues, which of the parties should be held liable to the other party, and to what amount?"

The Subordinate Judge found that the karbar was managed by both parties, and not by the defendants alone; that the khatas of the karbar were neither kept by the defendants, nor taken possession of by them at the time the partnership business was dissolved, and holding that the plaintiffs could not call upon the defendants to submit a nikas, or to pay them any sum, dismissed the suit.

From this decision the plaintiffs appealed.

[430] Mr. *Branson*, Baboo *Srinath Doss*, Baboo *Mohiny Mohun Roy*, and Baboo *Lall Mohun Doss* for the appellants.

Baboo *Chunder Madhub Ghose* and Baboo *Srinath Banerjee* for the respondents.

The judgment of the Court (PONTIFEX and FIELD, JJ.) was delivered by

**Pontifex, J.**—In this case the parties, or their respective ancestors, joined together in carrying on a joint karbar, or partnership, which continued for many years down to the year 1280. The plaintiffs, on the 15th September 1876, within three months after the termination of the business, instituted a suit in the Court of the Subordinate Judge of Dacca, whereby they claimed that, on an adjustment of accounts between the parties, they would be entitled to a very considerable sum. The defendants, by their written statement, insisted, on the other hand, that, on an adjustment of accounts, they would be entitled to a still more considerable balance. The parties being thus at issue, the Subordinate Judge, who tried the case, framed seven issues, to be found in his judgment. Now, assuming for a moment that the Subordinate Judge had jurisdiction to try the case, the course which he ought to have pursued is clearly pointed out in Forms Nos. 132 and 133 of sched. iv of the Code of Civil Procedure. At the first hearing of the suit, really what the Court had to determine was, whether there had been a partnership, and what were its conditions ; was it dissolved, or ought it to be dissolved, and who were the parties interested in the partnership, and in what shares ; and upon determining these questions, it ought, in the first instance, to have directed that accounts should be taken as set forth in Form No. 132, subject, of course, to any such alterations as the nature of the case might require. It is only after taking these accounts and obtaining the report of the officer of the Court, or, if there is no such officer, when the Judge himself has arrived at a decision on the accounts, that a final decree should be made according to Form No. 133 of the 4th schedule of the Code. Instead of following this procedure, the Subordinate Judge has dealt [431] with the case as if the whole matter was to be completed at the first hearing ; and has, as I have said, raised, at the first hearing, issues which ought more properly to have been raised after the first hearing. He has dealt with the third and fourth issues raised by him. The plaintiffs, who also carried on a separate business, in their plaint tried to make a case that the defendants were in fact the managing partners in this business, to which the suit relates ; and that the plaintiffs were only concerned in making advances, for the purposes of the business, whenever they were required. Their case also was, that the defendants were, as compared to them, in a much poorer condition of life, and that they never made advances, or were able to make advances, for the purposes of this business. The Subordinate Judge, therefore, raised the issues for the purpose of ascertaining by whom the business was in fact carried on, and by whom the advances were made : and he seems to have determined, upon the result of his view of the evidence, that the defendants were not alone the managers of the business, and that the plaintiffs were not the persons who alone made the advances. Having arrived at the conclusion, he held that the plaintiffs were not entitled to call upon the defendants to submit a nikas in respect of the business, and dismissed their suit. Now, whether the plaintiffs were right or not in the allegations made in the plaint, and if it were proved that they were joint managers, or even the sole managers, of the business, they were, nevertheless, entitled, after the dissolution of the partnership, to have the accounts taken ; and even if upon those accounts it should appear that the plaintiffs were, contrary to these allegations, under liability to the defendants, yet they would be entitled to have a decree of Court determining the amount of their liability and to get the indemnity of the Court from further litigation, or future demands by the defendants in respect of the accounts. We think, therefore, that even if the view of the evidence taken by the Subordinate Judge was a correct view, as to which we express no opinion, he was, notwithstanding, bound to proceed

with the accounts in the manner shown in Form No. 132 of the 4th schedule, and to have the matter settled. Now, a considerable part of the evidence [432] that was taken before the Subordinate Judge was addressed to the question who occupied the principal guddi, where the business of this partnership was carried on; and the Subordinate Judge seems to have come to the conclusion, that it was the defendants who continuously occupied that guddi, and that they not only joined in the management with the plaintiffs in the partnership business there, but also did their own separate business in that guddi. It also appears that the account books of the joint partnership are no longer forthcoming, or if forthcoming, are in such a condition that it would be difficult or impossible for the Court to utilize them for the purpose of settling an account between the parties. Now, if it were the fact that the defendants were the principal occupants of the guddi, it might be inferred that they would be at least as equally responsible for the books as the plaintiffs. But assuming that the books cannot be obtained or utilized, still an account must be taken of the partnership and of the property if any, still belonging to the partnership, in the best manner the Court can arrive at it. For example, if no books are forthcoming, the Court must call upon each party to furnish a statement of facts in respect of the business and its transactions, and to support such statement by evidence; and upon these statements of facts, as supported or contradicted by the evidence bearing thereupon, the Court must come to a conclusion and shape its decree accordingly. It is of great importance that, in suits for account and administration, the proper procedure should be followed, and it may be useful to refer to the observations of Phear, J., in *Syud Shah Alarahmad v. M. S. Bibee Nusibun* (24 W.R., 70), though in that case his observations were addressed to an account to be taken against one accounting party only, whereas in a partnership, all the partners are, of course, accounting parties. The plaint in a partnership suit ought to be framed on the lines of Form 113, sched. iv of the Procedure Code, and the accounts should be taken as prayed in that form. Now, we have considerable doubt whether this partnership suit should have been instituted in the Court of the Subordinate Judge. Under s. 265 of the Contract Act, it is enacted that [433] where parties wish to apply to the Court to wind up the business of a partnership firm, to provide for the payment of its debts, and to distribute the surplus according to the shares of the partners respectively, the Court to which they must apply, is the Court of the District Judge. That appears in the explanation to the section, and there has been a case in this Court, decided by McDonell and Field, JJ., *Prosad Doss Mullick v. Russich Lall Mullick* (Ante p. 157), in which they held that such a suit could only be brought in the Court of the District Judge. Under the circumstances in which this case comes before us, we think the proper course will be to direct that the District Judge proceed with the further trial of the case, and we shall now order that an enquiry be made as to the conditions on which the parties carried on the partnership, and as to the shares in which they were respectively interested. That an account be taken first of the credits, property, and effects now belonging to the partnership; and secondly, an account of the debts and liabilities of the partnership; and thirdly, an account of all dealings and transactions between the plaintiffs and the defendants with respect to the partnership. In taking these accounts, the parties will have to show what advances have been made by either of them from time to time, and also what monies have been drawn out by either of them from time to time; and they will have to prove whether any and what interest is payable upon the advances made by them, and the Court will make orders in accordance with the form of the prayer, to Form No. 113 of sched. iv to the Procedure Code. Upon the evidence taken, the Court will frame its decree in

accordance with Form No. 133 of the 4th schedule in favour of the plaintiffs or defendants according as it decides on which side the balance is due.

We had some little doubt at first as to how we should deal with the costs of the suit up to this hearing. It is true that the plaint is not very artistically framed, but it is also clear that the defendants, by their written statement, asked that an account should be taken, and claimed that, upon the taking of such account, they should be entitled to a balance; but so far [434] as we can see, it appears to us that the defendants have really thrown every obstacle they could in the way of the plaintiffs having this account taken. In the examination of the principal defendant himself, a question in cross-examination was put by the plaintiffs—a very pertinent question as it seems to us—with respect to property alleged to be now belonging to this partnership, *viz*, “which of the talooks was purchased with joint funds?” That question was objected to by the defendants, and was disallowed. Under ordinary circumstances, the costs of a partnership suit should be paid out of the assets of the partnership, or in default of assets, by the partners in proportion to their respective shares in the partnership business. But when one of the partners either denies the fact of a partnership, or opposes obstacles to the taking of the accounts, and so renders a suit necessary, it is usual to make such partner pay the costs up to the hearing. However, under the circumstances of this case, we think that the costs of the proceedings up to this time must be dealt with as costs are ordinarily dealt with in a partnership suit: accordingly we leave them to be dealt with by the District Judge, and we make no other order concerning costs. In taking the accounts before the District Judge, the parties will be at liberty to use any part of the evidence adduced by them before the Subordinate Judge, and also to adduce further evidence. This course is consented to by the parties before us. Neither party will be bound by the conclusions arrived at by the Subordinate Judge, but the whole case will be open for decision by the District Judge.

*Case remanded.*

## **NOTES.**

### **[STATUTORY CHANGE.—**

The explanation which prescribed the form in which a suit for dissolution of a partnership was to be brought has been omitted from section 265 by the Indian Contract Act Amendment Act (IV of 1886) S. 1. The result, of course, is that such a suit can now be brought in any competent Court according to the provisions of the Civil Procedure Code. See 20 Mad. 313 where the suit was brought in the Subordinate Judge's Court.]



[7 Cal. 435]

## ORIGINAL CIVIL.

*The 28th July, 1881.*

PRESENT :

MR. JUSTICE CUNNINGHAM.

In the matter of Hosseini Begum, an infant, and in the matter  
OF ACT X OF 1875.

*Mahomedan Law—Shiah School—Minors—Custody—Mother.*

According to the Shiah School of the Mahomedan Law, a mother is entitled to the custody of her female children, unless she has been guilty of unchastity.

[435] IN this case a rule had been obtained by one Phoodia Bibee, calling upon two persons, named Aga Mahomed Kazim Ispahani and Moonshi Mahomed Ibrahim, to show cause why they should not bring up before the Court the persons of Hosseini Begum and Koolsum Begum, the infant children of Phoodia Bibee, to be dealt with according to law. It appeared that Phoodia Bibee was the widow of one Meer Mahomed Kazim Jowhuree, to whom she had been married according to the Shiah rites of the Mahomedan law, and with whom she had resided up to the time of his death, which happened on the 13th April 1881. Meer Mahomed left a will, of which Aga Mahomed Kazim Ispahani and Moonshi Mahomed Ibrahim were the executors; and they had applied for, but had not obtained, probate of the will at the time of the present application. By this will Meer Mahomed had appointed one Hadjee Aga Syed Saduq the supervisor of the matters connected with the will. Phoodia Bibee had two children by her husband,—namely, the infants Hosseini Begum and Koolsum Begum, who were of the age of six and four years respectively, and she alleged that these children had, since their respective births, had been brought up, suckled, and reared by her personally. She further stated, that since the death of her husband, she continued to live at his dwellinghouse until the 22nd of May 1881, when she left the house owing to an attempt by Aga Mahomed Kazim Ispahani, to commit an indecent assault upon her, and went to the house of one Fatima Begum, a niece of her husband, and that she was obliged to leave her children behind. She then applied, through her attorney, to Aga Mahomed Kazim Ispahani and Moonshi Mahomed Ibrahim to give up the children to her, which they refused to do, stating that she had left her house without cause, and that, acting under the advice, and in obedience to the wishes of Hadjee Syed Aga Saduq, they would retain the custody and guardianship of the infants. They further stated that they had reason to apprehend that proper and sufficient care would not be taken of the infants, and that the moral atmosphere of their mother's new dwelling-house would be far from wholesome for the children. And they refused to allow Phoodia Bibee to have access to the children.

[436] The rule was obtained upon an affidavit by Phoodia Bibee setting out the above facts. Counter-affidavits were filed alleging that Phoodia Bibee was the "moota" wife of Meer Mahomed Kazim Jowhuree, and charging her with various acts of unchastity. These charges were denied by Phoodia Bibee.

Mr. Jackson and Mr. Gasper in support of the rule.

Mr. Ameer Ali and Mr. Abdul Rahman showed cause.\*

Mr. Ameer Ali.—Under the Shiah law, Phoodia Bibee is not entitled to the guardianship of her children. In *Mohomuddy Begum v. M. S. Oomdu-toomssa* (13 W. R., 454), the Court say,—“The appellant before us now states that she is a Shiah. If she be a Shiah, then, as we see in Baillie’s Digest of the Mahomedan Law, Imameea Doctrine, p. 232, a mother can neither be herself the guardian of her children, nor can she make a testamentary appointment of guardian to them.” [CUNNINGHAM, J.—Though she may not be entitled to the guardianship of her children, she is entitled to their custody]. The word ‘guardian’ is used to imply both guardianship of person and of property. Unchastity takes away the right of the mother to the custody of her children. In the Tagore Law Lectures for 1873, Baboo Shamachurn Sircar, quoting the Fatawa Alamgiri, Vol. I, p. 728, says :—“The mother is of all the persons best entitled to the custody of her infant child, unless she be wicked or unworthy to be trusted. Wickedness which disqualifies a mother for the custody of her child, is such wickedness as may be injurious to it, adultery or theft, or the being a professional singer or mourner.” In Baillie’s Digest, Imameea, p. 95, it is said, that the mother has a preferable right to the custody of a female child until the child has attained the age of seven or ten years. But that must be taken subject to the qualification stated in the Tagore Law Lectures, 1873. In Ali’s Personal Law of the Mahomedans, p. 203, it is laid down, that “the qualifications necessary for the exercise of the right of *hazamat* are the following :—(i) that the *hazina* should be of sound mind ; (ii) that she should be of an age [437] which would qualify her to bestow on the child the care which it may need ; (iii) that she should be well conducted, and (iv) that she should live in a place where the infant may not undergo any risk, morally or physically.” All the cases are decided with reference to the interest of the children ; if these are imperilled, the mother loses her right. [CUNNINGHAM, J.—Unless she has committed some act of impropriety, she is entitled to the custody of her infant children.] The executors must be able to exercise a supervision. If the mother goes to a place where they cannot do this, she loses her right.

Mr. Jackson and Mr. Gasper were not called upon.

Cunningham, J., made the rule absolute, and directed that the children should be given up to the mother in the course of the day.

Attorney for Phoodia Bibee : Baboo G. C. Chunder.

Attorney for Aga Mahomed Kazim Ispahani and Moonshi Mahomed Ibrahim : Baboo M. D. Sen.

[7 Cal. 437]

## APPELLATE CIVIL.

*The 10th June, 1881.*

PRESENT :

MR. JUSTICE TOTTENHAM AND MR. JUSTICE MACLEAN.

Beejoy Keot.....Plaintiff

*versus*

\* Goria Keot and others.....Defendants.\*

*Declaration of Title to Land in Assam, Suit for—Jurisdiction of Civil Court—  
Registration of Claimant's Name by Collector.*

A person claiming a right to rent-bearing land in Assam, held under a patta from Government in the names of the persons against whom he claims, is entitled to sue in the Civil Court for a declaration of his title and right to have his name registered as co-owner in the Collectorate; and the Civil [438] Court has jurisdiction to determine such suits, although the Collector has not been first applied to; but should not pass any order against the Collector in any suit to which he is not a party, but merely declare what the plaintiff's rights are.

THIS was a suit for declaration of coparcenary right to, and for registration of the name of the plaintiff, with those of the defendants, in the Collector's books, in respect of 52 bighas 4 cottas 5½ lechas of rent-bearing land. The plaintiff stated, that one Ramdas, who held 317 bighas 15 lechas in certain villages, of which the lands in dispute formed a portion, left three sons surviving—Andharu, Chana Apa, and Gondho—who were each entitled to an equal third share of the land; that Gondho left two sons, Bhogjar, the father of the plaintiff, and Papara, the fourth defendant; that the first defendant was the grandson and sole descendant of Andharu; and that the second defendant Ajala, and third defendant Kuherain, were the sons of Chana Apa. The plaintiff, accordingly, claimed, that he was entitled, along with his brother Jara, to one-sixth of the lands held by Ramdas. The plaintiff further stated, that, after the death of his father, he commenced to hold possession of the land in question in conjunction with the defendants, and that the mouzadar had entered his name and that of the defendant No. 4, Papara, along with those of the other defendants, in the measurement papers of 1283; but that, subsequently, the Deputy Commissioner had, on the 27th December 1876, ordered his name and that of Papara to be struck out, on the ground that they had been entered without orders; and, without any application having been made, had directed the patta to be issued in the names of the defendants Nos. 1, 2, & 3. The plaintiff, accordingly, brought this suit to have his coparcenary right declared and to have his name registered as co-owner. The defendants Nos. 1 and 4 admitted the claim, but the other two defendants contested it as being false, and in addition pleaded limitation, and submitted that the Collector was a necessary party.

The Assistant Commissioner, finding the facts in favour of the plaintiff, gave him a decree, declaring that he and Jara were entitled to a coparcenary

\* Appeal from Appellate Decree, No. 1737 of 1879, against the decree of W. E. Ward, Esq., Judge of the Assam Valley District, dated the 28th April 1879, reversing the decree of G. E. McLeod, Esq., Assistant Commissioner of Gowhatty, dated the 30th December 1878.

right in one-sixth of the land, and to [439] have their names entered in the revenue records; and directed that Kuherain should pay all costs. Against the decree the defendants Nos. 2 and 3 appealed, and the lower Appellate Court reversed it and dismissed the suit, holding that the plaintiff was not entitled to sue in the Civil Court without having first applied to the Collector to have his name registered as a joint Government tenant of the lands in suit, as, were the decree asked for made, the Collector would in no way be bound by it, the effect of it being to order the Collector to do what he had never been asked by the plaintiff to do.

The plaintiff appealed to the High Court.

Baboo *Bykunt Nath Dass* for the appellant.

Baboo *Bhoobun Mohun Dass* for the respondents.

The judgment of the Court (TOTTENHAM and MACLEAN, JJ.) was delivered by

**Tottenham, J.**—It will be sufficient to refer the District Judge to the judgments of this Court of the 2nd March 1880 in the case of *Kalindri Dabia v. Komolakanto Surma* (1) and [440] of the 12th August 1880 in the case of

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(1) *The 2nd March, 1880.*

MR. JUSTICE PRINSEP AND MR. JUSTICE MACLEAN.

Kalindri Dabia.....Plaintiff

*versus*

Komolakanto Surma and another.....Defendants.\*

Baboo *Bhubun Mohun Dass* for the appellant.

Baboo *Kali Mohun Dass* for the respondents.

The facts in this case sufficiently appear from the judgment of the Court (PRINSEP and MACLEAN, JJ.), which was delivered by

**Prinsep, J.**—The lands in this suit originally belonged to one Isharam. The plaintiff states that they were sold to Parsuram in execution of a decree against Isharam, and were purchased from Parsuram by her father in 1854 (1260). Isharam's name, however, remained on the Collector's register notwithstanding these purchases.

The defendant Roteekant Dass obtained a decree against Isharam, in execution of which the lands were sold to defendant No. 2, Komolakanto Surma, to whom the Collector, in 1281, granted a patta.

Plaintiff now sues for a declaration of her right to the land for registration of her name in the Collectorate, and to have the sale to defendant No. set aside.

The plaint was filed on 15th November 1875. The suit has twice been remanded by the lower Appellate Court, and we regret that it is impossible for us now to put an end to these proceedings.

The District Judge has found that, before coming to the Civil Court, the plaintiff is bound to go to the Collector and to endeavour to obtain a patta from him in cancelment of the patta granted to defendant No. 2. The Judge further states, that, "if the Collector, on enquiry,

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\* Appeal from Appellate decree, No. 1672 of 1879, against the decree of W. E. Warda, Esq., Judge of the Assam Valley District, dated the 28th April 1879, affirming the decree of G. E. Macleod, Esq., Assistant Commissioner of Gowhaty, dated the 28th December 1878.

*Hootaboo Ravah v. Loom Ravah* (2), and to say that this Court does not concur in [441] his view of the incompetence of the Civil Court to deal with questions of title arising between ryots in Assam. Nor do we accept as correct the District Judge's opinion that the Collector will disregard the finding of the Civil Court. We do not think, however, that the Civil Court should pass any order upon the Collector except in a case to which he is a party. The duty of the Civil Court

finds that there has been no mistake or collusion in the granting of this patta to defendant No. 2, and refuses to accede to the plaintiff's request, his decision on this point must be taken as final."

This opinion is certainly opposed to what was declared by the same District Judge on the 23rd December 1876, when this case came before him previously. He then stated—"Plaintiff is entitled, on the facts stated by her, to ignore the second sale in execution of Isharam's right altogether, and to ask the Court to declare her right in the land, as well as her right to have her name registered in the Collector's book as the Government ryot."

It appears to us that the Civil Court, which has twice sold the land as belonging to Isharam, is the proper tribunal to decide, whether anything passed to the purchaser at the execution-sale held on the 24th September 1874, or whether the rights of Isharam were at that time vested in the plaintiff as stated by her.

The District Judge should decide this appeal with as little delay as possible.

Costs of this appeal will abide the result, and appellant will recover the value of the appeal stamp.

*Appeal allowed and case remanded.*

(2) *The 12th August, 1880.*

MR. JUSTICE MORRIS AND MR. JUSTICE PRINSEP.

Hootaboo Ravah and another.....Plaintiffs

*versus*

Loom Ravah.....Defendant.\*

Baboo *Okhil Chunder Sen* for the appellants.

Baboo *Kahskant Sen* for respondent.

The facts in this case also were sufficiently set out, for the purposes of the report, in the judgment of the Court (MORRIS and PRINSEP, JJ.), which was delivered by

**Morris, J.**—The grounds upon which the lower Appellate Court has dismissed this suit, as well as the suit in appeal No. 66, appear to us to be untenable. In appeal No. 599, the plaintiffs sued to recover possession of one bigha odd of land as their proportionate share in certain plot of rent-bearing homestead land belonging to them and to the defendant, whom they allege to be their own brother. They also ask to obtain a separate patta from the Revenue Court in respect of this land.

The defendant denied that he was the uterine brother of the plaintiffs. He alleged that the land, of which he had obtained a patta from the Government, was his own property and that the plaintiffs had no share in it.

The first Court decided, and with its decision the present plaintiff's appellants, are content, that the plaintiffs were brothers of the defendant; that they had established their title to their

\* Appeal from Appellate Decrees, Nos. 599 and 600 of 1879, against the decree of W.E. Ward, Esq., Judge of the Assam Valley District, dated the 17th December 1878 reversing the decree of G. E. MacLeod, Esq., Assistant Commissioner of Gowhatty, in Kamrup, dated the 16th July 1878.

is simply to declare the rights [442] of the parties, and we presume that the Collector will give the requisite effect to any declaration so made.

The case will be remanded to the District Judge for disposal, and costs of this appeal will abide the result.

*Appeal allowed and case remanded.*

### NOTES.

[It is not the province of a Revenue Court to decide questions of title between contending claimants, such questions being within the province of Civil Court. See 9 Cal. 925.]

proportionate share in the land ; and accordingly it gave a decree, declaring their right in it ijmali, and that they were entitled to have their names registered conjointly with that of the defendant.

On appeal the Judge threw out the suit *in toto*, on the ground that the Collector had refused to recognize the plaintiffs as the Government tenants in occupation of the lands in suit ; that, consequently, any possession of these lands, if they ever possessed any, was unlawful, for no ryot "in Assam Proper has any title to hold and cultivate land without a patta from the Collector."

We are not aware of the law or authority under which the Judge advances so broad a proposition as this, that no ryot can enjoy possession of any lands in Assam without direct permission of the Collector, or hold or cultivate land without a patta from the Collector ; but it seems to us unnecessary to consider this point, because in the present suit the Collector is not a party. The present is a suit affecting the rights of private individuals *inter se* ; and for the determination and decision of such rights, whether relating to lands ryoti or otherwise, we can have no doubt that the Civil Courts in Assam have jurisdiction.

We observe also that the provisions of the Rent Law, Act X of 1859, are in force in Assam, and that the Government recognizes hereditary succession in tenancies. In a case such as this, if, as a matter of fact, land has been held under a patta in the name of an elder brother, and the younger brothers of the family can show that they have held the land conjointly with their elder brother, the nominal holder, the Civil Court is clearly the proper Court, in the event of dispute as to possession or share in such land between the two, to determine their respective rights and interests. We are, therefore, of opinion, that, in this case, the first Court acted rightly in determining the matters at issue between the parties, and that the Judge on appeal was not competent to decline to decide them.

We, therefore, remand the case, in order that the lower Appellate Court may hear the appeal and decide the case on its merits. Costs will abide the event.

The same order is applicable to the appeal No. 600.

*Appeal allowed and case remanded.*

[7 Cal. 442]

*The 26th May, 1881.*

PRESENT :

MR. JUSTICE PONTIFEX AND MR. JUSTICE FIELD.

Nilmadhub Shaha and others.....Defendants

*versus*

Srinibash Kurmocar.....Plaintiff.\*

*Suit for Possession—Limitation—Beng. Act VIII of 1869, s. 27.*

In a suit for possession of land, it appeared that the defendants had obtained a darpatni lease of the land in question in 1271 (1865), and that they had immediately dispossessed the plaintiff, and had never acknowledged him to be their tenant. The plaintiff instituted his suit within twelve years from the date of dispossession.

*Held*, that the suit was not barred by limitation under s. 27 of Beng. Act VIII of 1869.

That section only applies to cases where the relation of landlord and tenant exists, and cannot be pleaded in bar by a defendant who does not admit that such relation has existed.

THIS was a suit to have the plaintiff's purchased right declared in respect of an eight-anna share of certain land, and to recover khas possession, together with mesne profits. It appeared that the land had originally belonged to the plaintiff and the defendant No. 3, one Uma Sunduri Dasi, the widow of one Kesub Chunder Kurmocar, and that they were in joint possession. The plaintiff was dispossessed in the year 1272 (1865). He then brought a rent-suit in respect of his share, and obtained a decree. In 1284 (1877), the plaintiff purchased the share of Uma Sunduri Dasi, but was not allowed by the other defendants to take possession; whereupon he instituted the present [443] suit. The defendants contended that, in 1271, and immediately prior to the dispossession of the plaintiff, they had obtained a darpatni of the land in question, when they at once dispossessed the plaintiff, and that the suit was barred by limitation under s. 27 of Beng. Act VIII of 1869. Both the lower Courts gave the plaintiff a decree. The defendants appealed to the High Court.

Baboo Nil Madhub Bose for the appellants.

Baboo Shoshi Bhoosun Dutt for the respondent.

The judgments of the Court (PONTIFEX and FIELD, JJ.) were as follows:—

**Pontifex, J.**—It is admitted in this case, on the findings of the lower Courts, that the plaintiff is entitled to recover, unless he is barred by s. 27 of Beng. Act VIII of 1869 from suing. That section gave him a limitation of one year, and the plaintiff instituted the suit after the expiration of eleven years from the date of the alleged dispossession. Now, taking the words of that section by themselves, and putting, what I think is, a reasonable construction upon them, it seems to me they do not apply to this case, and the defendants are not entitled

\* Appeal from Appellate Decree, No. 379 of 1880, against the decree of Baboo Krishna Chunder Chatterjee, Officiating Subordinate Judge of Nuddea, dated the 27th December 1879, modifying the decree of Baboo Kristo Behari Mookerjee, First Munsif of Kooshtea, dated the 29th of June 1878.

to insist upon them. The facts of the case are, that the defendants claim that immediately prior to the dispossession of the plaintiff, a darpatni was created in their favour, and upon its creation they at once proceeded to dispossess the plaintiff from his holding. Now the words of the section are: "All suits to recover the occupancy or possession of any land, farm, or tenure from which a ryot, farmer, or tenant has been illegally ejected by the person entitled to receive rent for the same," should be commenced within one year. It seems to me that the course of action pursued by the defendants in turning out the plaintiff from his occupation immediately their darpatni was created, showed that at that time they did not then admit that he was a tenant. As he was immediately dispossessed after their title accrued, it is clear that they could neither have received rent from him, nor could he have paid rent to them; and as they did not admit that at that time he was their tenant, I do not think it [444] lies in their mouth now to insist that he was a tenant within the terms of s. 27; and not being a tenant, the limitation of one year would not apply to the case. There seems to be a question whether these suits under s. 27 are not merely possessory suits. As to that I am not at present prepared to give any opinion. The appeal must be dismissed with costs.

**Field, J.**—I also think that in this case the defendants cannot be permitted to approbate and reprobate. It appears that, after the grant to them of the darpatni, they ousted the plaintiff without giving him an opportunity of attorning to them and becoming their tenant, and they cannot now be permitted to say that there was a tenancy existing between him and the defendants, for the purpose of obtaining the benefit of the one year's rule of limitation. But it appears to me also, that the one year's rule of limitation provided by s. 27 of Beng. Act VIII of 1869 was not intended to apply to a case of this kind. The particular words in that section, upon which the defendants rely in this case, are: "All suits to recover the occupancy of any land, farm, or tenure from which a ryot, farmer, or tenant has been illegally ejected by the person entitled to receive rent for the same." In order to understand the meaning of these words, we may examine the history of their use in acts of the Legislature, which are *in pari materia*. That history is as follows: Section 23 of Act X of 1859 contained a specification of the different kinds of suits which could be brought under the provisions of that Act, and over which the Revenue Courts were given jurisdiction. Clause 6 of that section specifies the following suits, *viz.*, "all suits to recover the occupancy or possession of any land, farm or tenure, from which a ryot, farmer, or tenant has been illegally ejected by the person entitled to receive rent for the same." Now, it was decided in the Full Bench case of *Cooroo Doss Roy v. Ram Narain Mitter* (B. L. R., F. B. Rul., 628; S. C., 7 W. R., Civ. Rul., 187) that these words refer, only to possessory actions against the person entitled to receive the rent, and not to suits in which the plaintiff sets out his title, and seeks to have his right declared and possession given him in pursuance of that title. "Full meaning" said Peacock, C. J., [445] who delivered the judgment of the Full Bench, "may, and we think must be given to the word 'illegally ejected' without treating them as giving a wider sense to the words abovementioned." He then proceeds to give instances of such "illegal ejection," as, for example, when a zamindar ejects a ryot forcibly and without having recourse to the Court; and he concludes thus: "Looking to the whole Act, it appears to us that cl. 6 of s. 23 does not take from the Civil Court the power to try the question of title as between a ryot farmer, or tenant, and the person to whom he pays rent. It follows, therefore, that in this action, which is brought, setting out a title by the plaintiff, and



asking, 'under the above facts,' to be declared entitled, on the strength of his documents, to recover possession of the lands, he will be entitled, if he makes out his case, to a decree that he be put into possession of the land with mesne profits." See also the following cases decided before the Full Bench decision:—*Bishumbhur Boil v. Okoor Pandey* (4 W. R., Civ. Rul., 105), *Banee Madhub Banerjee v. Joy Kishen Mookerjee* (4 W. R., Act X Rul., 16.), *Lalla Gokool Pershad v. Raja Rajendar Kishore Singh* (W. R., 1864, Act X Rul., 4); and the following cases decided after the Full Bench case,—*Lalljee Sahoo v. Bhugwan Doss* (8 W. R., Civ. Rul., 337), and *Dhonaye Mundul v. Arif Mundul* (9 W. R., Civ. Rul., 306). In the Full Bench case—*Chunder Coomar Mundul v. Nunnee Khanum* (11 B. L. R., 434)—it was held, that the decision of a Revenue Court, in a case under cl. 6, s. 23 of Act X of 1859<sup>1</sup>, as to the genuineness of a mourosi patta, is not *res judicata* so as to estop a Civil Court from trying the validity of the patta in a subsequent suit in such Court between the same parties or parties under whom they claim. In this case on Baker Ali had sued under cl. 6 of s. 23 to recover possession of land from which he alleged that he had been illegally ousted, and which was included in a certain mourosi patta. The defendants alleged that the mourosi patta was spurious. Baker Ali succeeded, whereupon the defendant brought a suit in the Civil Court to have the patta declared to be a spurious document and to recover possession of the land. Jackson, J., doubted if suits [446] under cl. 6, s. 23 of Act X of 1859, were of the nature of possessory suit; but the other Judges who composed the Full Bench were agreed that the decision of the Revenue Court, except so far as it established the right of Baker Ali to the possession of the land when he was ejected, was a finding upon a collateral matter, and had not the effect of *res judicata* in the civil case.

I think the result of these cases is, that a case under cl. 6, s. 23 of Act X of 1859, was very similar in its nature to a case under the old section (15) of Act XIV of 1859, now s. 9† of the Specific Relief Act, I of 1877, and this being so, suits under cl. 6 to recover the occupancy or possession of land from which a ryot has been illegally ejected by the person entitled to receive rent for the same, differ materially from suits like those referred to in the Full Bench case of *Gooroo Doss Roy v. Ram Narain Mitter* (B. L. R., F. B. Rul., 628; S. C., 7 W. R., C. I. V. Rul., 147),—suits in which the plaintiff sets out his title and seeks to have his right declared and possession given him in pursuance of that title. To this latter class the twelve years' rule of limitation is applicable. In the Full Bench case, the suit was instituted by persons who had been ten years out of possession. While to the former

Cognizance of suits under this Act. \* [Sec. 23:—1. All suits for the delivery of pottahs or kubooliyets or for the determination of the rates of rent at which such pottahs or kubooliyets are to be delivered.

6. All suits to recover the occupancy or possession of any land, farm, or tenure, from which a ryot, farmer, or tenant has been illegally ejected by the person entitled to receive rent for the same.]

† [Sec. 9:—If any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he or any person claiming through him may, by suit instituted within six months from the date of the dispossession, recover possession thereof, notwithstanding any other title that may be set up in such suit.

Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.

No suit under this section shall be brought against the Government.

No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.]

class is applicable the one year's rule of limitation provided by s. 30 of Act X of 1859\*, which speaks of "all suits instituted under this Act," any specification being necessary, as such suits had been specified in s. 23. When Beng. Act VIII of 1869 was enacted, the specification of suits contained in s. 23 of Act X of 1859 became no longer necessary. And Act VIII enacted in general terms that all suits brought for any cause of action arising under Act X of 1859 were to be cognizable by the Civil Court according to their several jurisdictions (see s. 33)†. The object of the Legislature in passing Beng. Act VIII of 1869 was to transfer the trial of rent cases from the Revenue to the Civil Courts, and there was no intention to interfere with the special law of limitation provided for rent cases by Act X of 1859. In consequence, however, of the omission of the specification of suits in the Act of 1869, it became necessary, instead of the general words "all suits instituted under this Act" in s. 30 of Act X of 1859, to insert in the limitation section (27) of Beng. [447] Act VIII of 1869, a specification of the class of suits to which these special limitation provisions were applicable. Accordingly we find the words of cl. 6, s. 23 of Act X of 1859, "all suits to recover the occupancy [or possession] of any land, farm, or tenure from which ryot, farmer, or tenant has been illegally ejected by the person entitled to receive rent for the same," used with the omission of the two words in brackets, in s. 27 of the Act of 1869. It appears to me reasonable to suppose that it was intended by the use of these words to make the one year's limitation provided by the Act of 1869 applicable to the same class of suits only to which cl. 6 of s. 23 of Act X of 1859 had been decided to be applicable, and to which the one year's rule of limitation was applicable, under the same Act of 1859. I find that the same view has been taken by a former learned Judge of this Court (Phear, J.) in the case of *Nistarini v. Kali Pershad Dass Chowdhry* (23 W. R., 431).

*Appeal dismissed.*

Time for commencement of suits generally. \* [Sec. 30 :—Except as otherwise herein provided, all suits instituted under this Act shall be commenced within the period of one year from the date of the accruing of the cause of action. Amended by Act LIII., 1860. Amendment defunct.]

† [Sec. 33 :—Suits for the recovery of money in the hands of an agent or for the delivery of accounts or papers by agent, may be brought at any time during the agency, or within one year after the determination of the agency of such agent, or in the case of claims now existing within one year after the passing of this Act, or within the period now allowed for the institution of such suits in the Civil Court whichever may first expire. Provided that if the person having

the right to sue shall, by means of fraud, have been kept from the knowledge of the receipt of any such money by the agent, or if any fraudulent account shall have been rendered by the agent, the suit may be brought within one year from the time when the fraud shall have been first known to such person; but no such suit shall in any case (except the case of claims now existing as aforesaid) be brought at any time exceeding three years from the termination of the agency.]

Proviso.

[7 Cal. 447]

## REVISIONAL CRIMINAL.

*The 1st August, 1881.*

PRESENT :

MR. JUSTICE MORRIS AND MR. JUSTICE TOTTENHAM.

In the matter of Poona Churn Pal.\*

*Sanction to Prosecute—Presidency Magistrates' Act (IV of 1877), ss. 41, 42, 43, and 168—General and Specific Sanction—Order of Discharge—Superintendence of High Court—Charter Act (24 & 25 Vict., c. 104), s. 15.*

The only course to be pursued where it is sought to set aside an order of discharge made by a Presidency Magistrate, is that laid down in s. 168 of Act IV of 1877†, and as by that section there is no appeal allowed to a complainant who is a private individual, it is not open to him, by invoking the aid of the High Court under s. 15 of the Charter, to obtain under the Court's extraordinary powers that which he might obtain had he a right of appeal.

ON the 2nd May 1881, Poona Churn Pal obtained liberty, under the provisions of ss. 41 and 42 of Act IV of 1877, [448] from Mr. Justice Broughton, to prosecute one Dwarka Mohun Dass and his gomasta Anunto Hurry Pal, on the ground that the former, at the hearing of the suit of Dwarka Mohun Dass v. Poona Churn Pal, used as evidence on his behalf two documents purporting to be contracts, which were found by Mr. Justice Broughton not to be genuine, and that the latter had affirmed and filed a false affidavit in support of an application for leave to verify the plaint. At the prosecution at the Police Court, the two accused were charged under ss. 471, 193, and 209 of the Indian Penal Code. After summonses were issued and the parties had appeared, the Magistrate objected that no matter could be gone into which required sanction under s. 41 of the Presidency Magistrates' Act, and that the sanction obtained was a limited sanction. He held, therefore, that the prosecution under ss. 193 and 209 could not be entertained, but that the prosecution might proceed on the charge under s. 471. The complainant, not agreeing to waive his right to prove that the accused had fraudulently instituted a false suit and given false evidence

\* Criminal Rule, No. 190 of 1881, against an order of F. J. Marsden, Esq., Presidency Magistrate of Calcutta, dated the 9th July 1881.

†[Sec. 168:—The local Government may direct the Public Prosecutor or other officer specially or generally appointed in this behalf to present an appeal to the High Court from a Presidency Magistrate's order of acquittal or of dismissal, or of discharge; but in no other case shall there be an appeal by the prosecution from any order under this Act.

No appeal shall be presented under this section after two months from the date of the order complained of.

When an appeal is presented under this section, the High Court may order the accused person to be arrested and brought before it, and may commit him to prison pending the disposal of the appeal, or (if the offence of which he is accused be bailable) admit him to bail.

The High Court may, in any case so appealed, direct a new trial by any Presidency Magistrate, or may pass such order as may be warranted by law.]

at the trial of the suit, the Magistrate ordered the accused to be discharged, and fined the complainant Rs. 50, to be awarded to each of the accused by way of compensation.

A rule *nisi* was applied for and obtained by Mr. Lee on behalf of the complainant, calling upon the Magistrate to show cause,—*1st*, why the fines should not be remitted; *2nd*, why the sanction obtained should not be recognized in so far as it gave leave to prosecute under ss. 41 and 42 of the Presidency Magistrates' Act; *3rd*, and why he should not be directed to record the evidence of the complainant and his witnesses.

Mr. Jackson on behalf of the accused applied for and obtained a rule, calling upon the complainant to show cause why the accused should not be heard, the Court directing that the two rules should be returnable on the same day.

Mr. Lee, at the hearing of these rules, contended, that the accused had no *locus standi*, and no claim as of right to appear at the argument of the rule, because this was not an appeal from the Magistrate's decision, but an application to the High [449] Court to exercise its general powers of superintendence under s. 15 of the Charter, and that, inasmuch as the Court had no power to compel the accused to refund the Rs. 50 given to him as compensation, he would have no right to appear to defend at that point of the case. [On Mr. Bonnerjee, who appeared for the Magistrate and the Crown, informing the Court that he had no objection to the accused being heard, the Court decided, that as the accused was present and represented by Counsel, he had a right to appear.]

Mr. Bonnerjee, on behalf of the Magistrate and the Crown, showed cause against the rule, contending, that the application was in the nature of an appeal, and that being so, the petitioner had no *locus standi*, as appeals against acquittals could only be instituted by the Local Government as laid down in s. 168 of the Presidency Magistrates' Act. That the Magistrate had not acted illegally, for the sanction to prosecute was limited and not general, and that the Magistrate had no jurisdiction to hear a complaint of any offences which were not specifically mentioned in the sanction. The prosecution have no right to make this application. Section 147 of the Criminal Procedure Code is not wide enough to allow the High Court to entertain it: *The Empress v. Gasper* (I. L. R., 2 Calc., 278). [MORRIS, J.—Section 147 is for the promotion of justice.] The power of the Court has been curtailed by the Presidency Magistrates' Act.

Mr. Jackson (with him Mr. M. Ghose and Mr. Trevelyan) for the accused.—If the right of setting aside an order exists under s. 147, it exists as well for the public as the Government; but if so, how is it that the Legislature has provided that no appeal from an acquittal shall lie except one presented by Government? *Empress v. Miyaji Ahmed* (I. L. R., 3 Bomb., 150). Then, can persons come up to the Court by way of revision when they have no right by way of appeal. The case of *The Corporation of Calcutta v. Bheecurram Napsit* (I. L. R., 2 Calc., 290), lays down that s. 147 is only applicable to cases of conviction, whereby a defendant is aggrieved; complainants cannot come up under it. Nor will [450] the Court exercise its extraordinary powers under s. 15 of the Charter, when there is an appeal: *Rajcoomar Singh v. Dinonath Ghuttuck* (1 C. L. R., 352). The case of *In re Balaji Sitaram* (11 Bomb., 34) gives the requisites of a proper sanction. The petition on which the rule

was obtained is not accurate, and it does not appear that the person signing it was present at the Police Court. The following cases show that where material facts have been kept from the Court, the Court has always refused to entertain any application founded thereon :—*The Attorney-General v. The Mayor of Liverpool* (1 My. and Cr., 210), *Wilson v. Callender* (9 Moore's P. C. Ca., 100), *Sibmarain Ghose v. Hulodhur Doss* (9 Moore's P. C. Ca., 354). As to the question of refund of the fine, the Court has no power to make such an order : *The Queen v. Hadjee Jeebun Bux* (I. L. R., 1 Calc., 354).

Mr. Lee in support of the rule.—The Court has undoubted power to interfere under s. 15 of the Charter, even supposing that the application cannot be made under s. 147 of the Criminal Procedure Code. The application is not made by way of appeal, because there has been no trial, and s. 168 has reference to acquittal, dismissal or discharge after an enquiry of some sort. The Magistrate refused to do his duty by refusing to take evidence on the first two charges, and by wrongfully interpreting the sanction given by the High Court to be a limited one only. Further, the award of compensation was illegal. Section 242 of the Presidency Magistrates' Act provides that a sum not exceeding Rs. 50 should be allowed for compensation if it appear that there be not sufficient ground for the complaint, but the sanction granted by the Court must be taken to be sufficient ground; nor has the Magistrate power to fine until he has heard the case, or a sufficient portion of it, to enable him to decide that there was no good ground for the complaint. As regards the jurisdiction of the High Court to interfere, see *Chunder Coomar Roy v. Omesh Chunder Mojomdar* (22 W. R., Crim., 78).

[451] The judgment of the Court (MORRIS and TOTTENHAM, JJ.) was delivered by

**Morris, J.**—We are asked to exercise our powers of superintendence under s. 15 of the Charter Act, by remitting certain compensation awarded to two persons, who have been complained against by the petitioner, and by setting aside an order of discharge made by the Presidency Magistrate, and directing the trial of the case to be proceeded with, in the light of a construction which ought to have been put, but was not put, upon an order of sanction to a prosecution made by Mr. Justice Broughton, after judgment passed in a civil suit on the Original Side of the High Court, in which the petitioner was defendant, and the persons complained against, plaintiffs.

After hearing the learned Standing Counsel in support of the action taken, and orders passed, by the Presidency Magistrate, and also Mr. Jackson who appeared, and whom we permitted to address us, on behalf of the persons who would be affected by any order directing a further trial of the case, and after considering the arguments addressed to us in reply by Mr. Lee, we are of opinion that we cannot properly exercise powers of superintendence, under the Charter Act in this matter, and that the application must be rejected.

In the first place, s. 168 of the Presidency Magistrates' Act prescribes the course, and it seems to us the only course, which must be taken when an order of discharge made by a Presidency Magistrate is sought to be set aside. The Government alone have a right of appeal, and clearly, as was argued before us, no such special exception would have been made by the Legislature in favor of the Government, if both the Government and private individuals could obtain the same end by an application invoking the aid of the Court under s. 15 of the Charter Act.

Mr. Lee contends, that s. 168 of the Presidency Magistrates' Act relates only to cases in which a trial has been had, and that it has no application to a case, such as the present, in which the order of discharge was given in the course of proceedings preliminary to trial. Mr. Lee refers to the fact that, on the day fixed for the trial, when both parties were before the [452] Court, no examination of the complainant and of his witnesses was made, the reason being that the Presidency Magistrate, upon the view which he took of the sanction given by Mr. Justice Broughton, refused to allow the prosecution to proceed on all the charges specified in the summons.

This objection, though, perhaps, started by the Presidency Magistrate himself, was, undoubtedly, taken by Mr. Ghose, the counsel for the accused; and this being so, it seems to us, having regard to the provisions of s. 119, Act IV of 1877\*, that the trial, in the sense in which the word 'trial' is used in the Act had then commenced. By this objection, we understand the accused to have shown cause why they should not be convicted, and their objection prevailing, they were ordered to be discharged.

Then again, in the matter of setting aside the order, which practically amounted to a fine upon the complainant, by which compensation was awarded to the accused, we think that we are powerless to interfere. The award of compensation is a matter which lies entirely within the discretion of the Presidency Magistrate, and from the statement of the facts of the case, which has been presented to us, we are quite unable to say, that that discretion has been unreasonably, or improperly, exercised. The accused were certainly put to a considerable amount of harassment by being brought on two different occasions before the Court, and on neither occasion did the complainant see fit to prosecute his case. On the last occasion,—that is to say, on the 9th July, even on the view taken by the Magistrate of the limited character of the sanction given by Mr. Justice Broughton, there was nothing to prevent the complainant from adducing evidence against the accused.

The Counsel for the complainant admits that he refused to go on with the case, in the hope that the Magistrate would allow an adjournment to enable him to refer to Mr. Justice Broughton, and obtain from him an expression of opinion as to the nature of the sanction granted by him. It seems to us that the Magistrate was quite within his right in refusing to allow the trial to stand over, and his order of discharge was in accordance with law.

[453] This order is no bar to further proceedings being taken by the petitioner, if he be so advised, and this renders interference by this Court, under s. 15 of the Charter Act, entirely unnecessary.

This application is dismissed, and the rule discharged.

*Rule discharged.*

\*[Sec. 119 :—On the appearance of both parties on the day fixed for the trial, the substance of the complaint shall be stated to the accused person, and he shall be asked if he has any cause to show, why he should not be convicted.]

Procedure on appearance of parties.

[7 Cal. 453]

## ORIGINAL CIVIL.

*The 24th June, 1881.*

PRESENT :

MR. JUSTICE WILSON

Provabutty Dabee.....Plaintiff

*versus*

Mohendro Lall Bose...Defendant.

*Ancient Lights—Enlargement of Window—Obstruction—Notice—Delay—  
Mandatory Injunction.*

Where a person, who has a right to light from a certain window, opens a new window, or enlarges the old one, the owner of an adjoining house has a right to obstruct the new or enlarged opening, if he can do so without obstructing the old, but if he cannot obstruct the new without obstructing the old, he must submit to the burden.

A plaintiff entitled as of right to light and air through a certain window, subsequently enlarged it, and on the light thereto being interfered with by the defendant, gave him notice to remove the obstruction two days after it had been completed.

*Held*, that he had been guilty of no delay in taking steps to prevent the obstruction, and that he was entitled to a mandatory injunction requiring the defendant to remove it.

THE plaintiff, a Hindu lady, stated, that she was the owner of a certain house, numbered 56, Panchanuntollah Lane, and that adjoining these premises to the north and west, stood a house belonging to the defendant; that, in October 1880, the defendant, notwithstanding remonstrance, commenced to build a wall which, when completed, obstructed a window in the north wall of her house, and deprived her of the access of light and air [454] to the room to which the said window belonged, an easement which the plaintiff claimed to have enjoyed without interruption for twenty years and upwards. She further stated, that, in building such wall, the defendant had dismantled the cornice of the terrace which rested on the north wall of her house; and after calling upon the defendant, on the 11th October, without success, to remove the said wall, she, on the 14th October, sent him a formal notice, and subsequently brought this present suit to compel him to remove the wall and to restore the said window and cornice to their pristine condition, asking at the same time for a perpetual injunction restraining the defendant from, in any way, interfering with the plaintiff's property, and in the alternative for damages.

The defendant denied the easements claimed, and stated that the window in question had been opened about seven years before the date of suit, by one Goonjaree Coomar Bose, with the consent of his (the defendant's) predecessor in title; and further denied the encroachment.

It appeared from the evidence that the window in the north wall had been in existence a sufficient time to give the plaintiff a right to claim the easement;

but that, originally, the window had been of about 2 feet by 2½ feet in size, but that, ten or eleven years before the date of suit, it had been enlarged to 5 feet by 2½ feet. That, as regards the encroachment, it was clear, that the defendant had so built his wall as to encroach upon the plaintiff's cornice. That, as to the question as to whether the plaintiff had disintitiled herself to an injunction by delaying to send to the defendant notice of her objection to the interference with her lights, it was shown, that she had sent notice to the defendant to remove the wall a day or two after it had been finished.

Mr. *Jackson* (with him Mr. *Bonnerjee*) for the plaintiff.—This is not a case of diminution, but of total obstruction, of light. If the window was opened with permission, as is stated in the written statement, then, on the authorities, the defendant would be out of Court. The original window was enlarged [455] a few years ago, and on the authority of *Tapling v. Jones* (11 H. L. C., 290), if the defendant cannot obstruct one new light without obstructing the old one, he cannot obstruct at all. As to the alleged permission it amounts to this: "you enlarge your window, and I will not obstruct it;" it comes to a question of acquiescence; see *Cotching v. Bassett* (32 Beav., 101). We allege an absolute encroachment as to the cornice, and that is apart from the question of light. A perfect title is not necessary to support the right.

Mr. *Palit* (with him Mr. *Allen*) for the defendant.—The case opened and proved is not that which is stated in the plaint. [WILSON, J.—To my mind it is a matter of serious importance, where there is a diversity between the case stated in the plaint and the case made out: but that is in cases where the plaintiff speaks from personal knowledge.] Supposing the window to have been enlarged, the plaintiff is not entitled to light and air—*Cotching v. Bassett* (32 Beav., 101). Where the owner of a building, having ancient lights, replaces them by new larger windows, the Court will not interfere by injunction to restrain the owner of the servient tenement from obstructing them—*Heath v. Bucknall* (L. R., 8 Eq., 1), *Tapling and Jones* (11 H. L. C., 290), applies only to the right of an owner to recover damages at law. [WILSON, J.—The case of *Staught v. Burn* (L. R., 5 Chanc. App., 163) shows, that *Tapling and Jones* (11 H. L. C., 290), applies to the equitable as well as to the legal remedy.] The Court will not grant an injunction unless there has been substantial damage—*Aynsley v. Glover* (L. R., 18 Eq., 553; S. C. on App., L. R. 10 Ch., 283.)

**Wilson, J.**—The plaintiff in this suit is the owner of the house No. 56, Panchanuntollah Lane, the defendant is the owner of the house No. 63 in the same lane; and as to a portion of the two houses, No. 63 stands immediately adjacent to and north of the north wall of No. 56. The plaintiff complains that, in the course of certain building operations which took place in No. 63, the defendant has built a wall so as to block up altogether the light to a window of the north wall of No. 56, by which light was afforded to one of the rooms of that [456] house, and has encroached laterally on the soil of No. 56, interfering with the cornice, which has been variously described by the witnesses as a brick band, a string course, and a sailing course.

The first question is, whether the plaintiff has shown a right to access of light through that window: 2ndly, whether there has been a lateral encroachment; and 3rdly, what is the remedy.

The first question is of great importance to the plaintiff,—namely, whether she has a right to access of light through that window. If the window is twenty years old, she has acquired the right to light, subject to the question



I shall refer to presently, as to the enlargement of the window. If the window is not twenty years old, she has not acquired that right.

On the part of the plaintiff a large body of evidence has been given : evidence of a satisfactory kind,—that is, evidence of the right class of persons. The first witness called by the plaintiff was Omritolall Gangooly, the owner of the premises No. 57, part of what was formerly No. 31, out of which several plots, including 56 and 63, the premises of the plaintiff and defendant, have been carved out. He says, that, from the earliest time, he recollects that that room was in existence, and the north wall, and a window in that wall. I think he speaks the truth. The next witness was Radha Gobind Chatterjee. He has lived a great number of years on the premises, and remembers the wall and the window. The next witness is Ramlall Koberaj, a very important witness : he swears to having lived a long time in the house. His father was the family Koberaj. I think he speaks the truth. The next witness is Preonath Mookerjee. He remembers the window and wall. The next was Nityanund Pyne. He remembers the wall and the window.

Some of the witnesses recollect the alteration to the window.

There are at least three persons, Omritolall Gangooly, Ramlall Mookerjee, and Preonath Mookerjee,—all of whom lived in the house and used the privy. That is evidence of a character which must carry very great weight, unless there be anything to discredit it.

Then we have the evidence on the part of the defendant, of the man who was the intermediate owner of the premises, Soorjee Coomar Bose. He must know whether this window [457] existed there at the time of his purchase or not. He must know, or have wilfully stated what was false.

He says there was no window down to the reading of the Mahabarat, and that he then made the window.

He is not an independent witness like those on the other side. He has acted under the defendant with reference to this very building.

The next witness was Mohendro Nath Dass, the previous owner of No. 63. He swears to the making of the window before the time in question. Mohendro Nath Dass is a man very much mixed up with the defendant in business matters, and he cannot be called an independent witness.

The next is an important witness, Khoda Nawaz, the mistry. He swears he was employed to open the window. He is by no means an independent witness. He was under the direction of the first witness, Soorjee Coomar Bose, and employed by him and by the Seal family ; and with regard to him it would take a very small slip of memory, or a very small perversion of fact, to mistake the enlargement of a window for the opening of a window. He has no books, he depends on his memory, and he might, without any intention of making a false statement, represent the enlargement of the window as the opening of it.

Then Rakhaldass Chunder says,—he has known the plaintiff's house for a very considerable number of years, and has not known the window before. I do not value the evidence of such witnesses. People who have no interest might not notice these things. The same remark applies to Kali Kurmocar.

The plaintiff's evidence is far more reliable and free from suspicion than that of the defendant's witnesses. I think, it has been shown that there was an old window in this wall, which was enlarged at the Mahabarat reading.

I find in favour of the plaintiff on the first question, whether she has acquired a right to access of light through this window.

The second question has been settled by Mr. Bayne's evidence. There was some doubt on the point till he was examined.

On Mr. Walker's evidence the matter was left in some doubt. [458] He assumed that the wall rose from the ground. The plaintiff had better means of ascertaining, and she gave the same account as Mr. Bayne, though Soorjee Coomar said exactly the contrary. He said it was a wall built on foundations from the ground.

On the outer face of the north wall of the plaintiff's house, below the foot of the window in question, there was a string course projecting from the general surface of the wall. Mr. Bayne explained that the wall was made to rest on a beam, which was supported on one end on a back wall of the house No. 63, and on the other end by a pillar. The beam was on a level with this string course, and rested not in contact with, but above it, and in contact with the surface of the plaintiff's wall, and built so up to the top. That shows an encroachment, because the defendant had no right to build beyond the outside limit of the plaintiff's building. On Mr. Bayne's evidence and the other evidence it is shown, that there was on the top of the building a cornice projecting over and described to be 5 to 7 inches in width. From Mr. Bayne's account it is clear that, to the extent of that cornice, there has been an encroachment.

He stated, that if there be a cornice there has been an encroachment to the extent of that cornice.

The third question is, what is the remedy. The plaintiff, whose light has been obstructed, is entitled to a mandatory injunction, unless she has disintitiled herself to the right.

With regard to the law, the question is set at rest by the judgment of the House of Lords in *Taphu v. Jones* (11 H. L. C., 290), and it is clear that if a man has a right to light from a certain window and opens a new window, the owner of an adjoining house has a right to obstruct the new opening if he can do so without obstructing the old, but if he cannot obstruct the new without obstructing the old, he must submit to the burden.

This window was enlarged. It appears to me that the defendant acquired no right to obstruct that window for that reason—[459] *Staught v. Burn* (L. R., 5 Chan., 163) and *Aynsley v. Glover* (L. R., 18 Eq., 544; S. C., on appeal, L. R., 10 Chan. App., 283). Therefore, unless some other circumstances are shown to deprive the plaintiff of her right to an injunction, it seems to me she is entitled to an injunction.

The only other ground to disentitle her is delay. It is right to see to the evidence on this point.

The evidence is that of Nobin Chand Bural, Shosheebhusun Chuckerbutty, and Trigonanath Mookerjee.

Nobin Chund Bural tells us that, having received a communication from the husband of the plaintiff, he saw the premises, and sent first a private note and then a formal notice to the defendant. Assuming that Nobin Chund Bural used proper diligence, and there was no delay, was Nobin Chund Bural's notice

in proper time? It must be remembered that it was not the building on the place in question that was wrong. The defendant had a right to raise his building as high as he liked, so as not to obstruct the light. No one could interfere until it became apparent that the defendant was going to obstruct the light.

The work began on the 6th day of the poojah, and was finished the day after.

That is confirmed by the Sircar, who says, that the building of the wall took two or three days.

Then he says he was sent by the plaintiff's husband, who came on the last day.

Then Trigonath Mookerjee was called. He is the plaintiff's husband. He went to the defendant's premises and found them locked, and the next day he went to the place and saw the mistress, and the same day went to Nobin Chand Bural. I am of opinion that the plaintiff and all who acted with her acted with all diligence.

The proceeding of the defendant was a very rapid one, and the plaintiff gave formal notice to the defendant in proper time.

There was some obscurity as to whether the notice had been received by the defendant. The witness Mohendro Nath Dass [460] put that at rest, because he said, that he was told by the defendant himself that he had received a notice.

That the letter and notice were received by the defendant at the time is clear, for he has not chosen to go into the box to deny it.

I find there was no delay on the part of the plaintiff in taking steps to prevent the defendant from building his premises.

There was some conflict as to the state of the building at the time of the service of the notice. The Sircar says the walls were finished and the roof on, but that was impossible. The notice was given in a day or two after the wall was run up. It is impossible that in two days the roof could have been laid on and the floor completed.

I am quite satisfied that this wall and the other walls were completed, but that that was all.

I don't think, the plaintiff was guilty of any laches or carelessness. She gave notice as quickly as she could.

It appears to me that the plaintiff is entitled to the injunction she asks for, and that is an injunction requiring the defendant to remove so much of the building as obstructs the light of the window, and so much of the encroachment as interferes with the upper cornice of the plaintiff's house. Injunction to be, that defendant remove so much of his building as obstructs the light of the plaintiff's window or interferes with the upper cornice of the plaintiff's house.

Attorneys for the plaintiff : Messrs. *Mitter* and *Bhunjoo*.

Attorneys for the defendant : Messrs. *Swinhoe & Co.*

## [461] APPELLATE CIVIL.

*The 27th June, 1881.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND Mr. JUSTICE McDONELL.

Narian<sup>\*</sup> Khootia.....Plaintiff*versus*

Lokenath Khootia and another.....Defendants.\*

*Alienation—Impartible Raj—Chota Nagpore—Limitation Acts (IX of 1871),  
sched. ii, cl. 127 ; and (XV of 1877), s. 2, and sched. ii, cl. 127.*

The fact that the Raj of Chota Nagpore is an impartible one, does not prevent the Maharaja for the time being from alienating a portion of it in perpetuity.

Under Act IX of 1871, sched. ii, cl. 127,† the limitation for a suit by a person excluded from joint family property, to enforce a right to share therein, was twelve years from the time when the plaintiff claimed and was refused his share. Under Act XV of 1877, sched. ii, cl. 127, the limitation for such a suit is twelve years from the time the exclusion becomes known to the plaintiff.

*Held*, that the period of limitation prescribed by the latter Act is shorter than the period prescribed by the former Act, within the meaning of s. 2, Act XV of 1877

In this suit the plaintiff, Narian Khootia, claimed to recover a one-third share of seven villages under the following circumstances. Juggernath, Gobind, and Ram Chunder were brothers, employed in the worship of Juggernath at Puri, in the district of Cuttack. The plaintiff alleged that he was the adopted son of Gobind ; that certain villages belonged to his adoptive father and his father's brother, under certain grants made to their ancestors by the Maharaja of Chota Nagpore, for the performance of services in the temple of Juggernath. He further alleged, that the defendant No. 1, Lokenath Khootia, was the adopted son of Juggernath ; that Soobadra, the defendant No. 2, was the daughter of Ram Chunder ; that Juggernath, Gobind, and Ram Chunder, during their lives, enjoyed the property in question ; and that, after their deaths, the defendant [462] No. 1, in conjunction with the plaintiff's adoptive mother (Kumla), and Nilmoney, the mother of Soobadra, continued in possession of it. The plaintiff went on to say, that, after the death of Kumla and Nilmoney, the defendant

\* Appeal from Original Decree, No. 20 of 1880, against the decree of A. W. B. Power Esq., Deputy Commissioner of Lohardugga, dated the 14th of October 1879.

†[Art 127.—

Description of suit.	Period of limitation.	Time when period begins to run
By a Hindu excluded from joint family property to enforce a right to share there-in.	Twelve years ...	When the plaintiff claims and is refused his share.]

No. 1 deprived the plaintiff of his share, and on the 11th September 1875, got his (defendant's) name registered on the Court of Wards of Pargana Chota Nagpore, as the sole owner of the entire property.

The plaintiff has, therefore, brought this suit to recover his one-third share from the defendant No. 1, making Soobadra a defendant, who, however, has not appeared to defend, and has taken no part in the proceedings. The defendant admitted that, as regards five of the villages claimed, a *putro putrodik* grant was made of them by the Maharaja of Chota Nagpore to the three brothers, Juggernath, Gobind, and Ram Chunder; and he also admitted that, during their lives, they all used to perform the worship of the idol jointly out of the proceeds of the property. He further said, that Ram Chunder and Gobind died, one after the other, childless, and that, since then, he, the defendant No. 1, had been in possession of the property, and had performed the services without the interference of any of the family. He further stated, that Maharaja Juggernath Sahi Deo, the son of the original grantor, granted to him, the defendant, a registered deed in respect of the said five mouzas, and also another deed in respect of two other mouzas, which were claimed by the plaintiff, of which he had been in possession ever since, and that he had defrayed the expenses of the worship out of their proceeds. The defendant further denied that the plaintiff was the adopted son of Gobind.

The Deputy Commissioner dismissed the suit upon the following grounds: He considered that the original grant by the Maharaja, which the defendant admits to have been a *putro putrodik* grant, was resumable at the pleasure of each succeeding Maharaja. He found that, during the lives of the widows of Gobind and Ram Chunder, those ladies enjoyed the property in question jointly with the defendant No. 1 (the latter, however, performing all the religious services in respect of which the property was granted), and he seemed to [463] think, that, after the death of those widows, the defendant No. 1 had a right to appropriate the whole of the property, and that, by the grant, which was made to him by the succeeding Maharaja, the right to the villages became vested in him to the exclusion of the plaintiff and any other persons claiming under the original grant. He also seemed to think, the evidence showed the plaintiff would not be a fit person to perform the services of the idol; and lastly, that, inasmuch as the plaintiff had not been in possession of the rents for more than twelve years before suit, his claim was barred by limitation. The plaintiff appealed to the High Court.

Baboo Umbica Churn Bose and Baboo Chunder Madhub Ghose for the appellant.

Mr. Twidale and Baboo Jogesh Chunder Dey for the respondents.

The **judgment** of the Court (GARTH, C. J., and McDONELL, J.) was delivered by

**Garth, C. J.**—[His lordship here stated the facts above set out, and, having gone through the evidence, found, that, though there was sufficient proof that the plaintiff was the adopted son of Gobind, yet there was no sufficient proof of the plaintiff's title or possession. His lordship then continued.]

If the case, therefore, had rested on the plaintiff's evidence, we must have dismissed the suit, although not upon the grounds relied upon by the Deputy Commissioner.

We think, however, that the case must be decided upon the admission of the defendant No. 1. He admits distinctly that a *putro putrodik* grant was made

by the Maharaja of Chota Nagpore to his own adoptive father, Juggernath, and his two brothers Gobind and Ram Chunder. The nature of such a grant is well known. It is an hereditary grant, in which all the members of a Mitakshara family would be entitled to share, and which would descend (from father to son) like any other ancestral property.

The defendant No. 1, who claims to be the adopted son of one of the original grantees, would have no better right to the [464] property than the plaintiff, who is the adopted son of another of the grantees; and we do not understand upon what ground the Deputy Commissioner supposes that such a grant is resumable at the pleasure of any succeeding Maharaja.

It may be, that the Raj of Chota Nagpore is impartible, and we believe that it is so; but that only means, that the Raj descends to the eldest son, and is not divisible amongst the other sons or grandsons of the Maharaja.

The fact that the Raj is impartible does not prevent the Maharaja for the time being from making grants of the land in perpetuity. As long, therefore, as there were any other of the descendants of the original grantees capable of taking under that grant, the defendant No. 1 had no right to appropriate the property to himself, nor had the Maharaja any power, as far as we can see, to deprive the plaintiff of the benefit of the original grant, or to make any exclusive grant to the defendant No. 1. So long as the plaintiff's adoptive mother, Kumla, and Nilmoney lived, it would appear that they were allowed to share in the proceeds of the property; and we strongly suspect, that, after Kumla's death, the defendant No. 1 took advantage of the tender age of the plaintiff to deprive him of his rights, both as regards the property in question and his turn of worship, and to obtain for that purpose an exclusive grant to himself. It is clear from the evidence on both sides, that the plaintiff has taken some part in the services of the idol, although an inferior part to that taken by the defendant No. 1.

The only other point is with regard to limitation. It seems to have been considered by the Court below, that the ordinary twelve years rule of limitation was applicable to this suit; but we think, that the appellant is right in his contention that the case comes under cl. 127\* of the Limitation Act, as being a suit brought by a person excluded from joint family property to enforce a right to a share therein.

It is true that, under the Act of 1877, the time in such a case begins to run when the exclusion becomes known to the plaintiff; and it is probable that the plaintiff may have known that he was excluded from the property more than twelve [465] years before suit; but by s. 20 of the Act it is provided, that in any suit for which the period of limitation prescribed by that Act is shorter than the period prescribed by the Act of 1871, the suit may be brought within two years next after the 1st October 1877.

Now, under the Act of 1871, the twelve years under such circumstances would have been from the time, "when the plaintiff claimed and was refused his share" (see cl. 127). It does not appear in this case that the plaintiff ever claimed or was refused his share, at any rate until 1875, and consequently he had twelve years from 1875, within which to bring his suit. That period was shortened by the Act of 1877, because the time under the latter Act would run from the time when the exclusion first became known to the plaintiff; and

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\*[q. v. *supra*, 7 Cal. 461.]

therefore, under s. 2, the plaintiff was entitled to two years from the 1st October 1877 to bring his suit. He is, therefore, in ample time.

We have some doubt whether, having regard to the fact that this is a Mitakshara family, and that the plaintiff and defendant appear to be now the sole male members of it, the plaintiff has not a right to a larger share than he claims; but as he has abstained from giving the Court any information, we can only make a declaration, that he is entitled to hold the five villages jointly with the defendant No. 1 and any other persons who may be entitled under the original grant, provided that the share to which he is entitled does not exceed one-third of that property.

The appellant will be entitled to his costs from the defendant No. 1, in both Courts.

*Appeal allowed.*

# NOTES.

[It is now settled that an impartible Raj is not, in itself, also inalienable, in the absence of any custom to the contrary. See 10 All. 272 (P. C.) where the above was approved of.]

[466] *The 25th May, 1881.*

PRESENT :

MR. JUSTICE MORRIS AND MR. JUSTICE PRINSEP.

Kalytara Chowdhrair.....Decree-holder\*.

*versus*

Ramcoomar Gupta.....Judgment-debtor.

*Execution of Decree—Sale in Execution—Material Irregularity—Civil Procedure Code (Act X of 1877), ss. 274†, 289, 311.*

Under ss. 289 and 274 of the Civil Procedure Code, it is necessary that a copy of the sale-proclamation should be affixed to some conspicuous place on the property attached; and the omission to do so is a material irregularity within the meaning of s. 311 of the Code of Civil Procedure.

If it is proved that the price obtained for property sold at an execution-sale is greatly inadequate, and if it be also proved that there has been a material irregularity in publishing or conducting the sale, the Court will presume that the irregularity was the cause of the inadequacy of price, until proof is given to the contrary.

*Gopee Nath Dobey v. Roy Luchmeeput Singh* (I. L. R., 3 Cal., 542) approved.

THIS was an appeal from an order of the Subordinate Judge of Tippera, dated the 28th of February 1880, setting aside a sale in execution of a decree. The judgment-creditor, who was also the purchaser at the sale, appealed to the High Court, and the appeal was decided on the 21st of August 1880. In

\* Appeal from order No. 124 of 1880, against the order of Baboo Uma Churn Kastogiri, Subordinate Judge of Tippera, dated the 28th February 1880.

†[*q. v. supra*, 7 Cal. 41.]

their judgment the learned Judges (MORRIS and PRINSEP, JJ.) say :—“ So far as the evidence goes, we think it clear that the price realized was very much below the proper value of the property sold. It is on record that, in addition to the decree-holder, who purchased, there were only two bidders; and this paucity of bidders, no doubt, accounts for this unfortunate result. Substantial injury to the debtor is, therefore, established; but the law (s. 311) also requires that such substantial injury must have been the result of some material irregularity proved to have taken place in publishing or conducting the sale. In the present case the irregularity complained of is stated to have been the omission to publish the sale-proclamation on the property attached by affixing it on some conspicuous place thereon.” The learned Judges went on to say :—“ Reading [467] s. 289 of the Civil Procedure Code with s. 274, we are of opinion that the sale-proclamation cannot properly be made, unless it be affixed on some conspicuous part of the property attached. Here the evidence shows that the sale-proclamation, though made by beat of drum near the debtor's cutchery, yet was not affixed on the cutchery itself, but only on a *burh* tree in Rampore Hat, the exact position of which, with reference to the attached property, is doubtful. As to this, it is contended before us, that it is not shown that this omission or irregularity was the direct cause of the small price bid at the sale. If strict proof were required of this, a sale would rarely, if ever, be set aside, although the gravest irregularity might have been committed, and although a grossly inadequate price might have been obtained. The best evidence on the point would, no doubt, be that of a person stating that he was prepared to attend and bid for the property; but that, although he was cognizant of the attachment, he was not informed of the sale, because no proclamation had been fixed upon any portion of the property. But it would be impossible for a Court always to insist on such strict proof, because the debtor would be nearly always unable to obtain it even if such evidence did exist. Whenever, therefore, there is any great inadequacy in the price obtained, and there is also proof that there has been some material irregularity in the sale-proceedings, a Court is always inclined to connect one with the other, and to presume that the substantial injury has been the result of the irregularity. Such is the principle on which the case of *Gopee Nath Dobey v. Roy Luchmeeput Singh* (I. L. R., 3 Cal., 542) was decided. Some cases have been brought to our notice, in which the Court required strict proof rather than presumption, but each case must be decided on the particular facts established. In the present case . . . we think that it has not been shown that it was affixed in the manner required by law on any conspicuous spot within the attached property, because it has been left in doubt whether the *burh* tree in Rampore Hat is or is not within that property. If Rampore Hat is not within the attached property, then, in our opinion, there has been a material irregularity in the proclamation of sale, which may reason-[468] ably be presumed to have caused the extreme inadequacy of price which constitutes the substantial injury sustained by the debtor. The case will, therefore, be sent to the Subordinate Judge in order that the parties may have an opportunity of submitting evidence before him on this issue. ‘Is the *burh* tree in Rampore Hat within or without the attached property?’ After taking such evidence as the parties may produce, the Subordinate Judge will return the record with his findings thereon for the opinion of this Court.” The Subordinate Judge, on the 5th of March 1881, found that the *burh* tree was not proved to be within the attached property, and returned this finding to the High Court. The appeal then came on for final disposal.

Mr. H. Bell, Mr. W. M. Dass, and Baboo Rash Behary Ghose for the appellant.



Baboo Ishur Chunder Chuckerbutty and Baboo Loll Mohun Doss for the respondent.

The judgments of the Court (MORRIS and PRINSEP, JJ.) were as follows :—

**Prinsep, J.**—Having found in concurrence with the lower Court that a copy of the proclamation of sale was not affixed to some conspicuous place within the property attached and to be sold, and that the very inadequate price realized may be fairly attributed to this omission, it becomes necessary to consider the point taken by the learned Counsel for the appellant that this was a formality not required by the law then in force. The proceedings were taken on the 30th July 1879, and were therefore to be regulated in accordance with the Code of Civil Procedure as amended by Act XII of 1879. Section 289\*, as it now stands amended by Act XII, is to the following effect :—

“The proclamation shall be made in manner prescribed by s. 274 on the spot where the property is attached, and a copy thereof shall be fixed up in the Court-house; and in the case of land paying revenue to Government, also in the Collector’s office.”

It is contended by Mr. H. Bell, that the manner in which the proclamation is to be made on the spot refers merely to the [469] beating by drum, and that the provision made for the affixing of a copy of the sale-proclamation in the Civil Court and in special cases also in the Collector’s Court, and the omission of any similar provision regarding a copy on the spot, indicates the intention of the Legislature not to require this formality. I am unable to accept this view of the law. A consideration of s. 289† as it originally stood will clearly show the reason for the addition made to it by the Amending Act.

“The proclamation shall be made in manner prescribed by s. 274 on the spot where the property is attached.”

This is how the law was first expressed, and applying s. 274 to make a sale-proclamation on the spot where the property was attached, it was necessary to use the words of s. 274, that it should be “proclaimed at some place on or adjacent to such property (*i. e.*, the property to be sold) by beat of drum or other customary mode, and a copy should be fixed up in a conspicuous part of the property.”

The law was altogether silent regarding the affixing of a copy of the sale-proclamation elsewhere. This omission was discovered, and accordingly an addition was made to s. 289, by enacting “and a copy thereof shall be fixed up in the Court-house, and in the case of land paying revenue to Government, also in the Collector’s office.”

This in no way affected the previous part of s. 289, which still remained in force. I cannot, moreover, suppose, that the Legislature can have intended to enact that the fixing up of a copy of the sale-proclamation on a conspicuous part of the property should be discontinued without some express provision to that effect, as it is one of the most important formalities in connection with the due publication of a proclamation, and is always necessary in the making of proclamation under other laws for other purposes, to supplement the proclamation by word of mouth after beating of the drum.

We therefore set aside the sale, and dismiss this appeal with costs.

\*[*q. v. supra*, 7 Cal. 84.]

†[*q. v. supra*, 7 Cal. 41.]

Now, I am assuming that Act I. of 1877, as amended by Act XII. of 1878, regulates the procedure to be followed in this case, I think that the construction put on s. 289 by my learned colleagues is the right construction. It seems to me that the Legislature never intended to discard one of the most important elements in the publication of a sale-proclamation, viz., the affixing a copy of the order of proclamation of sale on a conspicuous part of the property to be sold. Section 289, as originally drafted, by its terms limited the making of the proclamation to "the spot where the property is attached," so it was to correct this apparent limitation that the Amending Act extended the mode of making the proclamation by adding the words "and a copy thereof shall be fixed up in the Court-house, and in the case of land paying revenue to Government, also in the Collector's office." These additional words, or at least the substance of them, is to be found in s. 274; and it is, evident that, by supplying them to s. 289, the Legislature simply intended to prescribe the adoption of precisely the same mode of making the proclamation of sale as it had previously prescribed in s. 274, for making attachment of immoveable property.

*Appeal dismissed.*

#### NOTES.

##### [PRIVY COUNCIL.

The above case in so far as it laid down that whenever there was inadequacy of price and material irregularity in publishing or conducting the sale, the courts will always presume that the irregularity was the cause of the inadequacy, must be considered to have been overruled by 21 Cal. 66 P. C., according to which **direct evidence** was necessary for the purpose.

##### CALCUTTA HIGH COURT.

But even after the Privy Council decision, the Calcutta High Court continued to hold that where the inference that the irregularity was the cause of the inadequacy was necessary or irresistible, the courts may properly draw it. See 24 Cal. 291 where the Privy Council decision in 21 Cal. 66 was considered and explained.

##### ALLAHABAD HIGH COURT.

But the Allahabad High Court interpreting the terms '**direct evidence**' in the narrower sense insisted on the production of such in every case. See 18 All. 97; 21 All. 311.

##### STATUTORY CHANGE.

Under Or. 21, R. 90, direct evidence is no longer necessary and the courts may act on presumptions in a proper case. This is due to the express change in the wording of section 311 of the Civil Procedure Code, 1882. 'Unless the applicant proves to the satisfaction of the Court etc.' is changed into 'unless upon the facts proved the Court is satisfied etc.']

[7 Cal. 470]

The 6th May, 1881.

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE  
MCDONELL.

Reasut Hossein and another.....Plaintiffs

versus

Chorwar Singh and others.....Defendants.\*

*Covenant—Forfeiture—Breach of Covenant—Joinder of Plaintiff—*

*Co-Sharers—Mokurari.*

Where it is optional with several joint lessors to avail themselves of a condition of re-entry upon breach of certain covenants, one or more of the lessors cannot insist upon a forfeiture without the consent of the others.

*Held*, therefore, in a suit which was brought for the cancellation of a mokurari lease and the recovery of *seer* possession, on the ground of forfeiture for breach of covenant, that all the co-sharers should join as plaintiffs; and that as some of the co-sharers, who were made defendants, appeared and opposed the cancellation of the lease, the suit must be dismissed.

THIS was a suit brought by the plaintiffs for the cancellation of a mokurari lease, which had been granted by one Mussa-[471]mat Noorun, their predecessor in title, and for the recovery of *seer* possession of the land comprised in the lease. There were two sets of defendants,—the Singh defendants, and the Hossain defendants. The Singh defendants were the successors in title of the persons to whom the mokurari lease was granted. The Hossain defendants were those co-sharers who would not join as plaintiffs. The suit was based on the following passage in the kabuliat granted by the Singh defendants' predecessors.

"We shall not default any instalment. If any Instalment is defaulted, then we shall pay the salaries of the sazawals, motsuddee, and the peon (who may be deputed by the *Sarkar*), according to the list furnished by the *sarkar*, together with interest on the defaulted instalment. If, notwithstanding the appointment of a sazawal, we fail to pay the rent of the *Sarkar* in full at the end of the year, then the said *Sarkar* shall be at liberty to take *seer* possession of the said mouza, and we, the declarants, shall have no claim in respect of the mokurari right to the said mouza. All the ordinary and extraordinary expenses incurred under the orders of the local authorities, Civil, Criminal, and Nizamut Courts, and Kanongoes, salaries of Chowkedarees, &c., shall be paid by us, the declarants. The *Sarkar* shall have no connection whatever with the same. We shall not take possession of minhaee lands. We shall not, by our acts of oppression, force the tenants to run away. We shall not cut down fruit-bearing and non-fruit-bearing trees. We shall not allow any portion of the lands appertaining to the said mouza to be taken possession of by any other person. We shall not allow any extraordinary *pyme* or *negar* to be opened in the lands of the said mouza. If such things take place, then the said *Sarkar* shall have power to cancel the

\* Appeal from Original Decree No. 298 of 1879, against the decree of Baboo Poreah Nath Banerjee, Subordinate Judge of Patna, dated the 30th June 1879.

The plaintiffs alleged that, notwithstanding the stipulations above set out, the Singh defendants had cut down and appropriated certain trees ; that they had oppressed and driven off the land certain tenants whose names were given ; that they had taken possession of certain lands not included in the mokurari lease, and allowed other lands, which were included in it to be seized by the neighbouring proprietors ; that they had allowed a new *pyne* and a new *negar* to run into the lands of a neigh- [472] bouring mouza ; and that they had not paid their rent. The Hossain defendants did not enter any appearance. The Singh defendants denied the allegations of the plaintiffs, and, in addition, two of them, who had bought the interest of one of the plaintiffs' co-sharers (thus becoming themselves co-sharers with the plaintiffs) protested against the cancellation of the mokurari lease.

**Moonshee Serajul Islam** for the appellants.

The **judgment** of the Court (GARTH, C. J., and McDONELL, J.) was delivered by

The suit is brought to eject the defendants from the property upon the ground that they have been guilty of certain breaches of covenant; and that, consequently, under a condition of re-entry contained in the lease, they have forfeited their tenure. The other representatives of Bibi Noorun's interest, who are co-sharers with the plaintiffs in her estate, are averse to bringing this suit, and consequently they have been made defendants.

From this decision the plaintiffs have appealed, and we think that we may dismiss the appeal upon this one ground only, that one or more of several joint lessors have no right to take advantage of a forfeiture against the will of their co-[473]lessors. The law is opposed to forfeitures, and unless we find that the right now claimed by the plaintiffs is clearly conferred upon them by the mokurari lease, we ought not to allow them to enforce it.

At the time when the lease was granted, Bibi Noorun was the sole owner of the property, and as such the sole lessor. Since that time her estate has descended to several persons, who are all joint owners of her interest, and jointly entitled to the rent of the mukurari. They are also jointly entitled to the benefit of the covenants, and of the condition of re-entry upon breach of those covenants, and it is optional with them all, whether they will take advantage of the condition or not.

The lease contains several covenants on the part of the mokuraidars, and then comes the forfeiture clause in this form: "If such things take place, then the *Sarkar* shall have power to cancel the mokurari lease and take over possession." It is clear, therefore, that the lease does not become void upon breach of any of the covenants; but the lessor, or her assigns, may take advantage of the condition or not as they think proper.

Under these circumstances, by the English law, not only would one or more of the joint lessors have no right to take advantage of the condition without the consent of the others, but if the joint lessors had, by agreement, made a partition of their shares, the condition would be at an end, because only those entitled to the lessor's interest in the whole property could avail themselves of it [see *Wright v. Burroughes* (3 C. B., 699) and *Dumpor's Case* (Sm. L. C., 7th ed., 41) and cases there cited].

Whether a voluntary partition in this country would have the same effect, we are not called upon in this case to decide. But, quite apart from English law, it seems to us that, according to the just and reasonable construction of a condition of this kind, where it is optional with several joint lessors to avail themselves of the condition or not, one or more of those lessors cannot legally insist upon a forfeiture without the consent of the others. The case of *Alum Manjee v. Ashad Ali* (16 W.R., 138) to [474] which we were referred in the course of the argument, appears to be in point; but we think that no authority is required for such a position.

The appeal must be dismissed with costs; but we allow one set of costs only.

*Appeal dismissed.*

#### NOTES.

[The principle of this decision is analogous to that on which 7 Cal 414 is based viz., a tenancy created by the joint volition of co-sharers can be put an end to only by their joint volition. See notes to 7 Cal. 414.]

The 23rd March, 1881.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Inder Pershad Singh.....Plaintiff

versus

Campbell.....Defendant.\*

*Breach of Contract—Impossibility to perform a portion arising after Execution—Suit to cancel such portion—Contract Act (IX of 1872), s. 56—Specific Relief Act (I of 1877), chaps. iv and v.*

A contract was entered into between the plaintiff and the defendant, by which the plaintiff agreed to cultivate indigo for the defendant, for a specified number of years, in certain specified lands situated in different villages, with respect to portion of which lands the plaintiff was a sub-tenant only. Subsequently, during the continuance of the contract, the plaintiff lost possession of those lands, through his immediate landlord having failed to pay the rent, and having been in consequence ejected therefrom by the owner. In a suit by him, under the above circumstances, to have so much of the contract as related to those lands cancelled, on the ground that it had become impossible of performance through no neglect on his part,—

*Held*, that such a case came within the provisions of cl. 2, s. 56 of Act IX of 1872† (Contract Act), and that the mere fact that the plaintiff could have paid up the debt due by his immediate landlord and so retained possession of the land, was not sufficient to constitute such an omission or neglect on his part as to take it out of the provisions of that section.

*Held also*, that chap. iv of Act I of 1877 (Specific Relief Act) did not apply to such a case, but that the plaintiff was entitled to the relief he sought under s. 40† of that Act, inasmuch as the contract was evidence of different obligations,—viz., to cultivate indigo in different villages.

\* Appeal from Appellate Decree, No. 1735 of 1879, against the decree of W. Dacosta, Esq., First Subordinate Judge of Mozuffarpore, dated the 14th May 1879, reversing the decree of Baboo Gopinath Mathey Munsif of Hajepore, dated the 27th June 1878.

Agreement to do impossible act void.

† [Sec. 56 :—An agreement to do an act impossible in itself is void.]

Contract to do impossible act or one which afterwards becomes impossible or illegal when void.

A contract to do an act which after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible, or unlawful.

Compensation for loss on non-performance of act known to be impossible or unlawful.

Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee, did not know, to be impossible or unlawful, such promisor must make compensation to such promisee, for any loss which such promisee sustains through the non-performance of the promise.]

What instruments may be partially cancelled.

† [Sec. 40 :—Where an instrument is evidence of different rights or different obligations, the Court may, in a proper case, cancel it in part and allow it to stand for the residue.]

THIS was a suit brought by the plaintiff to have a portion of a contract entered into between him and the defendant declared void, and to have the contract rescinded to that extent, [475] on the ground that, since it was entered into the portion sought to be rescinded had become impossible of execution by reason of circumstances over which he had no control.

By the contract, which was dated in the year 1874, the plaintiff agreed to grow indigo for the defendant for a period of nine years, from 1281 to 1289 F. S. (corresponding with the years 1874 to 1882), on 20½ bighas of land, 16½ of which were situated in Ruttonpoora, which he held under a sub-lease from the Bhatowlia Factory, and the remaining 4 in Mouza Keeralpore, of which he was the proprietor. In the year 1284 F. S. (corresponding with the year 1876-77), the Bhatowlia Factory was ejected from the lands in Ruttonpoora by the proprietor for the non-payment of rent, and, consequently the plaintiff lost possession of his 16½ bighas, and was unable to carry out his contract with the defendant in respect of those lands.

He, accordingly, brought the present suit to be relieved of his liability under the contract to that extent, on payment of the sum of Rs. 33 to the defendant, being the zur-taccavee in respect of that portion of the contract.

The defendant contended, that it was perfectly open to the plaintiff to have paid off the rent, for the non-payment of which his immediate landlord had been ejected, and so retained possession of the 16½ bighas, the subject of the contract, that it was also open to him to fulfil his contract by sowing indigo in other lands which he held, in lieu of those in Ruttonpoora; that, in addition, the contract provided that, in the event of the plaintiff failing to fulfil any of the terms or to sow indigo as stipulated, he was to pay damages at the rate of Rs. 20 per bigha, and that, in pursuance thereof, he, the defendant, had already recovered the loss sustained by him by reason of a breach of the contract by the plaintiff in the year 1283 F. S. (corresponding with the year 1875-76), and that the plaintiff was bound to pay up the loss at Rs. 20 per bigha for the year 1284 to 1289 (1876—1882) before the contract could be cancelled. In addition the defendant stated that he had lent the plaintiff the sum of Rs. 600 on a bond bearing interest at the low rate of 6 per cent. per annum, repayable in nine years, in consideration of the terms of the contract; and that the plaintiff had never offered [476] even to return the Rs. 33, or asked to have the contract partly cancelled as prayed for, and that consequently for all these reasons the plaintiff was not entitled to the relief he sought.

It appeared also, that the defendant had sued the plaintiff for the recovery of damages for the breach of the contract in the year 1284 F. S. (1876-77); and that a third suit had been filed by the plaintiff against the defendant to recover the value of indigo at the rate of Rs. 10 per bigha from the years 1282 to 1284 F. S. (corresponding with the years 1874 to 1876).

These three suits were dealt with by the Munsif at the same time, and he held that the plaintiff was entitled to the relief he sought in the present suit; and, accordingly, gave him a decree with costs, but dismissed his suit for the value of the indigo, and gave the defendant a decree in his suit for damages for the breach of the contract in 1284 (1876-77), but in respect of 4 bighas only, and not for the 20½ as claimed.

The defendant, accordingly, appealed against the decree in the present suit, and the Subordinate Judge reversed the decree in the Original Court, and dismissed the plaintiff's suit with costs.

The plaintiff now specially appealed to the High Court.

Mr. G. Gregory and Mr. M. L. Sandel for the appellant.

Baboo Annoda Pershad Bannerjee and Baboo Aubinash Chunder Bannerjee for the respondent.

The judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

**Mitter, J.**—In 1874, the plaintiff, Inder Pershad Singh, engaged to sow 20½ bighas of land with indigo yearly for nine years (1281—1289 F.S.) in consideration of a sum of Rs. 41 paid to him, at the rate of Rs. 2 per bigha, by Mr. W. Campbell of Karhar Factory. The land lies in two villages, viz., 16½ bighas lie in the village of Ruttonpoora, the plaintiff being an under-tenant of this land; and 4 bighas in the village of Keratpur, the plaintiff being the proprietor of this land.

In 1284 F. S. (1876-77), the proprietor of Ruttonpoora ejected [477] the superior tenant, under whom the plaintiff held the 16½ bighas in that village; and the plaintiff's occupancy of that land ceased then.

The present suit is brought by the plaintiff to be relieved from the contract entered into in 1874 so far as the 16½ bighas in Ruttonpoora is concerned. It appears from the judgment in this case, that the defendant, Mr. Campbell, brought a suit, No. 59 of 1878, against the plaintiff, to recover damages for non-fulfilment of the entire contract. The plaintiff thereupon brought this suit, No. 100 of 1878, as stated above, and another suit, No. 101 of 1878, for the price of indigo-plant supplied in 1282, 1283, 1284 (1874—1876), and the three suits were tried together in the Munsif's Court. The suit against the plaintiff was decreed in respect of the Keratpur lands, but dismissed as regards the Ruttonpoora lands. The plaintiff's suit No. 100 was decreed, and his contract cancelled in respect of the 16½ bighas of land in Ruttonpoora. The plaintiff's suit No. 101 was dismissed.

On appeal to the Subordinate Judge, the plaintiff's suit No. 100 was dismissed on two grounds. (i) that the impossibility to perform the contract by reason of loss of the 16½ bighas was caused by the plaintiff's neglect to preserve the lands, and therefore that cl. 2, s. 56, Act IX of 1872, did not apply. (ii) that the grounds upon which a contract can be rescinded as laid down in s. 35, Act I of 1877,\* are not applicable to this case.

When rescission may be adjudged. [Sec. 35 :—Any person interested in a contract in writing may sue to have it rescinded, and such rescission may be adjudged by the Court in any of the following cases, namely :—

(a) Where the contract is voidable or terminable by the plaintiff;

(b) Where the contract is unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff;

(c) Where a decree for specific performance of a contract of sale, or of a contract to take a lease, has been made, and the purchaser or lessee makes default in payment of the purchase-money or other sums which the Court has ordered him to pay.

When the purchaser or lessee is in possession of the subject-matter, and the Court finds that such possession is wrongful, the Court may also order him to pay to the vendor or lessor the rents and profits, if any, received by him as such possessor.

In the same case, the Court may by order in the suit in which the decree has been made and not complied with, rescind the contract either so far as regards the party in default, or altogether, as the justice of the case may require.]



The plaintiff has, therefore, brought this appeal to this Court. We are not definitely informed as to the subsequent history of cases Nos. 59 and 101, as being cases of a Small Cause Court class, they would not ordinarily come before this Court in Second appeal.

The grounds of appeal are directed against the two propositions laid down by the Subordinate Judge.

The appellant relies on s. 56, Act IX of 1872,\* and argues that his contract has become, since it was made, impossible. There can be no doubt that his contention is strictly true, and the second clause of the section plainly shows that the contract to the extent that it had become impossible had become void. The Subordinate Judge considers that the plaintiff, or promiser, could have prevented the impossibility; but on this point we are [478] not in possession of full materials for an opinion. The mere fact that the plaintiff might have paid up the amount of the decree against the Bhatowlia Factory, and thus saved the factory and himself as its tenant from ejectment, is not enough. We are informed it was a decree for rent and for ejectment under s. 52, Beng. Act VIII of 1869; but it may be that the decree was for a sum which the plaintiff could not reasonably be expected to pay, considering that he would have no security for his payment. The law which allows any one interested in protecting a tenure from sale to pay up a decree, gives him full security in the shape of a right to take possession of the tenure (s. 62, Beng. Act VIII of 1869); but this is not the case under s. 52 of the same Act. We cannot, therefore, say that the plaintiff lost his land from an omission made by his own neglect, and in our opinion the contract became void as to the 16½ bighas when the proprietor of Ruttonpoora came into possession of the land.

We are of opinion that the Subordinate Judge was correct in holding that chap. iv of the Specific Relief Act does not apply. Strictly speaking, the plaintiff had no right to sue for rescission of the contract in part. We must refer back to the Contract Act itself to see under what circumstances a contract is voidable or terminable, and we think that none of the provisions for voiding or terminating a contract exist in this case. But we think that chap. v of the Specific Relief Act may be resorted to. We have shown that the contract was void in part; and s. 35 allows a person against whom an instrument is void to sue to have it adjudged void. Section 40 provides for the partial cancellation of an instrument, which is evidence of different rights and obligations, and we think that the instrument in this case is evidence of an obligation to cultivate indigo in different villages, and that it is a proper case for the application of s. 40. We shall, therefore, cancel it so far as it obliges the plaintiff to cultivate 16½ out of 20 bighas with indigo, or to cultivate land in Ruttonpoora village.

It is only necessary to remark, that the defendant's contention that the plaintiff is bound to make good the full quantity of land from lands in his possession in villages other than Ruttonpoora, is not borne out by the terms of the contract.

[479] The instrument specifies the lands in each of the two villages of Ruttonpoora and Keratpur, which the plaintiff engaged to sow with indigo; but while it provided for the substitution of other lands for those contracted for in Keratpur, of which the plaintiff was a proprietor, it is silent as to the substitution of lands for those in Ruttonpoora, of which he was only a tenant.

We think it unnecessary to provide for compensation to the defendant beyond the restoration of the consideration of Rs. 33, or Rs. 2 per bigha for the lands in respect of which we cancel the contract, and this sum the plaintiff has offered to pay.

We reverse the decree of the Subordinate Judge, and restore that of the Munsif. The defendant will pay the plaintiff's costs in this Court and in the lower Appellate Court.

*Appeal allowed.*

[7 Cal. 479]

*The 10th May, 1881.*

PRESENT:

MR. JUSTICE PONTIFEX AND MR. JUSTICE FIELD.

Golam Ali.....Defendant

*versus*

Kali Krishna Thakur.....Plaintiff.

*Suit for Arrears of Rent—Accretions to Parent Tenure—Rate of Rent—Reg. XI of 1825, s. 4, cl. 1.*

In a suit for arrears of rent, it appeared that the defendant had, in 1260 (1853), executed a kabuliat, in which the boundaries of the land were given and the rate of rent fixed, and which provided that the land might be measured after 1261 (1864). In 1281 (1854), a measurement was made, and it was found that some land had accreted; and the plaintiff now sued for rent for the accreted land, at rates varying with its nature and quality.

*Held*, that the accreted land should be governed by the terms and conditions applicable to the parent tenure, and that the same rent was payable for it as for the land included in the kabuliat.

The meaning of Reg. XI of 1825, s. 4, cl. 1, is, that the incidents of the original tenure attach to the increment.

THIS was a suit for the recovery of arrears of rent for the year 1282 (1876) of a howla held by the defendant in Chur Panchkati, Pargana Edilpore, of which the plaintiff was zemindar. On the 4th Bhadra, 1260 (27th August 1853,) the defend-[480] ant executed a kabuliat, in which the boundaries of the howla were given, and the quantity of land, after deduction of *rugba*, was stated to be three drones eight kanis, the amount assessed upon which was Rs. 280, at the rate of Rs. 5 per kani. It was stipulated in the kabuliat that the land within the boundaries might be measured after Pous 1261 (December, 1854) upon fifteen days' notice to the defendant, and that the rent of the land found in excess of that stated in the kabuliat would be at the rate of Rs. 5 per kani.

Since the execution of the kabuliat, some land had accreted to the howla by the recession of the river on the south and west. In 1281 (1874), the land was measured by the plaintiff, and it was found that the total quantity of land

\* Appeal from Original Decrees, Nos. 219 and 265 of 1879, against the decree of Baboo Promotho Nath Mookerjee, Subordinate Judge of Furriddpore, dated the 23rd September 1878.

within the boundaries given in the kabuliat, after deduction of *rugba*, was seven drones nine kanis one gunda and one cora. The plaintiff alleged that the defendant was in possession of about twenty drones two kanis of accreted land, and now sued for the recovery of rent at the rate of Rs. 5 per kani for the land within the boundaries, and at rates varying with the nature and quality of the land for the lands without the boundaries. The defendant contended that the quantity of land within the boundaries described in the kabuliat had been understated; that the plaintiff was not entitled to recover any higher rate than that stated in the kabuliat for the accretions; and that the rates demanded for the accretions were neither customary nor fair. The Subordinate Judge found that the accretions ought to be assessed at the pargana rate, but as the plaintiff had failed to prove that rate, he gave him a decree at the same rate for the accretions as that paid for the parent tenure.

Both parties appealed to the High Court.

Mr. Branson, Mr. W. M. Dass, Baboo Chunder Madhub Ghose, and Baboo Rashbehary Ghose appeared for the defendant in both appeals.

The Advocate-General (The Hon'ble G. C. Paul), Baboo Kali Mohun Dass, and Baboo Ram Sikha Ghose appeared for the plaintiff in both appeals.

[481] The judgments of the Court (PONTIFEX and FIELD, JJ.) were as follows :—

**Pontifex, J.**—I am of opinion that the accretion, which, under Reg. XI of 1825, s. 4, cl. 1, must be considered an increment to the defendant's tenure, should be governed by the terms and conditions applicable to the parent tenure as provided in the kabuliat under which such parent tenure is held.

The defendant having admitted his liability to pay some rent, the question to be decided is, what construction should be placed on the words "increase of rent to which he may be justly liable" contained in that Regulation.

The use of the word *increase* seems to show that consideration is to be given to the rent reserved on the parent tenure. If rent was assessable without reference to the rent reserved on the parent tenure, then I should have expected it to have been expressed as follows :—"The accretion shall not be exempt from the payment of rent which may justly be assessed upon it."

Supposing a perpetual tenure had been created at a pepper corn rent, without any salami or bonus being taken, the holder of such tenure would, in effect, be an absolute proprietor, so far as the zemindar was concerned, and, as absolute proprietor, would, in my opinion, be as absolutely entitled to any accretion.

Supposing, on the other hand, that a perpetual tenure had been created at a rent less than a rack or fair holding rent, and that a salami was taken on its creation, it might be right, if the circumstances of the lease permitted it, to take such salami into consideration when assessing the rent upon any accretion.

But that is not the present case.

In the kabuliat under which the defendant holds, it seems to me that the cost and trouble of reclamation were intended to be recouped by the tenant's privilege to hold rent-free for two years after the land first came under culture, as to any land taken into cultivation subsequently to the lease; and as to the lands specially referred to in the kabuliat as then under-cultivation, by the reservation for the first three years of a [482] smaller rent than the final rent

of Rs. 5. And apart from evidence to the contrary, I must consider that the final rate of Rs. 5 was at the date of the *kabuliat* considered as a fair holding or *raha* rent after the expenses of reclamation had been recouped.

It may be true that, by reason of general improvement and progress, a fair holding rent at the present day would be more, and perhaps greatly more, than Rs. 5. But there is nothing to show that Rs. 5 was not a fair rent in 1261. And it must be remembered that though the accretion may have formed only lately, the tenant's right to it under the Regulation accrued in 1261; and if it had immediately thereafter come into existence, a perpetual rent as of that date would have been assessed upon it. Why should the zemindar's position be improved and that of the tenant deteriorated, merely according to the date of the accretion coming into existence?

I think, therefore, that the new accretion, or so much of it as has admittedly been in cultivation for a considerable period, should be assessed at the fair holding rent of Rs. 5 as established in 1261.

If the plaintiff's contention was correct, that the rent of the accretion should be assessed at the rate prevailing in the *parganas*, the defendant would get no greater benefit under the Regulation than a stranger; but, in my opinion, it was intended that he should have all the benefit of his already assured position.

It seems to me that a Court would have extreme difficulty in arriving at any rent intermediate to the *pargana* rate and the rent reserved on the parent tenure.

If any intermediate rent was now adjudged the zemindar might, on the same principle, insist at some future time that it would be liable to enhancement. But this would be contrary to the conditions governing the parent tenure. And if the accretion happened to be very large in extent, in comparison with the area of the parent tenure (and in this case the plaintiff claims that it is more than three times as large as the parent tenure), the value of the latter might almost vanish in consequence of the high rate assessed upon its offspring. In other words, the offspring might swallow up its parent.

[483] If, on the other hand, the zemindar could not insist on future enhancement, it is difficult to see on what principle he can now claim a higher rate of rent than that reserved on the parent tenure.

I think, therefore, the accretion should be assessed at the same rate as the parent tenure, and this renders it unnecessary for me to decide within what limits the parent tenure and the accretion respectively lie. But I agree with the Subordinate Judge that the report of the Amin in this case is not reliable, partly for the reasons stated by the Subordinate Judge and partly because the reasons stated by the Amin for fixing the southern boundary where he places it, seems to me insufficient and inconclusive. I also agree with the Subordinate Judge, that if *pargana* rates were assessable on the accretion, there is no sufficient evidence of what such rates should be. It may possibly be, that if Government were to assess a higher proportionate revenue on these accretions than is borne by the parent tenure, the plaintiff might have an equity to ask for contribution in that respect from the defendant. But that case has not yet arisen, and we are unable to deal with it, as at present no revenue has been assessed by Government on these accretions. I think that question should be left open till the Government assesses the accretions.

The learned Advocate-General, for the plaintiffs, placed some reliance on the remarks of the Judicial Committee in the former suit between the parties, in which it was decided that the plaintiffs were not entitled to possession of these accretions. Those remarks were as follows:—"The defendant was a middleman, and not a ryot, having a right of occupancy within the meaning of s. 17, Act X of 1859, or liable to enhancement under that section. If liable to enhancement at all, he could only be enhanced according to the pargana rate of the rents payable by similar holders."

The observations are somewhat ambiguous, but it is sufficient to say that they were not intended to settle the question, and were made, apparently, without the question having been really argued.

According to our decision, the defendant's appeal fails in its [484] main objection to the decision of the Subordinate Judge. And I am also of opinion that it fails with respect to the manner in which the howladari rukha should be calculated, the decision of the Subordinate Judge in this respect being correct.

In only one point is the defendant entitled to succeed in this appeal. The Subordinate Judge says in his judgment,—

"The defendant claims a further deduction of 202 bighas, which have been found by the Amin to be of the description called *hellh* and *dhalli*; but as this land would shortly be fit for cultivation, it cannot be exempted from assessment."

But I think that, in accordance with the terms governing the parent tenure, rent would not become payable until two years after the land is taken into cultivation.

We have been informed by the plaintiff's advisers that this has been altered on review; but if it has not, the defendant's appeal will succeed in that respect. In other respects it fails. The plaintiff's appeal fails in all respects. Under the circumstances, I think the parties ought to bear their own costs in this Court.

**Field, J.**—I concur in the judgment which has just been delivered by my learned brother. Upon the essential question to be decided in this case, I desire to make a few observations. That question really is this. At what rate is rent to be assessed on the alluvial increment to an under-tenure? In order to the decision of this question in this particular case, there are three points which it will be well to notice. In the first place, the rent on the original howla is a fixed rent, not capable of enhancement. This has been settled as the result of previous litigation between the same parties. In the second place, the alluvial increment is admittedly liable to assessment of rent; and there is now no contention before us, that the landlord is not entitled to receive additional rent for the additional land added to the under-tenure. In the third place, the under-tenure was created on the 4th Bhadro 1260,—that is, the 19th August 1853, and therefore there is no question of the applicability of s. 51 of the Reg. VIII of 1893, which applies only to talooks or tenures in existence at the time of the Permanent Settlement. The ground being thus cleared by the disposal of [485] these preliminary points, the question to be decided further resolves itself into this,—whether the rent on the alluvial increment is to be assessed in proportion to, or upon the same principle as, the rent payable upon the *usli*, or original under-tenure; or is to be assessed according to the rates payable in the vicinity for similar under-tenures or howlas, and without regard to the rent

payable upon the *usli*, or original under-tenure. Now the words of Reg. XI of 1825, s. 4, cl. 1, are these :—" When land may be gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed." What is the meaning of the term 'tenure' in this context? Tenure is usually regarded as a mode of holding property, as, for instance, in the expressions 'tenure by grand serjeanty,' 'copyhold tenure,' 'fudal tenure,' 'tenure burgage,' 'tenure by cornage,' and it is impossible to disconnect the meaning of the word 'tenure' in any particular context from the ordinary incidents, subject to which the particular tenure is held. Then again the word 'tenure' is used not only of the mode in which property is held but also of the land itself which forms the subject of the tenure. The very clause of the Regulation which we have to construe in this case, furnishes an example of this double meaning of the term 'tenure,' which is used in the first sense in the passage, "it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed." And in the second sense in the passage, "provided that the increment of land thus obtained shall not entitle the person in possession of the estate or tenure, &c." Looking at the whole clause of the Regulation, I think the reasonable construction to be put upon the words "land . . . gained by gradual accession . . . shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed," is, that the incidents of the original tenure attach to the increment. We have then immediately after these words a double proviso. The first proviso is concerned with the assessment of Government revenue. As to this, I shall have something to say hereafter. The second proviso is this :—" Nor if annexed to a [486] subordinate tenure held under a superior landlord, shall the under-tenant, whether a *khodkusht ryot* holding a *mourosi istemrari* tenure at a fixed rate of rent per bigha, or any other description of under-tenant liable by his engagements, or by established usage, to an increase of rent for the land annexed to his tenure by alluvion, be considered exempt from the payment of any increase of rent to which he may be justly liable." It appears to me, that the words 'payment of any increase of rent' have a certain reference to the rent payable on the original tenure. Then as to the words 'may be justly liable,' it is important to bear in mind that when Reg. XI of 1825 was passed, the Legislature had not laid down any rules for the enhancement of rent, or the assessment of land with rent. We know from State papers of the period of the Permanent Settlement, and the period subsequent thereto, that this was done designedly, as Government wished to avoid the appearance of interfering too much between the newly-created proprietors and the *ryots*, thinking, moreover, that the relations between them would be gradually settled by contract and by the proof of usages and customs in the Courts of justice. This we have in Reg. VII of 1799, s. 15, cl. 8, a provision to the following effect :—"The Courts of justice will determine the rights of every description of landholder and tenant when regularly brought before them, whether the same be ascertainable by written engagements or defined by the laws and Regulations, or depend upon general or local usage which may be proved to have existed from time immemorial." It thus appears to have been the intention of the Legislature to leave these questions of assessment and enhancement of rent to be settled by mutual agreement or local usage. This will, in all probability, explain the fact that the Legislature did not, in cl. 1 of s. 4 of Reg. XI of 1825, lay down any more precise rule for determining the rent to be paid for land forming an alluvial increment to an under-tenure than that contained in the words 'increase of rent to which

he may be justly liable.' These words—'justly liable'—appear to me to have a certain reference to the principle upon which the rent may have been assessed upon the original tenure. For example, rent is, in many cases, made payable as a lump sum for a given area. In other cases, it is assessed according to a classification of the land. In the case of a jungle-bori howla, a howla or lease of waste land, which must be reclaimed before it is fit for cultivation, it is usual to let a considerable area of land for a certain lump sum as rent. In the case of land wholly or partly brought under cultivation, it is not unusual to assess the rent with reference to the different classes of land and the different crops which the land is capable of producing. These are well-known usages of the country, and it appears to me, that the words 'justly liable' indicate an intention on the part of the Legislature that the rent payable for the alluvial increment should be settled with reference to the circumstances of each particular case, regard being had to the agreement of the parties in respect of the original tenure, where there is such an agreement, and where there is no such agreement, to any usage proved to be applicable to such tenure.

Then as to the proviso which has reference to the assessment of Government revenue, and the argument which has been addressed to us on this point, it may be observed that, when Reg. XI of 1825 was passed, there was a previous Regulation in force, that is Reg. II of 1819, which provided for the assessment of Government revenue upon alluvial increments to estates. Clause 1, s. 3 of that Regulation enacted as follows:—"All lands which, at the period of the Decennial Settlement, were not included within the limits of any pargana, mouza or other division of the estate for which a settlement was concluded with the owners, not being lands for which a distinct settlement may have been made since the period above referred to, nor lands held free of assessment under a valid and legal title of the nature specified in Regs. XIX and XXXVII of 1793, and in the corresponding Regulations subsequently enacted, are and shall be considered liable to assessment in the same manner as other unsettled mehals, and the revenue assessed on all such lands, whether exceeding 100 bighas or otherwise, shall belong to Government." The second clause of the same section further provides, that "the foregoing principles shall be deemed applicable not only to tracts of land such as are described to have been brought under cultivation in the Soonderbuns, but to all churs and islands formed since the period of the Decennial Settlement, and generally to all lands, gained by alluvion or dereliction since that period, whether from an introcession of the sea, an alteration in the course of rivers, or the gradual accession of soil on their banks." That Regulation, therefore, distinctly laid down the principle that alluvial increments to permanently-settled estates are liable to assessment for Government revenue; but it did not enunciate the principle upon which that Government revenue is to be assessed. That is a matter provided for by the executive orders of Government, or of the Board of Revenue; and it is further a matter over which the Civil Courts have no jurisdiction. It may, however, be assumed, for the purpose of deciding this case, that the revenue to be paid to Government upon the alluvial increment is assessable without reference to the amount of revenue payable upon the original estates. If, then, it may be argued, rent should be assessed on the alluvial increment according to the rate payable upon the *usts*, or original under-tenure and if this rent should be so small that it will not suffice to meet the Government revenue which the Settlement Officers may assess upon the same alluvial increment regarded as an increment to the revenue-paying estate, is it not unjust to the zemindar that he will thus be forced to hold this addition to his estate at a loss? If this question is asked in the interests of Government,



the answer is a very simple one,—*viz.*, that if, by reason of the rent payable on the alluvial increment being less than the Government revenue, the alluvial addition, or the original estate with the alluvial addition (where both are included in a single new engagement with Government), becomes unprofitable to the zemindar, the result will be a Government sale, and the avoidance of the under-tenure as the result thereof, whereupon the unincumbered estate will, in the hands of a purchaser at such sale, presumably yield sufficient to pay the revenue and afford a reasonable profit. But Government is no party to this case, and therefore it is unnecessary to decide this question so far as Government is concerned. Then so far as regards the zemindar, [489] the case contemplated by the argument has not yet arisen, for it has been admitted at this hearing that Government has not yet assessed any revenue upon the alluvial increment. The fact of Government revenue having been assessed upon the alluvial increment is, therefore, not necessary element for consideration in the case which we have to decide. But it may be important to point out that the new case, which will arise when revenue is assessed on the alluvial increment, is provided for by an Act of the Bengal Council,—namely, Act VIII of 1879. Under the provisions of s. 7 of this Act, the rent recorded as demandable from an under-tenant in all estates under settlement is to be determined by the Settlement Officer in accordance with certain rules therein prescribed. One of the questions which the Settlement Officer has to determine in order to settle this rent is this, whether the under-tenure is binding as against the Government or not? and upon the decision of this question will depend the amount of rent which is to be recorded as demandable from the under-tenant. Under s. 10 of the same Act, every under-tenant is liable to pay the rent so recorded as demandable from him, unless he can prove in a civil suit that such rent has not been assessed in accordance with the provisions of the Act; and under s. 11, if the Court modifies or sets aside such rent, it is to proceed to determine the rent payable by the under-tenant in accordance with the provisions of the same Act. The direct object of these provisions is to secure a reasonable proportion between the revenue payable by the zemindar to Government and the rent payable by the under-tenants to the zemindar. It will thus appear that it may possibly be open to the parties at any future time, when the Government proceeds to settle the revenue payable upon the alluvial increment, to re-open the question of the rent to be paid in respect of such increment, and to have such rent re-assessed under the provisions of s. 7 of the Beng. Act with advertence to the amount of Government revenue made payable upon such alluvial increment. It appears to have been the intention of this Act to enable the Settlement Officer to re-adjust the rent of under-tenures when such rent had been previously fixed at an amount insufficient to meet the [490] revenue subsequently assessed. Whether the Legislature has used language sufficient to effectuate this intention, and whether this particular under-tenure falls within the operation of the Act, it is no part of our duty on the present occasion to decide. I will only observe that our decision—proceeding as it does upon the present circumstances of the case, *i.e.*, while Government revenue has not been assessed—does not anticipate the assessment of revenue, and does not decide whether or not such assessment will have the effect of making the defendant 'justly liable' for any other higher rent. With reference to the provisions of the Regulation, and apart from the question of Government revenue, I have myself no doubt that the alluvial increment ought to be assessed with rent on the same principle as rent is, by the contract of the parties, payable upon the original, or *usli*, under-tenure.

*Decree modified.*



NOTES.

[There is no inflexible rule that the terms of the parent tenure govern the accretions to it also, but the question depends on the circumstances of each case—11 Cal., 696. In the absence of special circumstances, however, the presumption will be to that effect:—26 Cal., 739.]

[7 Cal. 490]

*The 25th May, 1881.\**

PRESENT :

MR. JUSTICE PONTIFEX AND MR. JUSTICE FIELD.

Sree Ram Chowdhry.....Petitioner

*versus*

Denobundhoo Chowdhry.....Opposite Party.

*Appeal—Award—Order refusing to file Award—Civil Procedure Code (Act X of 1877), ss. 525†, 588.*

Matters in dispute were referred to arbitration without the intervention of the Court. An award was made, and upon an application under s. 525 of the Civil Procedure Code to file the award, one of the parties showed cause why the award should not be filed, and the Subordinate Judge held the objection to be good.

*Held*, that no appeal lay.

Baboo *Rashbehary Ghose* for the petitioner.

Baboo *Saroda Churn Mitter* for the opposite party.

The facts of this case sufficiently appear from the **judgments** of the Court (PONTIFEX and FIELD, JJ.), which were as follows :—

**Pontifex, J.**—The parties before us referred certain matters [491] in difference between them to arbitration without the intervention of the Court.

The arbitrator having made his award, one of the parties applied under, s. 525 of the Code, that the award should be filed in Court.

\* Appeal from Original Order No. 11 of 1881, against the order of Baboo Menu Lall Chatterjee, Subordinate Judge of Moorshedabad, dated the 30th of August 1880.

Filing award in matter referred to arbitration without intervention of Court. Court.

† [Sec. 525.—When any matter has been referred to arbitration without the intervention of a Court of Justice, and an award has been made thereon, any person interested in the award may apply to the Court of the lowest grade having jurisdiction over the matter to which the award relates, that the award be filed in Court.

Application to be numbered and registered.

The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

Notice to parties to arbitration.

The Court shall direct notice to be given to the parties to the arbitration other than the applicant, requiring them to show cause, within a time specified, why the award, should not be filed].

Notice having been given under the section to the other party to the reference, he came in and showed cause, within the objections mentioned in ss. 520 and 521, or some of them, why the award should not be filed.

The Subordinate Judge has made a full enquiry into such objections, and in an elaborate judgment has decided that all the objections but one are untenable; but considering that one of such objections was fatal to the validity of the award, he refused permission to file it.

Against his order of refusal the applicant, under s. 525, has appealed to us, and has been met with the preliminary objection that there is no appeal, because the order is not a decree, nor is it an order appealable under s. 588.

Now it was held by a Full Bench of this Court under Act VIII of 1859, that such an order under s. 327 of that Act was not appealable: *Baboo Chintamun Singh v. Roopa Koer*; (6 W. R., Mis. Rul., 83), see also *Vyankatesh Ramchandra Jogekar v. Balajira bin Anandray* (1 Bom. H. C. Rep., 184).

Section 327 of the old Code corresponded to s. 525 of the present Code. Each of these sections directed that the application under it should "be numbered and registered as a suit." But at the date of the decision referred to, the section of the old Code differed from the section in the present Code, by "directing that the application should be written on the stamp paper required for petitions."

This difference does not seem to me material, nor has it been insisted on in argument. The words which are relied on as giving an appeal are the same in both sections,—namely, that "the application is to be numbered and registered as a suit."

But, notwithstanding these words, the Full Bench, in the case referred to, held, that there was no appeal; and there being nothing in the definition in the present Code of that which is [492] to be considered a decree, which would affect or prevent the application of the decision in that case as an authority in the present case, we are bound by it to hold that the preliminary objection must prevail.

The words to be numbered and registered as a suit would, in fact, seem to have been used merely for administrative purposes.

The same words used in s. 331 were not considered by the Legislature to attach by themselves all the incidents of a regular suit to the proceeding there directed. For that purpose other words were used in that section, as follows:—"The Court shall proceed to investigate the claim in the same manner and with the like power as if a suit for the property had been instituted, and every order made in such investigation is declared to have the same force as a decree, and shall be subject to the same conditions as to appeal or otherwise."

In the case of *Sashti Charan Chatterjee v. Tarak Chandra Chatterjee* (8. B. L. R., 315), a Full Bench decided, that where, in a case under s. 327 of the old Code, the lower Court had ordered an award to be filed, an appeal would lie from such order; and it would be open to the appellant to show that the paper which had been filed was not legally an award. But having regard to the last words of that section corresponding with s. 526\* of the present Code, I confess I have my

\*[Sec. 526:—If no ground such as is mentioned or referred to in section 520 or 521 be shown against the award, the Court shall order it to be filed, and such award shall then take effect as an award made under the provisions of this chapter.]

Filing and enforcement of such award.

doubts as to the soundness of that decision. For s. 325<sup>\*</sup> of the old Code and 522 of the new Code seem to me equally intended to prevent an appeal in the analogous cases, where the Court has given judgment according to the award,—namely, in cases under s. 506<sup>\*</sup> of the present Code, where, during the pendency of a suit, a matter in difference in the suit is referred to arbitration; or under s. 523<sup>†</sup>, where the parties have agreed to a reference out of Court, and upon application before award, an order has been granted for the agreement to be filed in Court.

It is true that, in cases under s. 525, the parties cannot obtain the advantages of the provisions contained in ss. 518 and 520, and therefore an appeal might be more necessary under s. 525 than under s. 522.

But in my opinion this goes to show that it was not intended [493] that an award should be filed under s. 525, if either of the parties to the reference showed cause against it by affidavit or verified petition within the provisions of s. 520 or 521. In such cases, of which the case before us is an example, I think it would be the duty of the Court, without inquiring into the validity of the cause so shown, to refuse the application to file the award and to leave the applicant to his remedy by suit, having regard to the fact that the Court has no power to deal with the award under s. 518, or to take action by remitting the award under s. 520.

This was the procedure pointed out by Mr. Justice Paul in the case of *Sashti Charan Chatterjee v. Tarak Chandra Chatterjee* (8 B. L. R., 315). It is not the course which has been followed by the lower Court in the present case: but as the lower Court refused to file the award, no injury or inconvenience results, because, notwithstanding such order, any of the parties to the reference may proceed to enforce the award by regular suit: *Vyankatesh Ramchandra Jogekar v. Balajira bin Anandray* (1 Bom. H. C. Rep., 184). But if the lower Court had ordered the award to be filed, grave inconvenience and possible injustice might have resulted. In the present case we

\* [Sec. 506 :—If all the parties to a suit desire that any matter in difference between them in the suit be referred to arbitration, they may, at any time before judgment is pronounced, apply, in person or by their respective pleaders specially authorized in writing in this behalf, to the Court for an order of reference.

Parties to suit may apply for order of reference.

Every such application shall be in writing and shall state the particular matter sought to be referred.]

† [Sec. 523 :—When any persons agree in writing that any difference between them shall be referred to the arbitration of any person named in the agreement or to be appointed by any Court having jurisdiction in the matter to which the agreement relates, the parties thereto, or any of them, may apply that the agreement, be filed in Court.

Agreement to refer to arbitration may be filed in Court.

The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be

Application to be numbered and registered.

interested as plaintiff or plaintiffs, and the others or other of them as defendants or defendant, if the application have been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

On such application being made, the Court shall direct notice thereof to be given to any

Notice to show cause against filing it.

of the parties to the agreement other than the applicants, requiring such parties to show cause, within the time specified in the notice, why the agreement should not be filed.

If no sufficient cause be shown, the Court may cause the agreement to be filed, and shall make an order of reference thereon, and may also nominate the arbitrator when he is not named therein and the parties cannot agree as to the nomination.]

are bound, in my opinion, both by authority and on principle, to hold, that the preliminary objections must prevail; and we must, therefore, dismiss the appeal.

Before leaving the subject I wish to express my opinion with respect to s. 522\*.

It is of course clearly right that the decision of the tribunal chosen by the parties should be final, provided it is not open to any of the objections referred to in ss. 518, 520 and 521; but I fail to see the expediency of refusing the parties an appeal from the decision of the lower Court on the objections taken under ss. 520 and 521. Questions raised under those sections are generally of very considerable delicacy and difficulty; and there seems to me no reason why the decision of the original Court, perhaps the lowest Court of all, should be final with respect to them. The finality of the Court's decision on these questions is altogether a different matter from the finality of the award if unobjectionable under ss. 520 and 521; [494] and I fail to see any reason why a judgment on an award under chap. xxxvii of the Code should be treated differently from a judgment in a suit to enforce an award. Why the one should be final as to the matters referred to in ss. 520 and 521, while the other should be open to appeal on the same matters.

The consequence of this difference must necessarily be, that parties will be slow to avail themselves of the other advantages which they might derive by proceeding under chap. xxxvii.

**Field, J.**—This is an appeal against an order rejecting an application for filing an award, such application having been made under s. 525 of the Code of Civil Procedure, Act X of 1877. A preliminary objection has been taken that no such appeal will lie, and in support of this objection, the Full Bench decision in the case of *Chintamun Singh v. Uma Kunwar* (B. L. R., Sup. Vol., 505), has been relied upon. The judgment in that case is very brief, and is as follows:—"It appears to the Court that an order rejecting an application to file an award under s. 327 of Act VIII of 1859 is not a decree; therefore it is not appealable as a decree. It is simply an order rejecting an application to file an award. Then is it one of the orders in respect of which an appeal is provided by the Act? We can find no right given to appeal against an order refusing to file an award. We do find a right of appeal given in certain other cases and against certain orders, such as an order rejecting a plaint, but no appeal is given with regard to orders rejecting an award." Sections 525 and 526 of the present Code correspond with s. 227 of Act VIII of 1859. Now, it is clear that the Full Bench decision proceeded upon two grounds,—(i) that the order rejecting an application to file an award was not a decree; (ii) that it was not an order against which an appeal was given by the then Code of

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\*[Sec. 522:—If the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in manner aforesaid, and if Judgment to be according to award. no application has been made to set aside the award, or if the Court has refused such application,

the Court shall, after the time for making such application has expired, proceed to give judgment according to the award,

or, if the award has been submitted to it in the form of a special case, according to its own opinion on such case.

Upon the judgment so given a decree shall follow, and shall be enforced in manner provided in this Code for the execution of decrees. No appeal shall lie from such decree except in so far as the decree in excess of, or not in accordance with, the award].

Civil Procedure. It appears to me that, unless we can find words in the present Code of Civil Procedure, the effect of which is that an order must now be regarded as a decree, or that such an order has been made an appealable order by the new Code, no such appeal will lie. The question then is, has the Legislature used any language in the present Code which shows an intention to alter the law as settled [496] by the Full Bench decision by making the order in question either a decree or an appealable order?

Now, that it is not an appealable order, follows at once from the fact that it is not mentioned amongst the orders made appealable by s. 588 as amended by Act XII of 1879.

Then is it a decree, regard being had to the new definition of decree contained in the amending Act XII of 1879? That definition is as follows:—"Decree" means the formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court, when such adjudication, so far as regards the Court expressing it, decides the suit or appeal." Is an application under s. 525 a 'suit' within the meaning of this definition? The Civil Procedure Code passed in 1877 and the Limitation Act passed in the same year draw a clear distinction between 'suits' and 'applications,' and this very application under s. 525 is to be found in the second schedule of the Limitation Act (see art. 176) which deals with applications. This would seem to show that this particular application is not to be regarded as a suit. But we must further consider the following words of s. 525:—"The application shall be in writing, and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants." Have these words the effect of converting the application into a suit for all intents and purposes, or do they merely mean that, for the purposes of entry in the register of civil suits prescribed by the Code of Civil Procedure, and of classification of the business of the Courts and for these purposes only, the application is to be regarded as a suit? It appears to me that the latter is the true meaning of the words. In support of this view, I may refer to s. 331 of the Code, which provides that the claim made by a person other than the judgment-debtor to be in possession of attached property on his own account, or on account of some person other than the judgment-debtor, is to be "numbered and registered as a suit between the decree-holder as plaintiff and the claimant as defendant." That these words alone do not convert such a claim or application into a suit for all intents and purposes, appears clear from the words which follow in the same section—namely, that "the Court shall proceed to investigate the claim [496] in the same manner and with the like power as if a suit for the property had been instituted by the decree-holder against the claimant under the provisions of chap. v, and shall pass such order as it thinks fit for executing or staying execution of the decree. Every such order shall have the same force as a decree, &c." Now it is clear that these words, which I have just quoted, would have been unnecessary if the effect of the words "shall be numbered and registered as a suit" were to convert the application into a suit for all intents and purposes. I think, therefore, that an application under s. 525 is not a suit within the definition of 'decree' so as to make the order passed upon such application a decree. A further argument may be found upon an examination of ss. 520 to 526 of the present Code. Under s. 525 there is (i) an arbitration without the intervention of the Court, and an award made thereupon; (ii) an application to the Court that such award be filed; (iii) a notice to the parties to the arbitration other than the applicant to show cause why the award should not be filed; and then (iv) under s. 526, there is the hearing at which the order

parties may, if they desire, show cause. Now what are the questions to be dealt with at this hearing? Although, under s. 525, the grounds upon which cause may be shown are not limited or specified, it is clear from s. 526 that the only ground upon which cause can be shown is some one of the grounds mentioned, or referred to, in s. 520 or 521. What the Court then has to deal with on the day of hearing is, whether any of the grounds mentioned in s. 520 or 521 are satisfactorily shown. It may here be observed that, in s. 327 of the old Code, there was nothing to limit specifically the grounds upon which cause might be shown. The language of that section was general—"if no sufficient cause be shown against the award." The new Code has substituted for these general words the more precise words—"if no ground such as is mentioned, or referred to, in s. 520 or 521 be shown against the award," which limit and define the cause to be shown. Then, when the Court has dealt with the ground or grounds mentioned, or referred to, in s. 520 or 521, is there any appeal against its decision? The Full Bench case, as already pointed out, decided that there was no appeal under the old [497] section (327). The only difference between the language of that section and the language of the present sections (525, 526) is in the limitation (as above pointed out) of the grounds upon which cause may be shown. From this change of language it appears to me that there is no intention to be gathered of changing the law as settled by the Full Bench case.

Sections 520 and 521 contain the grounds upon which an objection may be made to an award made by an arbitrator appointed by the Court in a pending suit at the desire of the parties. It is to be borne in mind that there is in this country no compulsory reference to arbitration, and there is no essential distinction between an arbitrator appointed by the Court at the desire of the parties under s. 506 or under s. 523, and an arbitrator appointed by the parties themselves without the intervention of the Court, except in this, that the arbitrator appointed by the Court is under the direction of the Court in the discharge of his functions. Is there an appeal against an order of the Court refusing to remit an award for re-consideration under s. 520, or refusing to set aside an award under s. 521, that is, in the case of an award made by an arbitrator appointed by the Court? Clearly there is no appeal against either of such orders as interlocutory orders, for no such appeal is given by the amended s. 588. Then, with reference to the case of *Mothooranath Tewaree v. Brindabun Tewaree* (14 W. R., 327), is there an appeal against either of such orders by way of appeal against the final decree? The case just quoted is an authority that, under the old Code, there was such an appeal; but under the new Code this appeal appears to have been taken away, for s. 522 enacts that the Court is to give judgment according to the award when it has decided neither to remit the award for consideration, nor to set it aside; that upon the judgment so given a decree is to follow; and then come these words:—"No appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award." These words differ from the words of s. 325 of the old Code for which they have been substituted, viz.,—"In every [498] case in which judgment shall be given according to the award, the judgment shall be final." The words "according to the award" excluded from finality matters not falling within their purview. The negative words of s. 522 of the present Code appear to me to go further, for they take away an appeal in every case except the particular cases in which it is expressly allowed. The result of the change of language seems to be, that if the Court, having refused to remit the award for re-consideration, or having refused to set aside the award, gives judgment according to the award, and a

decree follows upon this judgment, the person against whom such decree is passed cannot go to the Appellate Court and ask that Court to say, that the original Court either ought to have remitted the award for re-consideration or ought to have set it aside. It may be argued that, as an appeal is thus taken away in the case of the person who has unsuccessfully contended that an award ought to have been remitted, or ought to have been set aside, it is only reasonable to suppose that it was the intention of the Legislature to allow no appeal to the person against whom such contention has proved successful. If this be so, it follows that, in the case of an award made by an arbitrator appointed by the Court, there is no appeal upon any matter mentioned, or referred to, in ss. 520 and 521, whether the Court decides for or against an application to remit or set aside an award: and in this event it may seem reasonable to suppose that the Legislature did not intend to give an appeal in the case of an award made by an arbitrator not appointed by the Court, when it has refused an appeal in this case of an arbitrator appointed by the Court. But it is not necessary, for the purpose of the point now before us, to adopt this part of the argument as to there being no appeal when an application to remit or set aside an award made by an arbitrator appointed by the Court has been granted. There is no express alteration in the provisions of the Code on this point. The only alteration in the language of the old section made by s. 522 of the new Code has been pointed out, and from this alteration there is no intention to be gathered of giving an appeal and altering the law as settled by the Full Bench decision in *Chintamun [499] Singh v. Uma Kunwar* (B. L. R., Sup. Vol., 505). In considering the difference between the old and the new law, I have not overlooked the omission of the following words in s. 327 of the old Code, *viz.*, "shall be written on the stamp-paper required for petitions to the Court, where a stamp is required for petitions by any law for the time being in force." These words were concerned with the stamp revenue, and were repealed by the Court Fees Act, VII of 1870, and have no connection with the present subject. The conclusion then at which I arrive is, that the law as settled by the Full Bench case has not been altered by the present Code of Civil Procedure, and that the preliminary objection must prevail. At the same time I am bound to say that this is a conclusion to which I come most reluctantly, because it appears to me that, although it is very desirable to uphold awards when properly made, the matter contained in ss. 520 and 521 is matter upon which it would be just and reasonable to allow either party, when defeated, to resort to an Appellate Court.

*Appeal dismissed.*

#### NOTES.

##### [STATUTORY CHANGE :—

An order filing or refusing to file an award in an arbitration without the intervention of Court, is now appealable. See Section 104 (1) (f) of the Civil Procedure Code 1908. Hence the above case is no longer law.]



**[7 Cal. 499]**

**ORIGINAL CIVIL.**

*The 21st, 28th July & 1st August, 1881.*

**PRESENT:**

**MR. JUSTICE CUNNINGHAM.**

**Shahebzadee Shahunshah Begum**

*versus*

**Fergusson.**

*Public Officer—Official Trustee—Notice of Suit—Tortious Acts—Civil Procedure Code (Act X of 1877), ss. 2, 424—Official Trustee's Act (XVII of 1864).*

The Official Trustee is a 'public officer' within the definition given in s. 2 of the Civil Procedure Code.

The cases in which a public officer is entitled to notice of suit under s. 424 of the Code, are those in which he is sued for damages for some wrong inadvertently committed by him in the discharge of his official duties, and the object of giving notice is, that if a public body or officer entrusted with powers happens to commit an inadvertence, irregularity, or wrong, before any one has [500] a right to require payment in respect of that wrong, he shall have an opportunity of setting himself right, making amends, restoring what he has taken, or paying for the damages he has done.

The Official Trustee, therefore, is not entitled to notice of suit, when the question to be decided relates to the rights of the *cestuis que trust*: in respect of the trust-fund, and not to a wrong committed by him.

THE plaintiff in this case claimed to be entitled to a share in a certain trust-fund, of which the defendant, the Official Trustee of Bengal, was trustee.

"Public officer"

\*[Sec 2.—"Public officer" means a person falling under any of the following descriptions (namely):—

Every Judge;

Every covenanted servant of Her Majesty;

Every Commissioned officer in the military or naval forces of Her Majesty while serving under Government;

Every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court, and every person specially authorized by a Court of Justice to perform any of such duties;

Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;

Every officer of Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience;

Every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of Government, or to make any survey, assessment or contract on behalf of Government, or to execute any revenue process or to investigate, or to report on any matter affecting the pecuniary interests of Government, or to make, authenticate or keep any document

to prevent the pecuniary interests of Government, or to prevent the infraction of any law for the pecuniary interests of Government, and every officer in the service or employment, or remunerated by fees or commission for the performance of any public



The trust was one created by the Government for the benefit of some of the descendants of Tippoo Sultan, and contained an ultimate trust in case of failure of heirs for the benefit of the Secretary of State for India. No notice of the suit had been given to the defendant, who, in his written statement, pleaded that he was entitled as a 'public officer' to two months' notice of the suit under s. 424 of the Civil Procedure Code.

Mr. Stokoe for the plaintiff.—The Official Trustee does not come within the class of public officers intended to be included within the provisions of chap. xxvii of the Civil Procedure Code. He has no connection with Government. He is not subordinate to any person. It is not necessary for him to make a reference to the Government before answering a plaint. [CUNNINGHAM, J.—The object of the provisions in this chapter is to enable the Government to determine whether they will defend a suit against one of their servants, who is being sued for tortious act which he has committed.] Yes, the provisions are similar to cases contained in various English Statutes. If the Official Trustee is a public officer, he can only come under the last clause of s. 2, the definition section of the Code, as an officer "remunerated by commission for the performance of any public duty." All the officers referred to are those who have the interests of Government under their charge. They are divided into distinct classes—(i) every Judge, (ii) covenanted servants, (iii) commissioned officers, (iv) officers of Courts of Justice, (v) jailors, (vi) police officers and health officers. The last clause deals with several classes of public officers doing duties on behalf of Government, and it would be a singular result to [501] find that the Legislature having enumerated different classes of Government servants as public officers, should, in the last clause, mean to refer to another and totally different class of officers. 'Public duties' are those in which the Government has an interest. It cannot be said that the Government is interested in this case, although the Secretary of State for India is a party. The Official Trustee takes this trust under a private deed. There are two deeds,—in one the Official Trustee is the trustee, in the other private persons, and in both there is an ultimate trust for the Secretary of State. It cannot be said that, in the second deed, the trustees are public officers. No one can compel the Official Trustee to accept a trust. The only duties imposed upon him are those referred to in s. 32 of the Official Trustee's Act, and then the leave of the High Court must first be obtained under the Act: he is not entitled to notice, it is only under s. 424 of the Code that the right can be claimed. There is a material distinction between the definition of 'public officer' in the Civil Procedure Code and the definition in the Penal Code. The same classes are referred to in both Codes, and the definition in the Civil Procedure Code is taken with slight verbal alterations from the Penal Code, but the Penal Code has a further clause which is meant to define municipal officers. The duties they have to perform are of a more public nature than those which the Official Trustee has to perform. But these persons are not 'public officers' within the meaning of the Civil Procedure Code, and it would be anomalous if the Official Trustee, whose duties are of a less public nature, should be held to be a public officer.

The office of Official Trustee was created in order to remedy the inconveniences occasioned by the death, absence, or refusal, or incapacity of trustees to act. He is an 'official' trustee; his duties are not public, but private. He cannot be compelled to accept a trust. Under the previous Official Trustee's Act, XVII of 1843, the Official Trustee could be compelled to take a trust.

The object of giving notice is to enable an officer who has committed a wrongful act to make amends without going into Court, and the suits of which

notice must be given are those in respect of tortious or quasi-tortious acts : Addison on Torts, [302] 4th Edn., pp. 726—764; *Umphelby v. McLean* (1 B. & Ald., 42); *Davies v. The Mayor of Swansea* (22 L. J. Ex., 297); *Davies v. Curling* (8 Q. B., 286); *Fletcher v. Greenwell* (4 Dow : 166); *Attorney-General v. Hackney Local Board* (L. R., 20 Eq., 626); *Flower v. Local Board of Low Leyton* (L. R., 5 Ch. Div., 347).

Mr. *Handley* for the defendant, the Official Trustee.—Chapter xxvii of the Code does not say that the suits of which notice must be given are only those in respect of tortious acts. The case of *Selmes v. Judge* (L. R., 6 Q. B., 724), shows, that, in order to entitle a public officer to notice, it is not necessary that he should have committed a wrongful act. There the defendant had merely received money. [CUNNINGHAM, J.—The action was to recover money illegally demanded of the plaintiff by the defendant, and paid by him for a highway rate levied by the defendant. He had done an illegal act.] The Official Trustee ought not to be in a worse position than a Collector acting as the agent of the Court of Wards, who, when sued for acts done in that capacity, is entitled to notice : *The Collector of Bejnor v. Munuvar* (I. L. R., 3 All., 20).

Mr. *Lee* for the infant defendants.

*Cur. ad. vult.*

**Cunningham, J.**—As to the question raised by the Official Trustee, I am of opinion that he is not in the present suit entitled to the notice provided by s. 424\* of the Civil Procedure Code. He would appear to me to fall within the last words of the definition of 'public officer' given in s. 2 of the Act, inasmuch as he is "remunerated by fees or commission for the performance of public duty," that duty being imposed upon him by the Official Trustee's Act, 1864, as holder of an office to which he is appointed by the Chief Justice. The officer appointed under Act XVII of 1864 replaced "the Registrar or such other officer of the Court" as the Court selected as Official Trustee under Act XVII of 1843. The Official Trustee's scale of remuneration in the case of transferred trusts is fixed by law (s. 11), he is precluded from being a co-trustee, or from investing funds otherwise than in Government securities, or as the [303] Court directs, or from holding a religious trust; the office is a corporation sole, the interests of one trustee vesting forthwith in his successor; his books are to be inspected by the Chief Justice, who can make rules for the safe custody of trust-funds or the forms of the Official Trustee's accounts and statements and the custody of securities. He submits his accounts annually to the Chief Justice, who has them audited. Lastly, the executor or administrator of an infant or lunatic, to whom a gift or legacy is made, or the trustee of any such gift or legacy, may, with leave of the Court, transfer it to the Official Trustee, who must, thereupon, take charge of it. All these circumstances appear to me to indicate that the Official Trustee is, in the mode of his appointment, the character of his duties, the limitations by which he is restricted, and the control to which he is subject, a public officer; and accordingly he would, in my opinion, be entitled to the notice provided in s. 424, if it could

\*[Sec. 424 :—No suit shall be instituted against the said Secretary of State in Council or against a public officer until the expiration of two months

Notice previous to suing Secretary of State in Council or public officers.

next after notice in writing has been in the case of the Secretary of State in Council delivered to, or left at the office of, a Secretary to the Local Government or the Collector of the District, and, in the case of a public officer, delivered to him or left at his office, stating the cause of action and the name and place of abode of the intending plaintiff; and the plaint must contain a statement that such notice has been so delivered or left.]

be shown that suits such as the present are within the purview of chap. xxvii of the Code. But I do not think that they are. The words "in respect of an act purporting to be done by him in his official capacity" must be read in the light of the numerous English decisions which have been passed in cases where public officers, companies, &c., are entitled by Statute to notice; and it appears from these that the cases in which notice is necessary are invariably cases in which a public officer is sued for damages for some wrong inadvertently committed by him in the discharge of his official duties; and the object, as described in *Attorney-General v. Hackney Local Board* (L. R., 20 Eq. 626), is, that if a public body or officer entrusted with powers happens to commit an inadvertence, irregularity, or wrong, before any one has a right to require payment in respect of that wrong, he shall have the opportunity of setting himself right, making amends, restoring what he has taken, or paying for the damages he has done, or, as was said by Lord Ellenborough in *Theobald v. Crichmore* (1 B. & Ald., 228), to protect persons acting illegally, but in supposed pursuance of the law, when the illegality has arisen from ignorance or inadvertence.

The rule that the notice is confined to suits of this description [504] was taken for granted in *Davies v. The Mayor of Swansea* (22 L. J., Ex., 297), where Willes, J., then counsel for the defendant, conceded that, in an action brought for breach of a specific contract, no notice was necessary.

In the case referred to by Mr. Handley—*Selmes v. Judge* (L. R., 6 Q. B., 725),—the action was brought in respect of an admittedly illegal act done by the defendants, and the question raised was, whether in doing it they *bona fide* intended to act in pursuance of these powers.

Reading chap. xxvii in the light of the rulings of the English Courts, I conclude that the intention was to give to Government, as represented by the Secretary of State, and to the servants of Government in the discharge of their public duties, the same protection as English Statutes confer on many public officers and bodies, *viz.*, that when it is alleged that they have committed an illegality in the discharge of their duties, they shall have time and an opportunity of making amends before the matter is brought into Court. This view is, I think, borne out by the entire chapter, and is strengthened by the provision in s. 426 with reference to Government electing whether it will undertake the defence or not.

The actions here referred to seem to me to differ essentially from those in which the Official Trustee is joint, often formally, often as a friendly part, for the purpose of deciding what his duty as Official Trustee is in some particular, or of arming him with the necessary authority to do some act which he cannot do on his own responsibility. In one sense in this case, the action may be said to be brought for the wrongful refusal to do some act which the plaintiff is entitled to have done; but in another sense, *viz.*, for the disposal of the real issue raised between the parties to this suit, their respective legitimacy, he need not really be a party at all, and in any case it is impossible to regard such a suit as in any sense brought for damages, and I do not, therefore, consider that it falls within the provisions of s. 424.

Attorneys for the plaintiff: Messrs. *Watkins* and *Watkins*.

Attorney for the Official Trustee: Mr. *Gregory*.

Attorney for the infant defendants: Baboo N. G. *Neogy*.

The 13th June, 1881.

PRESENT :

MR. JUSTICE PONTIFEX AND MR. JUSTICE FIELD.

Nuffer Chunder Bhutto.....Plaintiff

*versus*

Jotendro Mohun Tagore and others.....Defendants.\*

- *Damages—Inundation—Embankments—Liability to Repair—Beng. Act VI of 1873—Regs. II, VIII, and XXXIII of 1793—Reg. VI of 1806—Reg. XI of 1829—Act XXXII of 1855.*

In a suit for damages caused by the overflow of a river through an embankment on the defendants' land, it appeared that the defendants held under a *kabuliat* from Government, which provided, that the zemindar should not object to pay rent on the score of drought or inundation; that he should bear all losses incurred on that account; and also, that he should do embankment work at the proper time, and should be liable for loss from negligence. It did not appear whether the embankment was in existence when the *kabuliat* was granted. It was proved that the defendants received an annual sum from Government as a contribution to the repairs of embankments, but such payment was not provided for in the *kabuliat*, and no evidence was given as to the terms of the agreement under which it was paid.

*Held*, that there was no common law liability to repair imposed on the defendants.

That, it not having been proved that the embankment in question was in existence at the date of the *kabuliat*, the defendants were not liable *ratione tenuræ*, and that if the sum paid by Government was in consideration of the defendants' maintaining the embankment in question, and if the terms of the agreement under which it was paid showed that it was intended to impose the obligation to repair for the public benefit, the defendants would be liable.

Regulations and Acts relating to embankments in Bengal considered.

THE defendants in this case were the zemindars of Pargana Rukunpore, which contained a village called Rameshulpore, bounded on its west side by the hill-stream or river Daroka. The plaintiff was the *patnidar* of Belun, lying alongside and to the north of Rameshulpore, and also bounded on its west side by the Daroka. The plaintiff complained that the Daroka [506] having burst into Rameshulpore through its south side, had thence inundated Belun; and asserting that the zemindars of Rukunpore were bound to maintain embankments to keep out the Daroka, claimed damages against the defendants, on the ground that, in consequence of their neglect to maintain proper embankments along Rameshulpore, injury had been caused to Belun by the invasion

\* Appeal from Appellate Decree, No. 363 of 1880, against the decree of A. J. R. Bainbridge, Esq., Judge of Moorsshedabad, dated the 17th November 1879, reversing the decree of R. K. Sen, Esq., Munsif of Berhampore, dated the 30th June 1879.

of the water through Rameshulpore. The defendants held their *zemindari* under a *kabuliat* from the Government, dated the 30th May, 1794, which contained the following provisos:—"I shall not object to pay the full rent on the score of drought or inundations. I shall bear all losses on that account." And "I shall do embankment works of the said mouzas at the proper time. Should there be any loss from my negligence, I will bear the same." The plaintiff contended, that, under these covenants, the defendants were bound to repair. The defendants denied that any liability to repair was imposed on them, and contended that the object of the covenants was to save the Government revenue in case of loss by floods. It was proved that the defendants received an annual sum of Rs. 733-1 from Government as a contribution to the repairs of the embankments in the *pargana*, but no evidence was given as to the terms of the agreement under which it was paid. The *Munsif* held, that the defendants were bound to keep up the embankment, and gave the plaintiff a decree for damages. This decree was reversed by the District Judge, and the plaintiff now appealed to the High Court.

Mr. Branson, Baboo Gurudas Banerjee, and Baboo Rashbehary Ghose for the appellant.

Mr. Bell and Baboo Nil Madhub Bose for the respondents.

The following judgments were delivered:—

**Pontifex, J.** (who, after stating the facts of the case as above, continued):—  
Now if the defendants are liable, their liability must exist—

*1st.*—By the original or common law of the land, or

*2nd.*—By prescription, or

*3rd.*—*Ratione tenuræ*, or

[507] *4th.*—Under an obligation of public concern, for the observance of which public money is paid to them.

With respect to *1st*, the original or common law liability, no authority has been adduced to show that any such liability exists, and even if it did exist, it would scarcely apply beyond the repair of the ordinary or natural bank of the river, and would probably carry with it the correlative obligation of contribution to the expense of repairs by all parties protected or benefited. But the Daroka is a hill-stream liable to sudden freshes: and the plaintiff claims that the defendants are bound not only to preserve that natural bank, but to erect and maintain an artificial embankment without any liability on the part of the owners of Belun to contribute to the expense thereof. I am of opinion, therefore, that the defendants are not liable by the original or common law.

Next, with respect to *2nd*, or liability by prescription. This could only be established by evidence, and the lower Appellate Court has found, and indeed it is admitted, that there is no evidence to support a liability by prescription.

Thirdly, with respect to *3rd*, or liability *ratione tenuræ*. If it had been proved that the embankment on the south side of Rameshulpore was in existence on the 30th of May 1794, the date of the *kabuliat* under which the

defendants hold Rukunpore from the Government, I am inclined to think the defendants might be liable at the suit of the plaintiff in the same way as the Corporation of Lyme Regis were held liable at the suit of a stranger in the case of *Mayor of Lyme Regis v. Hynley* (2 Cl. and Fin., 331).

Now the kabuliat contains two clauses with respect to inundations: The first clause is—"I shall not object to pay the full rent on the score of drought or inundation. I shall bear all losses which shall be incurred on that account."

This clause was evidently intended to protect the Government against any claims by the zemindar for remission of rent on account of losses by inundation.

But at a much later part of the kabuliat occurs this other clause,—“I shall do embankment works of the said mouzas at [508] the proper time. Should there be any loss from my negligence I will bear the same.”

If this was intended, as the defendants argue, to protect the Government from claims for remission, it would be surplusage. Another meaning must, therefore, be sought for. It may be said that it was intended only to protect the Government by preserving the security for their rent intact. This might be a fair argument if the zemindari was in the neighbourhood of a large and destructive river, which might not only inundate, but absolutely obliterate it, making it an unproductive waste of water. But this does not seem to be the character of the Daroka, and besides, this argument might be pushed further to show that it was equally the interest of Government to preserve the adjacent settlements. It is difficult to understand why the Government imposed the liability under the 2nd clause, unless it was for the public benefit,—that is, the benefit of all those whose lands would be protected by the embankment; and the fact that the Government made the settlement permanent, would be a sufficient consideration for the obligation.

But though the Munsif held that this particular embankment was in existence at the date of the kabuliat, he seems to me to have arrived at that conclusion upon insufficient evidence; and I am inclined to agree with, as we are bound by, the finding of the lower Appellate Court upon this question of fact, that the embankment in question has not been proved to have been then in existence, and if it was not in existence, I do not think the zemindar would be bound to maintain it by the terms of his kabuliat. I am, therefore, of opinion that the defendants are not liable *ratione tenuræ*.

Lastly, with respect to 4th, or liability under an obligation of public concern, with respect to which the defendants have received, and still continue to receive, public money for the purpose of keeping embankments in repair. The defendants admit that they receive an annual sum of Rs. 733-1 anna from the Government as a contribution to the repairs of embankments in Pargana Rukunpore. This contribution must be payable under some agreement subsequent to the kabuliat, because it is opposed to its terms. The defendants do not produce the [509] agreement, or state for the repair of what embankments the contribution is made. But s. 36 of Beng. Act VI of 1873, referring to this contribution by the Government, speaks of embankments generally, and also refers to any embankment.

Now if the defendants receive this contribution by Government in consideration of maintaining the embankment in question in this suit, and if the

terms of such agreement show that it was intended to impose the obligation for the public benefit, I am of opinion that they would be liable at the suit of the plaintiff on the principle of the *Lyme Regis case* (2 Cl. and Fin., 331). If, however, they can show that the agreement under which the contribution is made was solely for the benefit of the zemindars, which, looking to the terms of the kabuliāt and the provisions of Act VI of 1873, seems to me, as at present advised, an unlikely conclusion, then the plaintiff would not be entitled to sue.

But no evidence has been given as to the date or terms of this agreement, or as to whether it affected this particular embankment. Assuming the agreement was not for the sole benefit of the zemindar, but was intended to impose an obligation of general and public concern, then, if it was general in its terms and applied only to embankments existing at its date, it would be for the plaintiff to show that this particular embankment did then exist. On the other hand, if the agreement contemplated the construction and repair of all embankments necessary for keeping out the river, it would be for the Court to decide whether this particular embankment was included within its scope, or rather, whether the particular inundation of which the plaintiff complains was caused by the zemindar's neglect of his obligations.

In my opinion, before dismissing the plaintiff's suit, some enquiry should have been made with respect to these matters. But so far as I can see, no issue was raised in the lower Courts for this purpose, although the plaintiff raised the question. I would, therefore, remand the case to the Munsif's Court for the trial of these additional issues :—

1. When was the agreement as to contribution by Government referred to in Beng. Act VI of 1873 made, and what were its terms ?

[510] 2. Did it relate to embankments generally, or to such as might be necessary for keeping out the river, or to such only as were in existence at its date ?

3. Was the embankment, in question in this suit, in existence at the date of the agreement ?

4. Was the obligation imposed by the agreement an obligation of general and public concern, and are the zemindars bound by it to repair the embankment in question so as to make them liable at the suit of the plaintiff for special damage occasioned by its breach ?

Having tried these issues, the Munsif will re-consider his judgment ; and if, and when, the case goes on appeal to the lower Appellate Court, that Court must also try the issue already decided by the Munsif, but not yet tried by the lower Appellate Court, whether the inundation complained of by the plaintiff was caused by defects in this particular embankment, or was occasioned by defects in embankments at Guthla or elsewhere ; and the lower Appellate Court will re-consider its judgment in the whole case. Both parties will be at liberty to adduce fresh evidence, and the cost of suit, including the costs of this appeal, will abide the result.

**Field, J.**—The defendants in this case are the zemindars of Pargana Rukunpore, in which is included the village Rameshupore. The plaintiff is the patnidar of Belun, a village, which lies to the north of, and adjacent to, Rameshupore. The plaintiff claims Rs. 506 as damages for the destruction of crops in Belun, which, he alleged, was caused by the fact that the defendants,

being bound to repair certain embankments along the bank of the river Daroka, neglected to do so; and, in consequence, the waters of this river broke into Belun and inundated the plaintiff's village.

The plaint is not very scientifically drawn, but we find in it matter which may be construed so as to base the defendants' liability to maintain or repair the embankment upon one of the four following grounds, which are indeed the only grounds upon which it is possible to base it, *viz.*—

1. Common law.
2. Liability by prescription.

[511] 3. A duty created by the conditions of the original grant at the time of the Permanent Settlement.

4. A duty arising out of the circumstance of Government making an allowance for the particular purpose of repairing the embankments of the pargana.

Before dealing with these four questions, I propose to consider the Regulations and Acts which have, from time to time, been passed by the Legislature upon the subject of embankments in these provinces, and some of which were referred to in the course of the argument in this case. There can be no doubt that the construction and maintenance of embankments were common in Mahomedan times; and were, to a certain extent, necessary in consequence of the physical features of the country. Many embankments were maintained by Government and this for several reasons. The necessary works required skill and expenditure which were beyond the resources of private individuals: or the embankments were, especially in the district of Moorshedabad and its vicinity, on a large scale necessary and intended for the protection of the city, which was the seat of the Court, and the surrounding country. Naturally the construction, maintenance, and repair of such works were entrusted to the State officials immediately connected with the Court. Other embankments were maintained by zemindars, who, it will be remembered, were then officers of Government, and who were allowed to deduct the amounts expended by them from the revenue collected for, and remitted to, the Government.

When arranging the terms of the Permanent Settlement, the Government were very desirous that the revenue should be paid in one fixed sum; and that there should be no complication with miscellaneous petty charges, which had a constant tendency to increase. It appears to me that s. 72 of Reg. VIII of 1793 was enacted to carry out this intention of Government. This section enacts as follows:—"The settlement is to be made, as far as possible, in one neat sum, free from any charges of moshaira, zemindari, amlah, poolbundi, cutcherry charges, or others of a similar nature, it being intended that all charges incidental to the receipt of the rents of the lands, and independent of the allowances of the officers of Government and [512] expenses attending the collection of the public revenue, shall be defrayed by the proprietors from the produce of their lands." I do not read this section as reciting or imposing any liability upon zemindars to construct or maintain embankments as a necessary incident of their zemindari tenure. I think it is concerned with a different object,—namely, that of making the land revenue payable in one lump sum, not complicated with, or liable to, reduction by miscellaneous or petty charges. At the time of the Permanent Settlement, certain stipulations on the



subject of poolbundi were inserted in some of the kabuliats executed by the zemindars. These stipulations were very wide and general, and did not exactly define the liability imposed thereby upon the zemindars who executed such kabuliats. There can be no doubt that the Government was, in 1793, to some extent alive to the importance of the construction and maintenance of these works. We find in the preamble to Reg. II of 1793 the following passage :—"The extensive failure or destruction of the crops that occasionally arises from drought or inundation, is in consequence invariably followed by famine, the ravages of which are felt chiefly by the cultivators of the soil and the manufacturers, from whose labors the country derives both its subsistence and wealth. Experience having evinced that adequate supplies of grain are not obtainable from abroad in seasons of scarcity, the country must necessarily continue subject to these calamities, until the proprietors and cultivators of the lands shall have the means of increasing the number of the reservoirs, embankments, and other artificial works, by which, to a great degree, the untimely cessation of the periodical rains may be provided against and the lands protected from inundation." In the Code of Regulations, all of which were passed upon the same day, viz., the 1st May 1793, we find one Regulation specially concerned with the subject of embankments, namely, Reg. XXXIII of 1793. The preamble of that Regulation is as follows :—

"It being necessary that provision should be made for the annual repair of certain embankments in different parts of the country which have been considered as public works, and have been kept in repair at the expense of Government, in consequence of their great extent, and the damage to which the districts and places, for the protection of which they have been constructed, would be liable from inundation, in the event of their not receiving the necessary annual repairs ; and there being the strongest grounds for believing that if the embankments, reservoirs, and watercourses in the estates of individuals, which are not considered as public works, were enlarged or put into a proper state of repair, and new works of the same nature made where necessary and practicable, a sufficient portion of the crops might be preserved in seasons of drought or inundation for the subsistence of the body of the people, and consequently the recurrence of the miseries which this country has so often suffered from famine be prevented, &c." Now this preamble contemplates embankments of two classes :—

1. Embankments which, as public works, were erected and are maintained by Government at its own expense.

2. Embankments in the estates of individuals which were not considered as public works, but which the Government contemplated being enlarged or put into a proper state of repair, and also contemplated the construction of new works of the same nature at the expense of individual zemindars.

Sections 2 to 7 of this Regulation provide for the maintenance and repair of the first class, which may be termed public embankments. The remaining sections (8 to 15) provide for the making of advances by Government to zemindars for the purpose of enabling them to construct new embankments and repair or enlarge the old ones. These advances were to be repaid with 12 per cent. interest ; and the Collectors were to supervise the expenditure of the money so advanced. A penalty of 25 per cent. was imposed in case the works were not carried out. This Regulation contains no provisions for compelling zemindars to carry out the general stipulations as to poolbundi which were inserted in their kabuliats (in the kabuliat which has been before us in this case, this stipulation

as to poolbundi is generally expressed, no particular embankments being specified as the embankments to be kept in repair). As a natural result, constant disputes arose between the zemindars and the officers of Government as to what embankments were to be repaired by Government and [514] what by private individuals. The zemindars were found unwilling to take advances upon the terms provided by the Regulation; and the old embankments were not maintained in proper repair, much less were new works undertaken, as the Government had hoped they would be. Fresh legislation became in consequence necessary within a very few years after the Permanent Settlement; and accordingly we find a new Regulation enacted in 1806, viz., Regulation VI of that year. The preamble to this Regulation contains the following significant recital:—

"Whereas it is essential that further provisions should be made for the more effectual repair of the embankments which the zemindars and talookdars are bound, under the conditions of the Permanent Settlement of the land-revenue, to maintain at their own expense, &c." Sections 2 to 10 of this Regulation provide for the repairs and maintenance of public embankments, and the duty of carrying out these works was to be discharged by Embankment Committees. Then comes s. 11. This section invested the committees with a general control over the embankments which were repaired at the expense of the zemindars and farmers, as well as those which were maintained by the Government, and the section proceeds: "By this rule it is not intended to interfere with the zemindars and farmers in the repair of the embankments situated in the lands held by them, so long as that duty shall be effectually and properly performed. The committees shall, however, be at liberty, whenever they may deem it necessary, to call upon any zemindar or farmer, either by a perwana from themselves or through the Collector, as may be deemed preferable, to make such repairs to the embankments situated in the lands of such zemindar or farmer as may be required. Should any zemindar or farmer, after the receipt of such perwana, neglect to make the necessary repairs, the committee shall submit to Government an estimate of the expense required for that purpose, and the repairs shall, in all such cases, be made by the officer of Government, and the expense recovered from the zemindar or farmer who was bound to keep the embankments in a proper state of repair." The remaining sections of this Regulation provide for [515] cuts and sluices in embankments, and for the prosecution and punishment of persons damaging or injuring embankments. No provision was, however, made for determining whether any particular embankment was one which the zemindar was bound, under the conditions of the Permanent Settlement, to maintain at his own expense. And further, we find no provisions as to the manner in which sums expended upon the repair of embankments were to be recovered from the zemindars, if they did not discharge them voluntarily. But in those days the rule laid down had only just commenced, and no zemindar would have thought of resisting the perwana of the Embankment Committee, or of the Collector, such a perwana, issued under the express authority of a Regulation, being regarded as an order of the Sirkar or Government. The power of the executive being thus brought to bear directly upon the zemindars in this matter, there appears to have been no further difficulty felt for a number of years, and we find no further legislation till 1829.

Reg. XI of that year merely abolished Embankment Committees, and transferred their duties to such officers as might be appointed by the Governor-General in Council. We have nothing then till we come to Act XXXII of 1855, which repeals the previous Regulations, and substitutes amended provisions

therefor. The provisions of this Act are briefly as follows:—A public embankment was defined to be an embankment now or hereafter kept up by the officers of Government at the expense either of Government or of any private individual. In many instances zemindars, in order to escape the responsibility and trouble of maintaining and repairing embankments by their own agents, had compounded with Government to have the work done by the officers of Government who had charge of the public embankments. It is matter of history that the Raja of Burdwan gave up the annual sum of Rs. 60,000, which, at the time of the Permanent Settlement, was deducted from his jama in consideration of his undertaking the duty of poolbundi. But to return to the Act of 1855, a Superintendent of Embankments was appointed under the provisions of this Act, and he was vested with large powers of effecting improvements—(i) by taking over private embankments, (ii) by removing those which [516] proved obstructive to drainage, &c., (iii) by changing the line of any public embankment or making a new one, and (iv) by enlarging, &c., any embankment. The Revenue authorities were now for the first time vested with exclusive jurisdiction in all matters provided for by the Act, and the jurisdiction of the Civil Courts was expressly excluded. There was also a provision in s. 6 that the cost of keeping up private embankments taken under Government was to be charged upon persons bound to keep up such embankments. But in this Act, as in previous enactments, no provision is made for deciding in any particular case whether any individual embankment is to be repaired at the expense of Government, or at that of the zemindar in whose estate it is situated. The rest of the Act provides for compensation to persons injured by the works, sluices, and cuts; for specifications and estimates of the expense of keeping up the embankments maintained at the cost of the zemindars and others; and for the recovery of these expenses as arrears of revenue. The law remained in the state in which this Act of 1855 left it until 1873, when Act VI of that year was enacted by the Bengal Council. This Act repealed Act XXXII of 1855. It defined a public embankment to be an embankment maintained by the officers of Government. The main features of this Act were these:—(i) The powers of the Superintendent were transferred to the Collector, and enlarged for the construction of new works and for improvements. In fact, by the Act of 1855, and more especially by this Act of the Bengal Council, the Collector was invested with authority similar to that exercised by the Commissioners of Sewers in England under the 6 Henry VI, c. 5; 3 & 4 Will. IV, c. 22; 4 & 5 Vict., c. 45; 12 & 13 Vict., c. 50; 23 & 24 Vict., c. 51, and other Statutes. (ii) The costs of all works executed under the Act were to be borne rateably by the zemindars of the estates in which were situated the lands benefited or protected by the repairs or works executed. Similarly, in England, all persons whose property derives any advantage from the works of the commissioners may be assessed in respect of that property: *Soady v. Wilson* (3 A. & E., 248). The zemindars [517] were empowered to levy a certain proportion of these expenses from the tenure-holders who were subordinate to them. Now it may be contended that the adoption of this principle of rateability in this Act amounted to a virtual renunciation on the part of Government of the principle which, as I have pointed out, had existed in former enactments,—the principle, that is, of making individual zemindars personally liable for the cost of maintaining those embankments which were situated in their estates. Now, from what has already been said, it will be seen that the change thus made in the law had the effect of introducing into this country a principle which has long existed in England, and has been recognized and regulated by the Statutes of Sewers, under which

the burden of keeping up sea-walls, embankments, and similar works is thrown rateably upon the persons whose property is benefited by the construction and maintenance of these works. (iii) The Engineer was invested with certain powers for the repair of public embankments: these powers to be exercised subject to the control of the Collector. (iv) A specification, to be found in Sched. D of the Act, set out and enumerated, for the first time, the embankments which are maintainable at the expense of Government: and the Lieutenant-Governor is vested with power to enter any new embankment in this schedule or to remove any existing embankment therefrom. (v) Schedule E contains a further specification of certain sums contributed annually in accordance with custom for certain parganas in the Moorshedabad District towards the maintenance of the embankments thereof, and it is to be observed that Rukunpore—the pargana with which this suit is concerned—is one of the parganas specified in that schedule. The jurisdiction of the Civil Courts is excluded in respect of all things done under the authority of the Act.

I now turn to the four questions which, as I have already mentioned, have to be disposed of in order to the decision of this case; and the first of these questions with which I have to deal is, whether there is any common law liability cast upon the defendants, to repair the particular embankment with which this case is concerned. Now, in the whole of the legislation which I have just examined, there is nothing to be found which [518] presupposes or assumes any such liability; and this point is of the more importance when we remember that the preambles of the old Regulations contain, in very many instances, a recital of what the framers of those Regulations considered to be the antecedent common law of the country. The only liability spoken of is a liability based upon the conditions of the Permanent Settlement, and this is very different from common law liability. If there had been any such common law liability, it would have been unnecessary to insert special stipulations in the Permanent Settlement *kabuliats*. It would be reasonable to suppose that the proprietor of an estate bordering upon a river should not be allowed to alter the natural condition of the land so as to cause injury to his neighbours by letting the water in upon their lands: but there is nothing reasonable in the supposition that such a proprietor should be compellable to construct and maintain artificial works in order to confer a benefit upon his neighbours by protecting their lands from inundations that would happen in the normal state of things. He might himself receive little or no advantage from expensive works, the benefit of which would be enjoyed by strangers, who had contributed nothing towards their construction or maintenance. According to my view, and so far as I have been able to discover, there is, under the common law of this country, no liability cast upon a riparian proprietor to construct artificial works or keep them in repair. There is no such common law liability in other countries so far as I have been able to discover. In England, it has been decided in the case of *Hudson v. Tabor* (L. R., 2 Q. B. Div., 290), that, apart from prescription, there is no liability cast on a frontager to maintain walls for the protection of the land. At page 294 of the report in this case, the ancient usage of the realm is discussed; and Lord Coleridge, C. J., says:—"The whole of this procedure is entirely inconsistent with the notion that, at common law, the frontager could be compelled, by action, to repair any part of such defences which had been injured by the outrageousness of the sea." And an examination of the rest of the judgment will show that, according to the view taken by the Court of Appeal in that case, there is cast [519] upon a frontager, by the common law, no liability to put fresh materials

on the top of a sea-wall, from time to time, in order to keep it up to the proper height. See also the report of this case in the Court below (L. R., 8 Q. B., Div., 225). In the case of *Rex v. The Pagham Commissioners* (8 B. and C., 355), it was decided that no obligation lay upon persons occupying lands adjoining the sea to erect works for the protection of their neighbours, and that there was no liability to indemnify them against loss. In the case of *Morland v. Cook* (L.R., 6 Eq., 252), there was an acre-scot levied rateably for the repair of these works. It was there based upon a covenant, and this covenant was held to be binding on purchasers without notice thereof. An examination of the cases upon this subject will show that the liability to construct or repair sea-walls was, in some instances, imposed on individuals by covenant amongst themselves; and, in other instances, is regarded as a liability of contributing rateably, imposed by the common law upon all persons benefited by the construction and maintenance of such works. In the case of *Rex v. The Commissioners of Sewers for Essex* (1 B. and C., 477), it was held, that all persons enjoying the benefit of a sea-wall are bound and liable at common law to repair and maintain it in the absence of any special custom or contract for that purpose. This liability is opposed to the supposition of any exclusive liability on the part of an individual to construct or maintain a sea-wall or embankment upon his own land for the benefit of his neighbours' land.

Then, secondly, are the defendants liable by prescription? On this point it may be sufficient to say that no case of prescription has been established by the evidence, and very strong and clear evidence would be necessary in order to establish such a prescription. In the case of *Mason v. The Shrewsbury and Hereford Railway Company* (L. R., 6 Q. B., 578), a natural watercourse, called Ashton Brook, flowing through the plaintiff's land, had been diverted for upwards of forty years by a canal company under the powers of their Act, and the bed had become silted up, and was no longer adequate to carry off the flood water in its natural [520] state. The canal was discontinued, and the waters, restored to their former course, and the plaintiff's land was thereby flooded and damaged. The Court held that the plaintiff had no legal ground of complaint. Blackburn, J., said:—"Before the canal was made, the person whose estate the plaintiff now has had the ordinary rights and liabilities of a riparian owner on the banks of a natural stream. He was entitled to have the waterflow to him in its natural state, so far as it was a benefit, as, for instance, to turn his mill or water his cattle; and he was bound to submit to receive the water, so far as it was a nuisance." Now, this is a strong case, seeing that the canal works had been in existence for more than forty years; and notwithstanding this, it was held that the plaintiff had no legal right to the continuance of the benefit conferred upon him by their construction. See also *Hudson v. Tabor* (L. R., 2 Q. B. Div., 290), where it was remarked, that the mere fact that each frontager had always maintained the wall in front of his land, and that no one had thought it necessary to erect a wall to protect his land from his neighbour's land, was not sufficient evidence to establish a prescriptive liability on the part of the defendant to maintain the wall for the protection of the adjoining landholders.

I come now to the third question—Are the defendants bound by the conditions imposed upon them by the original grant made at the time of the Permanent Settlement? The stipulation in their *kabuliat* is as follows:—"I shall make embankment works of the said *mouzas* at the proper time. Should there be any loss from any negligence, that loss shall be mine." Now I think there can be no doubt that the effect of s. 67 of Reg. VIII of 1793 was to make

this stipulation in the kabuliat binding upon them for all future time. It is possible that this stipulation was made in the interests of the ryots and was in furtherance of the policy which the Government of the time enunciated in many of the Regulations—the policy, that is, of protecting and providing for the interests of the ryots. Two points have to be considered in connection with the question with which I am now dealing: *first*, if there was such a liability imposed by the original grant, can the plaintiff maintain this [521] suit, seeing that he was no party to that contract, if the term ‘contract’ may be applied to the agreement entered into between the Government and the zemindar; and *secondly*, is the embankment with which this case is concerned within the provisions of that stipulation? Now, that the plaintiff can maintain this suit, I think the case of *The Mayor of Lyme Regis v. Henley* (1 Bing. N. C., 222), is an authority. In that case, Park, J., said:—“It is, however, further urged, that whatever engagement the Corporation may be under as between them and the Crown, so as to render them liable either to forfeiture of their charter, or any other proceeding by the Crown, yet that no stranger can take advantage of such engagement and maintain an action. It is admitted that if their liability arose by prescription, they would be indictable, and also an action would lie for special damage, as in the *Mayor, &c., of Lynn v. Turner* (Cowp., 86), *Churchman v. Tunstal* (Hardr., 162), *Payne v. Partridge* (Show., 255), and many other authorities which it is unnecessary to cite; because it is clear and undoubted law, that wherever an indictment lies for non-repair, an action on the case will lie at the suit of a party sustaining any peculiar damage. Now, we are unable to see any sound distinction between a liability by prescription and a liability arising within time of memory, but legally created. We do not say that prescription necessarily implies a charter or grant, but it necessarily implies some legal origin, and a charter would be a legal origin. Suppose that a prescriptive obligation were alleged, and that a charter granted before time of memory were produced, and so the legal origin were shown, would that destroy the prescription? Certainly not. Would the obligation arising from that charter have been less binding within a few years after it was granted, than it is now after a great lapse of time? Certainly not. If then the origin be legal, how can it be important when it took place? We do not go the length of saying that a stranger can take advantage of an agreement between A and B, nor even of a charter granted by the king, where no matter of general and public concern is involved; but where that is the case, and the king, for the benefit of the public, has made a certain [522] grant imposing certain public duties, and that grant has been accepted, we are of opinion that the public may enforce the performance of those duties by indictment, and individuals peculiarly injured, by action.” Whether the grant to the defendants in this case was a matter of sufficient general and public concern, is a question which I think it will be unnecessary to decide upon this part of the case, because, upon the second point which I am about to notice, I am satisfied that no liability under the conditions of the kabuliat can be enforced as to this particular embankment. Were it otherwise, I would have no hesitation in deciding that both the grant and the stipulation in the grant were of general and public concern.

The second point to be considered in connection with this third question is, whether this particular embankment is within the covenant contained in the defendants’ kabuliat. The Munsif has found that it is, but it appears to me that this finding is based on insufficient evidence; and I concur in the decision of the District Judge upon this point. It was argued before us that the condition in the kabuliat ought to apply, not only to the embankments which

were in existence at the time of the Permanent Settlement and which might have been supposed to be within the intention of the Government and the zemindar who executed the kabuliāt, but also to all embankments which might at any future time be considered necessary for the protection of the land; but this is an argument in which I am unable to concur. The progress of the country and of engineering skill, and the increase of population necessitating the bringing of fresh land into cultivation, have, within recent years, rendered possible and created a demand for works of reclamation and drainage which cannot reasonably be supposed to have been within the contemplation and intention of the Government and the zemindar of 1793. I think, then, that the only reasonable construction to be put upon the kabuliāt is, that the zemindar is bound to repair such embankments as in 1793 and previously had usually been repaired by the zemindar. As the District Judge has found that the particular embankment in this case does not fall within that category, I think that the defendants cannot be made liable to repair this [523] embankment upon the basis of any stipulation contained in the original kabuliāt.

Then, as to the fourth and last point, are the defendants bound to repair by reason that this is one of the embankments for the repair of which they receive a contribution from the Government? I think that there is not sufficient evidence upon the record to enable us to determine this point, and that there ought to be an enquiry as to the circumstances under which, and the objects for which, this allowance has been made by Government; and I concur in the remand order proposed by my learned colleague.

*Case remanded.*



[7 Cal. 523]

## APPELLATE CRIMINAL.

*The 13th July, 1881.*

PRESENT :

MR. JUSTICE CUNNINGHAM AND MR. JUSTICE PRINSEP.

Hursee Mahapatro.....Petitioner

*versus*

Dinobundo Patro.....Opposite party.\*

*Tributary Mehals—Mohurbhunĳ—Jurisdiction—British India.*

A British subject residing in Midnapore, in Bengal, was charged before the Maharaja of Mohurbhunĳ with having committed the offence of defamation in Mohurbhunĳ, in the Tributary Mehals. On an application made by the accused to the Magistrate of Midnapore, objecting to be tried by the Raja of Mohurbhunĳ, the Commissioner of Cuttack, who was also Superintendent of the Tributary Mehals, directed that the case should be transferred to Midnapore and tried by the Magistrate of that district, who had the power of an Assistant Superintendent of the Tributary Mehals. The accused, while being tried, moved the High Court to set aside the proceedings at Midnapore, on the ground that the offence not having been committed within the district the Magistrate was acting without jurisdiction.

*Held*, that the proceedings were without jurisdiction.

*Per* CUNNINGHAM, J.—The Tributary Mehals are now, as they were in 1874, a portion of British India, which the Government of India has been pleased to exempt from the ordinary law and jurisdiction of the Courts, and to govern by means of special officials and enactments. Whatever may be the powers of Government as to Mohurbhunĳ, those powers do not extend to [524] empowering the legally constituted tribunals of a British district to follow in that district, and in the case of residents in it, any procedure, and to exercise any other jurisdiction than that created by the law.

*Per* PRINSEP, J.—The territory of Mohurbhunĳ is a part of British India, but at present not subject to any laws not specially extended to it. The Tributary Mehals being British India, and being excluded from the operation of all the laws in force in British India, unless expressly extended to them, the orders of Government conferring powers on particular officers over criminal offences committed within those mehals are *Ultra vires*.

THE facts which gave rise to this rule being issued were as follows :—

A complaint was preferred to the Raja of Mohurbhunĳ by one Dinobundo Patro, the dewan of the Raja, charging the petitioner and two others with libel. Thereupon the Raja issued summonses and warrants for the attendance of the accused, one of whom, the petitioner, was a ryot of the Raja's, holding lands and residing in Midnapore. The process was sent to the Magistrate of Midnapore for the purpose of being executed, and the petitioner then applied to the Magistrate not to execute the process not on the ground that the Raja had no jurisdiction to try him, but that as the Raja was personally concerned, a fair trial would not be held.

\* Criminal Motion, No. 27 of 1881, against the order of J. C. Price, Esq., Magistrate of Midnapore, dated the 18th December 1880.



The Magistrate, on the 30th June 1880, forwarded the petition to the Superintendent of the Tributary Mehals, an office then held by the Commissioner of Cuttack; and he, on the 12th July, addressed the Raja, requesting him to make over the papers of the case to the Magistrate of Midnapore, who was also vested with the powers of an Assistant Superintendent of Tributary Mehals. Two of the accused were then summoned to appear before the latter officer, and after several witnesses had been examined, he, on the 13th December 1880, framed a charge against them under s. 500 of the Penal Code. This charge was entitled as made by "the Assistant Superintendent of the Tributary Mehals," and was as follows:—

I, J. C. Price, Officiating Assistant Superintendant of Tributary Mehals hereby charge you, Hursee Mahapatro, Baidi Bagh, as follows:—That you, on or about the end of Phalgun last, at Baripada, in Mohurbhunj, defamed one Dinobundo Patro Naib of Nyabasan Parganna, by saying that he had taken [525] bribe of Rs. 5,000 to get the Nyagram Rajah a loan from the Mohurbhunj Maharaja of Rs. 25,000, also by referring to, and confirming the allegations made in a petition previously submitted to the Maharaja, and thereby committed an offence punishable under s. 500 of the Indian Penal Code, and within the cognizance of this Court. And I hereby direct that you be tried by the said Court on the said charge.

(Sd.) J. C. PRICE,

*Asst. Supdt.*

*The 13th December, 1880.*

The prosecution then proceeded till the 18th January, when one of the accused was acquitted, the charge as against him being abandoned. The other accused then entered into his defence, and called witnesses, but previous to judgment being delivered, he moved the High Court to set aside the proceedings as having been without jurisdiction, and obtained the rule which now came on to be argued.

The *Advocate-General* (the Hon'ble G. C. Paul) with him Mr. Phillips, appeared to show cause on behalf of Dinobundo Patro the dewan of the Maharaja of Mohurbhunj. The first question in this case is the jurisdiction of this Court to interfere in the matter. We contend that Mr. Price, as Assistant Superintendent of the Tributary Mehals, is not a Court subordinate to this Court, and therefore not under this Court's powers of control and supervision. He was not acting as a Magistrate, but under, a different capacity, viz., that of a political officer, and this Court can only interfere when he is acting as a subordinate Court, as it has no such powers over private individuals. Moreover, this jurisdiction has been exercised under orders from the Local Government for a long series of years, and cannot now be questioned on a rule like this, and this question should not be raised on an application of this kind, especially when nothing has yet been done. We further contend that Mohurbhunj is not British India, but foreign territory, for the Regulations do not show that it is British territory. [CUNNINGHAM, J.—Is the Government [526] represented? We ought to know if the Government concede that Mohurbhunj is not a portion of British India.] We do not appear for the Government on the present occasion, as they have had no notice of the rule.

Mr. Phillips followed on the same side.

Mr. M. Ghose in support of the rule.—This Court has jurisdiction over all Magistrates who are subordinate, whether they profess to act as such or not. Mr. Price is a Magistrate ordinarily subject to this Court's powers of superin-

tendence, and he is acting as a 'Court' and trying a case within the jurisdiction of this Court, though he may choose to call himself "Assistant Superintendent of Tributary Mehals," an office unknown to the law. He must show that the law allows him to act as such without being subject to the superintendence of this Court. If a Judge or a Magistrate convicts any subject of Her Majesty, such Judge or Magistrate cannot oust the jurisdiction of this Court by saying that he had convicted not in his judicial, but in his executive, capacity. It is immaterial how Mr. Price chooses to describe himself in the proceedings, for that will not alter the case or his real character. [CUNNINGHAM, J.—Have you any authority on this point?] There is a well known class of cases where this Court, under s. 15 of the Charter, has set aside proceedings of Magistrates under s. 518 of the Criminal Procedure Code, which are expressly declared by law to be non-judicial proceedings; see *Banee Madhub Ghose v. Wooma Nath Roy Chowdhry* (21 W. R., Cr., 26), *Chunder Coomar Roy v. Omesh Chunder Majoomdar* (22 W. R., Cr., 78), *Sree Nath Dutt v. Unnoda Churn Dutt* (23 W. R., Cr., 34). The principles of these cases apply to the present case, and they were considered by a Full Bench: *In re Chunder Nath Sen* (I.L.R., 2 Cal., 293). And again subsequently considered by all the Judges in *Gopi Mohun Mullick v. Taramoni Chowdhuran* (I.L.R., 5 Cal., 7; S. C., 4 C.L.R., 309). In *Shurut Chunder Bannerjee v. Bama Churn Mookerjee* (4 C.L.R., 410), I contended that this Court [527] had no power to set aside, on revision, an order of a Magistrate not made in his judicial capacity; but Morris and White, JJ., decided against me, on the ground that the Magistrate had acted without jurisdiction, and that case has been followed by other Judges. This Court has, therefore, jurisdiction under the Charter to set aside the proceedings of a subordinate Magistrate, which are themselves without jurisdiction. The next question is, whether Mohurbhunj is a part of British India, and subject to the Code of Criminal Procedure. If it is not British India, then my client can only be tried under the provisions of the Extradition Act, and by a Court subject to the ordinary jurisdiction of this Court. But if it is not British India, then my client cannot be tried in Midnapore, as that would be contrary to the provisions of s. 63 of the Criminal Procedure Code. [CUNNINGHAM, J.—But we have the power to transfer a case to Midnapore if we choose.] Yes, if Mohurbhunj is British India, and in that case my client would be tried by Mr. Price in his capacity of Magistrate, and have a right of appeal to the Sessions Judge, to which we do not object. He objects to be tried by a Court which the law does not recognize. But I contend that Mohurbhunj is British India; see Hunter's Statistics, Puri and Tributary Mehals; Regs. IV of 1804, XII of 1805, ss. 36, 37, XIII of 1803, s. 13, XI of 1816, V of 1818, s. 6, Act XX of 1850; and *Damodar Gordhan v. Deoram Kanji* (I. L. R., 1 Bomb., 367), Mohurbhunj being part of British India, and not included in the Scheduled Districts Act, the orders of the Government empowering Mr. Price, the Raja of Mohurbhunj, and the Commissioner of Cuttack to try cases are *ultra vires*; and if it be contended that Mohurbhunj is not a part of British India, then the Government should have notice before your Lordships decide that question.

The Court, accordingly, took time to consider, and subsequently directed notice to be served on the Government of Bengal. The case was then re-argued, and Mr. Phillips, Standing Counsel, appeared on behalf of the Government, and contended that Mohurbhunj was not a part of British India. He [528] referred to *Lachmi Narain v. Raja Partap Singh* (I. L. R., 2 All., 1), and objected to the jurisdiction of the High Court. Mr. M. Ghose re-argued the whole case, and contended that Mohurbhunj was within British India, and that the trial of the petitioner in Midnapore ought to be set aside.

The judgments of the Court (CUNNINGHAM and PRINSEP, JJ.) were as follows :—

**Cunningham, J.**—This case comes before us in the exercise of our powers of criminal revision.

The facts, as set out in the petition of Hursee Mahapatro, are as follows :—

A complaint was preferred to the Raja of Mohurbhunj, charging the petitioner and two others with libel. Thereupon the Raja issued summonses and warrants through the Magistrate of Midnapore for the attendance of the accused, who are residents of that district. The accused petitioned Mr. Price, the Magistrate of Midnapore, that the case should not be tried by the Raja. The Magistrate forwarded the petition, on the 30th June 1880, to the Superintendent of the Tributary Mehals (a post occupied by the Commissioner of Cuttack) ; and on the 12th July 1880, he addressed the Raja, requesting him to make over the papers of the case to the Magistrate of Midnapore ; "who," it was observed, "has the powers of an assistant to the Superintendent of the Tributary Mehals." This officer, under his usual official seal, summoned two of the accused. They appeared before him, several witnesses were examined, and on the 13th December 1880, he framed a charge against them under s. 500 of the Penal Code. This charge was entitled as made by "the Assistant Superintendent of the Tributary Mehals."

On the 18th January 1881, the prosecution was abandoned against one of the accused, and Mr. Price directed his acquittal.

The remaining accused then examined his witnesses, and the case was argued. Judgment has not yet been delivered, and the accused has now moved the High Court to set aside the proceedings as having been without jurisdiction.

[529] The question before us is, whether the proceedings before Mr. Price, either as Magistrate of Midnapore, or Assistant Superintendent of the Tributary Mehals, have been without jurisdiction, and whether, supposing them to be without jurisdiction, he is, in his capacity of Assistant Superintendent of the Tributary Mehals, amenable to the revision powers of the High Court.

The estate of the Raja of Killa Mohurbhunj forms a portion of territory which was ceded by the Mahrattas to the British Government in 1803 ; it forms one of a group of estates known as "the Tributary Mehals."

The history of these mehals, as shown by the Regulations, Acts, and orders of Government, and so far as concerns the present enquiry, is as follows :—

Reg. IV of 1804, after reciting that the province of Cuttack, including Balasore and other dependencies of the said provinces, had been ceded to the East India Company in full sovereignty, and that it was necessary to provide for the administration of criminal justice formed the province into a 'zilla' with two divisions, and a Magistrate in each ; extended the Criminal Regulations of Bengal ; but provided that the Court should not have power to take cognizance of cases committed before the 14th October 1803, the date on which the fort and town of Cuttack surrendered to the British arms.

Reg. XII of 1805 provides for the collection of public revenue in Zilla Cuttack. It recites and, with certain modifications, confirms a proclamation

issued by the Commissioners, dated 15th September 1804, regarding the rights of landowners in the 'Mogulbundi' tract of the zilla, viz., that part in which the land itself was responsible for the revenue; and, after generally extending the Regulations as to the settlement and collection of public revenue, it provides against the implication that any of those Regulations are, for the present, to be considered to be in force in certain enumerated jungle or hill zemindaries occupied by a rude and uncivilized race of people, with the proprietors of which engagements were formed by the late Board of Commissioners for the payment of a certain fixed Government rent or tribute to Government. The same exemp- [580] tion was extended to Mohurbhunj, with the provision that the Collectors should conclude a settlement with the proprietors of that estate for the payment of a fixed annual Government rent on the same principle as that observed in the case of the other hill or jungle zemindaries.

Reg. XIII of the same year deals with the maintenance of order and administration of justice in Cuttack, and (after excluding certain tracts) forms the rest of the district into one zilla, instead of two, as provided by Reg. IV of 1804.

Section 13 extends the Beng. Regulation as to criminal justice to the zilla, but excludes from its operation certain hill zemindaries and the territory of Mohurbhunj.

Reg. XIV of the same year, in providing for the administration of civil justice, makes a similar extension of the Beng. Regulation, and contains a similar exemption to that contained in Reg. XII.

By Reg. XI of 1816, provision was made for trying inheritance suits 'in certain tributary estates' excepted by Reg. XIV of 1805, s. 11, from the ordinary law. These suits were to be heard by the Superintendent of the Tributary Mehals, an officer who appears to have been appointed in 1814 (Hunter's Statistical Account of Bengal, Orissa, 196), but of whose appointment no official notification has been brought to our notice. The sub-division of estates was forbidden, and no suit could be taken up, the cause of action in which arose previous to the 14th October 1803, the day on which the fort and town of Cuttack surrendered to the British arms.

An appeal from the Superintendent lay to the Sadr Adawlut, and in some cases to the King in Council.

The relations of the Raja of Mohurbhunj to Government are defined by a 'treaty engagement' executed by the Raja, dated 1st June 1829. By this the Raja engaged with the East India Company always to maintain himself in submission and loyalty; to pay annually as peshkush for the zilla Rs. 1,001; to apprehend fugitives from Orissa; to apprehend and give up for trial on demand, any ryot who had committed 'an offence' within the Mogulbundi territories; to supply provisions to the Company's troops when 'passing through my territories; [531] to offer no impediment to subjects of the Company passing through my boundaries; to depute a contingent force of my own troops, and to act with the forces of Government against recusant rajas, receiving only rations.

Act XXI of 1845 enabled the Governor-General in Council to remove any of the estates mentioned in s. 2 of Reg. XI of 1816 [including Mohurbhunj] and to place them under the jurisdiction of an officer to be appointed by the Government of Bengal and to be called 'Agent for the Suppression of Meriah Sacrifices,' and his subordinates.

The agents so appointed were to be guided by instructions from time to time received from the Government of India through the Local Government; and the Government was empowered to prescribe rules for their guidance, and to prescribe the finality of their decisions in civil cases, and the class of criminal cases which they were to submit to the Sadr Court.

Act XX of 1850, after reciting that certain zemindaries and Mohurbhunj were temporarily exempted by Regs. XII and XIII of 1805 from the ordinary revenue and criminal law, and that it was desirable to provide for disputes as to the boundaries of zemindaries, provided that any boundary dispute between the excepted estates and estates subject to the Beng. Regulations should be tried by the Superintendent of the Tributary Mehals, subject to confirmation by the Government of Bengal. On the 24th September 1851, the Lieutenant-Governor of Bengal appointed Mr. Schalch, the Magistrate of Midnapore, to be an *ex officio* Assistant to the Superintendent of the Tributary Mehals. In conformity with orders of the Secretary of State, dated 26th July 1860, adoption sanads were granted to the Rajas of these mehals, which are therein described as 'estates' when subsequently the word 'estates' was directed by the Lieutenant-Governor to be substituted. In speaking of them, the Government of India directed that the designation of 'state' as employed by Lord Canning should remain unaltered.

On the 12th December 1870, the Secretary of the Bengal Government addressed the Magistrate as "*ex officio* Assistant Superintendent, Tributary Mehals," informing him that, as *ex officio* Assistant Superintendent of the Tributary Mehals, he [532] was empowered to take up for trial all offences committed within the Tributary Mehals not punishable with death, and to pass sentences not exceeding seven years, submitting his proceedings, in each case, to the Superintendent: trials thus conducted were to be, as far as possible, in accordance with the Criminal Procedure Code.

In 1872, the Government of India vested the Superintendent of the Tributary Mehals with the powers exercised by a Sessions Judge in Regulation Districts, and with power to hear appeals from sentences passed by any subordinate officer in Tributary Mehal cases.

On the 30th April 1873, the Government of Bengal addressed the Superintendent of the Tributary Mehals, in answer to a letter submitting a tabular statement of the powers then exercised by officers in the tributary estate of Orissa, and the powers which, in the opinion of the Superintendent, ought to be exercised in accordance with the spirit of the new Criminal Procedure Code; authorized the Superintendent to exercise the powers of Magistrate of a District, and of a Sessions Judge under s. 15 of the Act; and gave him power to hear appeals from sentences under s. 36. The Magistrates and *ex officio* Assistant Superintendents of Tributary States were invested with the powers of a Magistrate of the first class and under ss. 36 and 222 of the Code.

Up to this point the effect of the Acts of the Government, political, executive, and legislative, appears to have been—*1st*, that the Tributary Mehals had become an integral portion of British India within the scope of the general powers of the Government, and subject to any legislative enactment duly passed in their behalf; and *2ndly*, that they had been expressly exempted from the ordinary law of the country, and were administered by specially appointed officers under special enactments. As to these orders, it is important to remember that, by virtue of s. 25 of the Indian Councils Act, 1861 (24 and 25,

Vict., c. 67), no question can arise as to the validity of any rule, law, or regulation made by the Governor-General, or the Local Government, for Non-Regulation Provinces prior to 1st August 1861, on the ground of its having been made otherwise than in accordance with existing law.

[533] We have now to consider whether the position of Mohurbhunj was affected by the Laws Local Extent Act and Scheduled Districts Act passed in 1874.

It has been urged that, inasmuch as Mohurbhunj is not specified among the Scheduled Districts of Bengal in the first schedule of Act XIV of 1874, or the sixth schedule of Act XV of 1874, it is under, s. 3 of the latter Act, subject to the ordinary law in force throughout British India.

This contention, however, proceeds, in my opinion, on a misconception of the import and effect of those measures.

It is obvious from the preamble to Act XIV of 1874, that the 'Scheduled Districts' specified in the schedules of that Act and Act XV were not the whole but merely 'among' the parts, of India which had either never been brought within, or had been removed from, the ordinary jurisdiction of the Courts.

It is indeed clear from the preambles and general language of the Act s. 3), that the object was to declare, and in some instances consolidate, the existing law, and to clear away uncertainties as to jurisdiction where they existed,—not to alter the political position of any district not expressly mentioned in them; and it was, no doubt, with this intention that s. 8 (k) of Act XV provided that nothing in the Act should affect the operation of any enactment not mentioned in any of the schedules.

Now Regs. XIII and XIV of 1805, and Reg. XI of 1816, Act XXI of 1845 and Act XX of 1850, were in force at the time of the passing of the Laws Local Extent Act. They are not mentioned in the Schedule to Act XV of 1874, and they are, therefore, unaffected by its provisions.

The position of the Tributary Mehals was, accordingly, in my opinion, unaffected by the two measures in question. The subsequent repeal of some of the Regulations and Acts just mentioned would not, owing to the saving clause inserted in Repealing Acts,—*e.g.*, s. 1 of Act XVI of 1874,—affect any established jurisdiction or form of practice or procedure or existing usage, office or appointment; and we must hold accordingly, that the Tributary Mehals are now, as they were in 1874, a portion of British India, which the Government has been [534] pleased to exempt from the ordinary law and jurisdiction of the Courts, and to govern by means of special officials and enactments. If this be so, and if those special enactments have the effect of removing this part of the country from the ordinary criminal supervision of the High Court, it would be questionable whether the High Court has jurisdiction to interfere with the proceeding of the officials appointed by Government to administer the criminal law in the parts of the country so specially circumstanced.

As to the laws now actually in force in Mohurbhunj, it is impossible to deny that the effect of s. 3 of Act XV of 1874 has been to produce some obscurity as to the position of those parts of India which, not being Scheduled Districts as enumerated in the schedules to the Acts, are yet not administered in complete accordance with the laws declared to be in force throughout the whole of British India except the Scheduled Districts; and that the difficulty

thus occasioned is enhanced by the provisions commonly inserted in subsequent Acts "that the measure shall extend to the whole of British India except the Scheduled Districts as defined in Act XIV of 1874." It might be urged with great cogency that the intention of the Legislature, as gathered from these Acts and especially from the last para of s. 1 of Act XIV of 1874, was, that every part of British India not subject to the ordinary law should be administered in accordance with those Acts, or with a scheme framed under the provisions of 33 Vict., c. 3.

It is, however, unnecessary, for the purpose of the present decision to come to a precise conclusion as to the legal position of Mohurbhunj, the validity of the various orders of Government concerning it, or the competence of the officers appointed to carry out those orders. The act with which we are concerned, was not done in Mohurbhunj by an officer empowered to exercise jurisdiction there, but in Midnapore by a Magistrate empowered to act under the Criminal Procedure Code in an ordinary district and trying a resident of that district. Now, whatever may be the powers of the Government as to Mohurbhunj, there is, in my opinion, no ground for the contention that those powers extend to empowering the legally constituted tribunals [335] of a British district to follow in that district, and in the case of residents in it, any procedure, and exercise any other jurisdiction than that created by the law. When, therefore, the Superintendent of the Tributary Mehals proceeded to exercise a power not conferred on him by the order of 1872, in transferring a case from one district to another, and when the Magistrate of Midnapore, dealing in Midnapore with a resident in the district, proceeded to exercise magisterial powers under another style, and to depart in some material particulars from the provisions of the Court as to procedure, these officers seem to me to have been acting without jurisdiction, and their proceedings ought, accordingly, in my opinion, to be set aside.

PRINSEP, J.—One Dinobundo Patro charged Hursee Mahapatro before the Raja of Mohurbhunj with defamation. The accused, apparently, is a ryot of the Raja, holding lands and residing in Midnapore; and process was issued by the Raja through the Magistrate of Midnapore for his attendance at Mohurbhunj. He petitioned the Magistrate of Midnapore not to execute this process, on the ground, not that the Raja had no jurisdiction to try him, but that, as the Raja was personally concerned, a fair trial would not be held. The Magistrate of Midnapore, who also holds the undefined office of Assistant Superintendent of Tributary Mehals, on the 30th June 1880, addressed the Commissioner of Cuttack as Superintendent, and apparently in that capacity his official superior, recommending that the case should be transferred for trial either to Midnapore or Balasore.

On 12th July, the Superintendent of the Tributary Mehals directed the case to be tried by the Magistrate of Midnapore, and requested the Raja to transmit the record to that officer. The trial then took place before the Magistrate of Midnapore, who, in the course of the proceedings, also signs himself as Assistant Superintendent.

The petitioner having thus succeeded in procuring the transfer of the case to Midnapore, has obtained a rule from this Court on the ground that the proceedings of the Magistrate of Midnapore are without jurisdiction. I regret that, from the nature [336] of this objection, we have been compelled to have the matter fully argued, for ordinarily such conduct would be deserving of no consideration.



This case has raised points of difficulty regarding the relations of the British Government towards the territory of Mohurbhunj, the jurisdiction of the neighbouring Magistrates and the Commissioner of Cuttack, or, as they are called, Assistant Superintendents and the Superintendent of the Tributary Mehals; and finally, whether we have any power to interfere either as a Court of revision under the Code of Criminal Procedure, or under other powers conferred on us under the Charter of the High Court.

As regards this last point it is argued, that the Magistrate of Midnapore and the Superintendent of the Tributary Mehals, having been vested with certain powers by the Government of Bengal, and in the exercise of those powers being in no way subordinate to the jurisdiction of this High Court, we can have no control over their proceedings, and at any rate we can have no control until they shall have terminated in such a manner as to enable us to exercise our authority as in a writ of *habeas corpus*. • It is sufficient, however, for the purposes of the present case, that I should state that, in the view that I take of the relations between the Government and Mohurbhunj, it is unnecessary for me to consider the full extent of this argument. I should, however, be very disinclined to refuse to act on a *prima facie* good objection to proceedings taken by a judicial officer in British territory acting under authority of a very doubtful character, until the person against whom such proceedings were directed, had suffered in some way from the consequences of such doubtful jurisdiction. It is our duty to prevent, rather than endeavour to cure, the effect of injuries. If the argument be pressed to its extreme, it would be necessary for a man to be imprisoned, or to have been whipped, or even to be under sentence of death, before we could intervene, a position it would be impossible to accept.

The point which we are really called upon to decide is, whether the territory of Mohurbhunj is a foreign state or British India. I would, however first of all remark, that even [537] supposing, for purposes of argument, that Mohurbhunj is a foreign state, the Magistrate of Midnapore would have no jurisdiction to try the petitioner, because the offence charged (defamation) being an offence under chap. xxi of the Penal Code, and no complaint having been made to him, he has, under s. 142 of the Code of Criminal Procedure, no authority to take cognizance of it. Further it may be remarked, that the Magistrate would not be competent to deliver him to the Raja of Mohurbhunj for trial, inasmuch as the Magistrate is not a political officer, as defined in s. 3 of the Extradition Act (XXI of 1879), appointed by one of the authorities mentioned in cl. 2. Nor, as far as we are informed, is there any officer who could so act, supposing Mohurbhunj to be foreign territory.

I will now proceed to consider whether the tract of country known as Mohurbhunj is British India as defined by law: and to determine this, it is necessary to consider the manner in which this territory has been dealt with by the Legislature since its conquest by the British in 1803. From the terms of the treaty entered into between the Honourable East India Company and Senab Sahib Roghojee Bhoonsla, on 17th December 1803, it appears that "the province of Cuttack, including the port and district of Balasore, was ceded in perpetual sovereignty to the former; and art. 10 refers to certain treaties made antecedently by the British Government with feudatories of the Senab Sahib Sooba, which were then confirmed (see Aitchison's Treaties, Vol. III, pp. 97-98). These treaties were made with several of the chiefs of the Cuttack Tributary Mehals as they are now called, and are reproduced in Aitchison's



*Treaties*, Vol. I, pp. 118 *et seq.* The Chief of Mohurbhunj was not among other chiefs, but that is not material, for it is clear that Mohurbhunj, as well as other Tributary Mehals, was ceded as portion of the province of Cuttack. The terms of Reg. IV of 1804 and of Regs. XII, XIII, and XIV of 1805, show, that within the term "dependencies of the province of Cuttack" was included the territory of Mohurbhunj.

Reg. IV of 1804, s. 7, gives the 14th of October 1803 as the date of this conquest, and the commencement of the jurisdiction of the Courts established under that law for the administration [538] of justice in criminal cases and the authority of the Police. And it was declared that the general Regulations in force in the provinces of Bengal and Behar should be in force, unless it should be otherwise specially directed in any such Regulation.

In the following year (1805) three Regulations were passed relating to the Zilla of Cuttack, namely: Reg. XII, for the settlement and collection of public revenue; Reg. XIII, for the maintenance of peace and the support and administration of the Police; and Reg. XIV, for the administration of justice in civil cases: but the territory of Mohurbhunj, together with the estates of other hill or jungle rajas or zemindars, now denominated the Tributary Mehals, was expressly excluded from the operation of these Regulations, the concluding portion of each of those Regulations, containing a provision to that effect. The power of legislating for the territory of Mohurbhunj was, therefore, clearly asserted by the Regulations of 1805, but it was declared that, for the present, the exercise of such power would be reserved.

The preamble of Reg. XI of 1816 is to the following effect:—"Whereas it is necessary that provisions should be made for receiving, trying, and deciding claims to the right of inheritance or succession in certain tributary estates in Zilla Cuttack, which were excepted by s. 11, Reg. XIV of 1805, from the operation of the general rules for the administration of civil justice, established in the provinces of Bengal, Behar, and Orissa; and whereas the nature of the tenures by which those estates are held, the character of the inhabitants, and other local circumstances render it expedient that the estates in question should not be subject to partition, but should descend entire and undivided to the persons respectively having the most substantial claim according to local and family usage, the following rules have been enacted, to be in force from the date of the promulgation of this Regulation in Zilla Cuttack." That law provided for a regular procedure, with a right of appeal first to the Sadr Dewany Adawlut, and ultimately to the King in Council, in the matters above described. This is the first occasion in which I can find mention made of the office of Superintendent of Tributary Mehals.

[539] The next legislative enactment, in which reference is made to the Tributary Mehals, is Act XXI of 1845. That was an Act passed for the suppression of Meriah sacrifices in the Hill Tracts of Orissa. Section 1 made it "lawful for the Governor-General in Council, by an order in Council, to remove from the jurisdiction and superintendence of the Commissioner and Superintendent of the Tributary Mehals in Cuttack any of the tributary estates specified in s. 2, Reg. II of 1816 of the Beng. Code, and to place any such estates under the jurisdiction and superintendence of such officer (to be called the Agent for the Suppression of Meriah Sacrifices) and his subordinates, as shall from time to time be appointed by the Government of Bengal on that behalf." It is important too to note the terms of s. 6, which provide that it shall be competent for the Governor-General in Council to prescribe such rules as he may

deem proper for the guidance of such Agents and subordinates, and to determine to what extent the decision of the said Agents in civil suits shall be final, and in what suits an appeal shall lie to the Sadr Court, and to define the authority to be exercised by the said Agents in criminal trials, and what criminal cases they shall submit for the decision of the Sadr Court.

Thus it appears from the terms of Act XXI of 1845, that the Commissioner of Cuttack, as Superintendent of Tributary Mehals, had some power over that territory, the exact extent of which power has not been made known to us; but that power, whatever it was, was not conferred by any legislative enactment. It appears, however, that Legislature, in empowering the Governor-General in Council to remove that territory from his jurisdiction, thought it necessary specially to empower the Governor-General in Council to pass executive orders, having the force of law, regulating and determining how far the orders of the Agents should be final, in what suits an appeal should lie, what should be their powers in criminal trials, and what cases they should submit for the decision of the Sadr Court.

The preamble of Act XX of 1850 is in somewhat the same terms as that of Reg. XI of 1816, in declaring that the territory of Mohurbhunj and certain jungle and hill [540] zemindars in the Zilla of Cuttack were temporarily exempted from the laws in force in other parts of India subject to the Government of Bengal. But it was found necessary to give jurisdiction to some officer of Government to determine disputes regarding the boundaries of those zemindaries. Accordingly, the Superintendent of Tributary Mehals was appointed for this purpose. These are all the legislative enactments specially relating to Mohurbhunj and other Tributary Mehals up to 1874. Act XIV of that year declared that that Act extends, in the first instance, to the whole of British India within the territories mentioned in the first schedule thereto annexed; and among these schedules are to be found only two from among the Tributary Mehals. These two mehals, as they are termed, are the mehals of Angool and Bunki, which had been taken under the direct management of Government some years previously in consequence of the misbehaviour of their hill rajas or zemindars.

Act XV of the same year, which was passed simultaneously with Act XIV, declared, that all the Acts mentioned in the first schedule thereto annexed are now in force throughout the whole of British India, except the Scheduled Districts. And s. 6 extended certain other enactments throughout the whole of the territories now subject to the Government of the Lieutenant-Governor of Bengal, except the Scheduled Districts subject to such Government. The 'British India' has been declared to be thus defined in all Acts made by the Governor-General in Council, unless there was something repugnant to the subject or context thereof. 'British India' shall mean the territories for the time being vested in, Her Majesty by Statute 21 and 22 Vict., c. 106, and that Statute, s. 1, declares, "that the Government of the territories now in the possession or under the Government of the East India Company . . . . . shall cease to be vested in, or exercised by, the said Company, and all territories in the possession or under the Government of the said Company . . . . . shall become vested in Her Majesty; . . . . . and for the purpose of this Act 'India' shall mean the territories as vested in Her Majesty as aforesaid and all territories which may [541] become vested in Her Majesty by virtue of any such rights as aforesaid."

So far then as concerns the terms of the Regulations and Acts of the Government in its legislative capacity, it would seem that the territory of

Mohurbhunj is 'British India,' and, unless specially exempted, is subject to the same laws as the rest of British India. But it seems to me that, although Mohurbhunj is British India; and although the Acts of 1874 declared what was the law for British India, inasmuch as the concluding sections of Regs. XII, XIII, and XIV of 1805, which expressly excluded the Tributary Mehals 'for the present' from the operation of the general law of the country, we cannot rightly hold that the general terms of the Acts of 1874 override the special terms of the Regulations of 1805; and I am confirmed in this opinion on finding that, although there has been a very extensive repeal of the older Regulations and Acts, those parts of the Regulations of 1805 to which I have referred are still in force. So far then, I am inclined to think that Mohurbhunj is British India, but at present not subject to any laws not specially extended to it.

It is, however, contended, that the fact that treaty engagements were entered into by the British Government with the rajas and zemindars of these Tributary Mehals shows that they were regarded as independent rulers; and we have been referred to a treaty engagement published at pages 184 and 185 of the first volume of Aitchison's *Treaties, Engagements, and Sanads*.

Now, as regards the so-called treaty engagement, it appears to me that there is nothing in its terms which recognized the absolute independence of the Raja of Mohurbhunj from the authority of the British Government. The document is headed "Treaty engagement executed by the Raja of Killa Mohurbhunj, a Tributary Mahal subordinate to Cuttack, in the Sooba of Orissa." By it the Raja engages to maintain himself in submission and loyalty to the Government; to pay annually in perpetuity for himself, heirs, and successors 1,001 sicca rupees as peshkush for the said Killa; to apprehend and send to the authorities any resident of British territory who [542] may flee into Mohurbhunj; to deliver up any ryot of Mohurbhunj who may commit an offence in British territory; and to refrain from enforcing any claim of his own on any resident of British territory, notifying the circumstances to the authorities, and acting on such orders as he might receive. He further engages to cause rassud, &c., to be supplied to Government troops passing through his territory, and to help them with any further assistance that might be necessary, and that he will depute a contingent force of his own troops with the forces of Government for the purpose of coercion and the bringing of any recusant raja or other person into subjection to the aforesaid Government. Lastly, he relinquishes a claim on account of a ferry.

Now it is only necessary to consider the terms regarding the deputation of a contingent force of his own troops by the Raja to act with the forces of Government, with a view to determine whether that constitutes any ground for supposing the exercise of an authority independent of the Government. It is notorious that, even in present days, native chiefs in British territory, especially those in distant and jungle portions, do maintain a certain number of armed retainers; and I have no doubt that, at the time of the signing of this engagement, the number of such retainers was larger than that now existing. A body of such men, known as Pykes in Orissa in Government territory, existed even until a recent date. The preamble to Reg. XIII of 1805 states, that it was the practice in the province of Cuttack, when under the Mahratta Government, to vest the immediate maintenance of the peace in certain Sirdar Pykes, also called Kandytes, aided by inferior Pykes, under the orders and control of the said Sirdars, for whose support lands were assigned under the orders and authority of the said Government; and that the general control

of the said Sirdars and other Pykes was vested, at the time of conquest of the province of Cuttack by the British arms, in the zemindars, talookdars, farmers, and other holders of land within the limits of their respective estates and farms. This state of affairs, so far as regards the province of Cuttack, with the exception of the Tributary Mehals, was discontinued by [543] that Regulation; and it may fairly be supposed that what existed in 1805 throughout the districts of Cuttack continued in the Tributary Mehals, which were disconnected therefrom in 1805, until 1829, and that this is what was referred to in the treaty engagement entered into by the Raja of Killa Mohurbhunj on the 1st of June of that year. In other respects,—that is to say, as regards the settlement of the peshkush payable by the Raja to the Government, the provisions of the treaty engagement are clearly within the terms of s. 37, Reg. XII of 1805; and the other terms are only such as are ordinarily found in kabuliats executed by the zemindars and farmers of the Government revenue with Government. I cannot, therefore, regard this engagement otherwise than as an agreement on the part of the Chief or Raja of Mohurbhunj to the terms of the settlement concluded with the Collector of Cuttack under s. 37, Reg. XII of 1805, such as that officer was deputed to make.

So far then as the course of legislation and the Acts of Government with regard to Mohurbhunj up to comparatively recent times, that territory was never even regarded as a foreign state. Government have, from time to time, asserted their power to legislate for it; and, in bringing it within the operation of some laws, have declared that they, for the present, suspended further legislation. The concession of the right to adopt to the chiefs of the Tributary Mehals under Lord Canning's Proclamation of 1862, and the recent change in the designation of their lands as 'states' instead of the term 'estates,' which had been used for nearly seventy years, cannot alter their status. On these grounds, I am of opinion that Mohurbhunj is not foreign territory, but that it forms a part of British India at present specially exempted from the operation of the laws in force in British India.

I have already referred to the indefinite character of the authority exercised by the Commissioner of Cuttack as Superintendent of the Tributary Mehals. Up to 1845 some authority was so exercised, but by Act XXI of that year, power was given to the Governor-General in Council to withdraw it, and he was empowered to confer whatever civil and criminal powers he thought proper on the Agent for the Suppression of Meriah Sacrifices and his subordinates. When that office was abolished, is not very material; it is sufficient to state that the Act was repealed in 1874. But it is clear that the Commissioner of Cuttack, as Superintendent of the Tributary Mehals, and the Magistrates of the Districts surrounding that tract of country as assistants to the Superintendent of Tributary Mehals, have, from time to time, been empowered by the Government of Bengal to exercise powers as Criminal Courts of various grades in the Tributary Mehals. We have not been informed under what authority these powers were conferred, and looking at the state of the law which I have already discussed, I am of opinion that the Government of Bengal acted beyond its authority in so investing these officers. I have come to this conclusion, because it was thought necessary by a special legislative enactment (Act XXI of 1845) to empower the Governor-General in Council to establish Civil and Criminal Courts in the Tributary Mehals and to define the powers of the several grades of these Courts, and such power has been claimed

and exercised by the Government of Bengal without any such authority; and next, because the fact that the Indian Councils Act, 24 and 25 Vict., c. 67, s. 25, by validating all orders passed by Government in Non-Regulation Provinces, amongst which the Tributary Mehals may be fairly placed, shows that such orders were without the sanction of law and required legal confirmation. Up to 1861 any such orders are now not open to question, but this does not affect the validity of the orders conferring magisterial powers on the Magistrate of Midnapore over Mohurbhunj.

We have been informed by the Standing Counsel Mr. Phillips, who, having first appeared for the private prosecutor, appeared for the Government on our intimating that an officer of Government should argue the case before us on behalf of Government, that, as stated in a printed memo from the Bengal Secretariat that he handed up to us, the Bengal Government determined to pass no permanent or defined rules "on the subject of the relative jurisdiction of the Superintendent, Tributary Mehals, and the hill rajas regarding the trial of [545] criminal offences," but directed that "the spirit of certain proposed rules should be acted up to in all future cases with certain limitations; and that the Rajas should be informed that they are ordinarily amenable to the Superintendent's Court, subject to such instructions as may, from time to time, be furnished by Government."

On the 12th December 1870, the Secretary to the Government of Bengal informed the Magistrate of Midnapore, that, as an *ex officio* Assistant Superintendent of the Tributary Mehals, he was "empowered to take up for trial, all offences committed within the Tributary Mehals not punishable with death, and to deliver judgment and to pass sentence of simple or rigorous imprisonment for a period not exceeding seven years;" that his "proceedings will, in each case, be subject to the approval and sanction of the Superintendent, Tributary Mehals, to whom they should be forwarded;" and that "the trials should be conducted, as far as possible, in accordance with the provisions of the Criminal Procedure Code."

On the 8th August 1872, the Viceroy and Governor-General in Council sanctioned the proposal of the Lieutenant-Governor of Bengal to vest "the Superintendent of the Tributary Mehals, Cuttack, with the same powers as are exercised by Sessions Judges in the Regulation Districts, and with power to hear appeals from all sentences passed by any subordinate officer in Tributary Mehal cases."

On the 30th April 1873, the Secretary to the Government of Bengal informed the Superintendent, Tributary Mehals, that "the Lieutenant-Governor authorized him to exercise the powers of a Magistrate of a District, the powers of a Sessions Judge under s. 15, chap. iii of the new Criminal Procedure Code, and gave him power to hear appeals from sentences under s. 36."

But the Tributary Mehals being British India and being specially excluded from the operation of all the laws in force in British India, unless expressly extended to them, as I have already stated, I can find no authority for those orders of Government conferring powers on particular officers over criminal offences committed within the Tributary Mehals. It appears to me that until so expressly declared by legislative [546] enactment there were no penal laws in force in the Tributary Mehals, and that consequently there was no authority to invest officers with certain powers to administer an unknown and uncertain penal law. We have been informed on

the authority of Hunter's Statistical Gazetteer, Vol. XIX, p. 198 (an authority not binding on us), that the Penal Code was, by order of the Government of India dated 18th December 1860, declared applicable to the Tributary Mehals. No such order can be found in the Government Gazette, nor have we on enquiry been able to obtain it from the offices of the Government of India. But it would also seem, from what has taken place in the proceedings now before us, that the jurisdiction of the Raja of Mohurbhunj, in Mohurbhunj, is admitted, but that jurisdiction is, it is said, subordinate to that of the Superintendent, Tributary Mehals, who can interfere with his proceedings. The Superintendent has been vested with certain powers under the Code of Criminal Procedure, and he has been told by Government that " trials should be conducted, as far as possible, in accordance with the provisions of the Criminal Procedure Code ;" but that Code gives the power of withdrawing cases from one Court and transferring them to another, only to a High Court or to the Local Government. If he was acting under the Code, he exceeded his powers ; but, as I have before said, I can find no authority for such interference at all.

Next, even supposing the case to have been lawfully withdrawn from the Raja of Mohurbhunj, I can find no authority for the Magistrate of Midnapore trying it either as Magistrate or as *ex officio* Assistant Superintendent of Tributary Mehals in Midnapore.

For all these reasons, I am of opinion that the rule must be made absolute, and that the proceedings taken before the Magistrate of Midnapore, or Assistant Superintendent of Tributary Mehals, must be declared to have been without jurisdiction and of no effect.

*Rule absolute.*

#### NOTES.

##### [JURISDICTION OF CRIMINAL COURTS IN THE MOFUSSIL:—

The principle that the Jurisdiction of Mofussil Criminal Courts depends upon the offence having been committed within their local limits was again affirmed in 15 Ind. Cas., 991.]

[547] PRIVY COUNCIL.

*The 15th March, 1881.*

PRESENT :

SIR B. PEACOCK, SIR M. E. SMITH, SIR R. P. COLLIER, AND  
SIR R. COUCH.

The owners of the ship "Brenhilda".....Appellants

*versus*

The British India Steam Navigation Company.....Respondents.

[Motion on an appeal from the High Court of judicature at Fort William in Bengal.]

*Practice in Appeals from Vice-Admiralty Court of Bengal—Time for Appealing.*

By rule 35 of the Rules respecting appeals from the Vice-Admiralty Courts abroad, made and ordained by King William IV in Council in pursuance of the Statute 2 Will. IV, c. 51., all appeals from the decrees of Vice-Admiralty Courts are to be asserted within fifteen days after the date of the decree.

*Held*, that the words "after the date of the decree" mean after the date when the decree is pronounced by the Admiralty or Vice-Admiralty Court, as the case may be; not the date when the decree is reduced to writing and signed.

On the 23rd July 1880, the High Court in its Appellate jurisdiction, modifying a decree of the High Court as a Court of Vice-Admiralty in a cause of damage by collision, referred it to the Registrar to assess the damages that had been incurred in reference to one of the ships, both of which were held to be in fault. The parties went, without protest, before the Registrar for that purpose, the impugnants, also, having taken out process to compel the appearance of the promovents before him, and the damages were assessed with the consent of both parties at a certain amount. On the 2nd September 1880, a notice of appeal was given on behalf of the impugnants, and was recorded as asserted pursuant to rule 35 above referred to.

*Held*, that the appeal was not within time, more than fifteen days having elapsed after the decree before the appeal was asserted. According to the law laid down in the Vice-Admiralty Courts, the proceedings taken before the Registrar were themselves sufficient also to prevent an appeal as of right.

THIS was a motion to set aside a petition of appeal, and to relax and dissolve the inhibition and citation issued thereon, against a decree of the High Court of Bengal (23rd July 1880) [548] in Admiralty or Vice-Admiralty proceedings. By the decree, the High Court in its Appellate Jurisdiction modified the decree of the High Court in its Original Jurisdiction (6th January 1880), made in a cause, civil and maritime, of damage by collision at sea in the Bay of Bengal, promoted by the owners of the steamship *Ava* against the ship *Brenhilda*, her tackle, apparel, furniture, and freight. The decree of the Appellate Court ordered a reference to the Registrar to assess the damages which had been done to the *Brenhilda*, upholding the decision of the Court below that there had been negligence on both sides, and that half the damages which resulted to the owners of the ship *Ava* were to be paid by each of the parties; but the owners of the *Brenhilda* should



be allowed to deduct half of the damages which they had sustained by the injury to their ship. On this reference, the parties attended, the impugnants issuing summonses, and certain damages were assessed by the Registrar on their consent.

The owners of the *Brenhilda* afterwards appealed to Her Majesty in Council. The proceedings taken in India, and the facts relevant to the question raised on this motion, are stated in their Lordships' judgment.

Mr. J. T. Woodroffe moved to set aside the appeal, on the ground that it had not been asserted within the time prescribed by the law in force; and that it had been perempted by acts having been done in furtherance of the decree by the party seeking now to appeal. He referred to the Charter of Justice, 26th March 1774, constituting a Court of Admiralty for Bengal, &c., s. 27; the Commission of Vice-Admiralty, 19th July 1822, appointing the King's Commissary; see Rules and Orders of the Supreme Court of Judicature at Fort William in Bengal by Smoult and Ryan, rule 35 of the Rules made and ordained by King William IV in Council in pursuance of the Statute 2 Will. IV, c. 52, which, so far as it related to India, was not repealed by the Statute 24 and 25 Vict., c. 104, and the Letters Patent of 1862, establishing the High Courts, s. 31. He contended that the rules of the High Court issued under the Letters Patent, as well as the legislation in India, *viz.*, in Acts VI of 1874 and X of 1877, s. 616, left the rules [549] of William IV untouched. Moreover, the notice of appeal had been recorded as issued under the latter. *The Aquila* (6 Moore's P. C. Ca., 102) was cited. Again, acts had been done by the appellants in furtherance of the decree against which they now sought to appeal, such appeal having been thereby perempted; *The Clifton* (3 Knapp's P. C. Rep., 375). *Lloyd and Clarke v. Pool* (3 Haggard's Eccl. Rep., 477; 3 Hag., Admlty. Ca., 117), *The Hydross* (5 Moore's I. A., 137). The promovents' objection to the right of appeal was rightly brought forward without waiting till the hearing: *Tronson v. Dent* (8 Moore's P. C., 419).

Mr. Butt, Q. C. (Mr. Benjamin, Q. C., and Mr. Clarkson with him) did not dispute that the rules of William IV applied; but contended that the objection to this appeal should have been taken in the High Court, and that there was a presumption that the admission of the appeal which had taken place was right. The appellants were entitled to wait, as they had done, till they obtained a copy of the decree to be appealed from. There had been no laches on their part. The argument that the appeal had, by the alleged acquiescence on the part of the appellants in the decree under appeal, been perempted, was a highly technical one. And the proceedings taken by the appellants, in going before the Master, were not, under the circumstances, a voluntary act, but only an act done in submission to the directions of the decree of the High Court.

Mr. J. T. Woodroffe replied.

Their Lordships' judgment was delivered by

**Sir B. Peacock.**—This is a motion on the part of the British India Steam Navigation Company, the owners of the ship *Ava* to relax and dissolve the inhibition and citation issued in a certain pretended appeal of the abovenamed appellants, and to dismiss or to quash the said appeal for want of competency, or to grant the respondents leave to file an act of protest on petition against the admission of the said pretended appeal.



[550] The suit came before the High Court in the exercise of its Original Jurisdiction. It was brought by the owners of the steamship *Ava*, against the *Brenhilda*, for a collision which took place in the Bay of Bengal. The High Court, in its Original Jurisdiction, held, that there was negligence on both sides, and consequently that half the damages which resulted to the owners of the ship *Ava* were to be paid by each of the parties. The damages were assessed at 50,000*l*, which would leave 25,000*l* to be borne by the owners of the *Ava* themselves, and 25,000*l* to be paid by the owners of the ship *Brenhilda*. The parties appealed to the High Court in the exercise of its Appellate Jurisdiction, and that Court affirmed the decision of the first Court so far as it was held that there was negligence on the part of each of the ships; but they thought it right to amend the decree by declaring that, instead of the owners of the *Brenhilda* paying the full sum of 25,000*l*, being one-half of the damages sustained by the owners of the *Ava*, they should be allowed to deduct half of the damages which they had sustained by the injury to their ship and that it should be referred to the Registrar of the Court to assess those damages. That decision was pronounced on the 23rd of July 1880. The parties went before the Registrar for the purpose of assessing the amount, and it appears by the report of the Registrar that the damages were assessed at 3,000*l* with the consent of both parties. On the 2nd of September 1880, a notice of appeal was given, which was recorded as follows:—"Pursuant to rule 35 of the Rules and Regulations made and ordained by His late Majesty King William the Fourth in Council, in pursuance of the second William the Fourth, cl. 51, Mr. Phillips, Advocate for the impugnant, appears and declares his intention of appealing to the Privy Council against both the decrees made in this cause." The rule referred to is in these words:—"All appeals from the decrees of the Vice-Admiralty Courts are to be asserted by the party in the suit within fifteen days after the date of the decree, which is to be done by the Proctor declaring the same in Court, and a minute thereof is to be entered in the assignation book, and the party must also give bail within fifteen days [551] from the assertion of the appeal in the sum of 100*l* sterling, to answer the costs of such appeal." The judgment was delivered on the 23rd of July 1880, and consequently the notice on the 2nd of September was not an assertion within fifteen days from the date of the decree. It has been urged that the decree was not drawn up in writing and signed by the Court until some considerable time afterwards, and that the parties could not appeal without annexing a copy of the decree to their petition of appeal. But the rule of annexing a copy of the decree to the petition of appeal refers to appeals which are preferred under the Code of Civil Procedure, Act VIII of 1859, it does not apply to appeals preferred or asserted under the 35th section of the rules of William the Fourth. The words "after the date of the decree," according to their Lordships' view of the rule, do not mean after the date when the decree is drawn up in writing, but after the date on which the decree or sentence is pronounced by the Vice-Admiralty or Admiralty Court, as the case may be. The words which are constantly used in Acts which refer to decrees in the Admiralty Court are "the pronouncing of the sentence or decree." Their Lordships, therefore, think that the date of the decree did not mean the date on which the decree was reduced to writing and signed by the Court, but the date on which the High Court delivered their judgment and expressed what the decree was. If the parties intended to appeal, they ought, in accordance with the rule, to have asserted their appeal within fifteen days from the date of the decree, by declaring in Court that they intended to appeal; and that they did not do. It is important in Admiralty proceedings that notice of appeal should be given within a short

period. When a ship is sued, it is usually arrested, and unless it is released upon bail, it is detained by an officer of the Court. It is, therefore, important, if a party intends to appeal from the decision of the Admiralty Court, that notice should be given within a certain limited time, and that time with regard to Vice-Admiralty cases, is fifteen days from the date of pronouncing the decree.

The collision took place in the Bay of Bengal, and therefore it may be a question whether the High Court was exercising Vice-Admiralty or Admiralty Jurisdiction; but that is not [552] material, for if the case was tried in the Admiralty Jurisdiction, the appeal ought to have been asserted, according to the old rules of the Admiralty Court, within fifteen days. The parties have stated in their petition that they asserted the appeal in accordance with the 35th rule of William the Fourth. The assertion was too late, and consequently the appellants had no right to appeal. Further, they appeared before the Registrar for the purpose of carrying out the order of the High Court in assessing the damages which they had sustained by the injury which had been done to the *Brenhilda*, and acted without protest. It is said that they were obliged to go before the Registrar; but they might have appealed and got an inhibition; or, if not, they might have appeared before the Registrar under protest. The owners of the *Brenhilda* took out the summons to compel the owners of the *Ava* to appear before the Registrar for the purpose of acting under the decree of the High Court in assessing the amount of damage sustained by the owners of the *Brenhilda*. That of itself, according to the decision to which we have been referred, would be a sufficient ground for preventing the parties from appealing. Their Lordships, therefore, think that the owners of the *Brenhilda* have not put themselves into a position to appeal, as a matter of right, against the decision of the High Court. The question before their Lordships is not whether they should recommend Her Majesty to grant an appeal as a special matter of favour. That they could do only if a petition were presented to Her Majesty, and referred to the Judicial Committee to report their opinion thereon.

Under these circumstances, their Lordships think that the motion ought to be granted, and that the petition of appeal ought to be set aside. It is unnecessary to do more than set aside the petition of appeal; upon that being done, the relaxation of the inhibition will issue as a matter of course. Their Lordships, therefore, will humbly report to Her Majesty that the petition of appeal ought to be dismissed. The appellants must pay the costs of this motion and of the appeal.

Solicitors for the appellants: Messrs. *Lym and Holman*.

Solicitors for the respondents: Messrs. *Parker & Co*.

#### NOTES.

[Under cl. 15 of the Letters Patent, an appeal lies to the High Court from the decision of one of its Judges exercising Admiralty or Vice-Admiralty jurisdiction and such appeals are governed by the practice under the Civil Procedure Code. See. 17 Cal., 66.]

**[553] APPELLATE CIVIL.***The 5th July, 1881.*

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE FIELD.

Gopee Nath Acharje.....Defendant

*versus*

Achcha Bibee.....Plaintiff.\*

*Execution—Attachment by more than one Judgment-creditor of Property of Judgment-debtor in Court—Priority—Civil Procedure Code (Act X of 1877), ss. 272 and 295.*

In execution of a decree of a Munsif's Court, the plaintiff attached certain money, the proceeds of decrees which her judgment-debtor had obtained against third parties, then lying in a Small Cause Court to her credit, and subsequently obtained an order from the Munsif directing the same to be paid to her in satisfaction of her decree, which order was duly communicated to the Small Cause Court Judge. Subsequently, the defendant, who held another decree against the same judgment-debtor, attached the same sale-proceeds. The small Cause Court Judge then proceeded, under s. 272 of the Civil Procedure Code, to enquire whether the plaintiff was entitled to any priority over the second attaching creditor, and having decided that question in the negative, divided the sale proceeds rateably between them. In a suit brought by the plaintiff, under the above circumstances, to recover from the defendant the portion of the sale proceeds so paid to him,—

*Held*, that s. 295 of the Civil Procedure Code had no application, inasmuch as the plaintiff had not applied to the Small Cause Court Judge to execute her decree, and it had never been transferred to that Court for execution; and that the proviso in s. 272 is merely intended to mean that any question of title or priority is to be determined by the Court in which, or in whose custody, the property is, and not by the Court which made the order of attachment.

*Held* also, that, previous to the order by the Munsif directing the payment to be made to the plaintiff, the Small Cause Court Judge would have had jurisdiction to deal with the question he had tried; but, as that order was made prior to the attachment by the defendant, the judgment-debtor had no interest in the money which could be so attached, the effect of that order being to vest the property in the money in the plaintiff, and to take it out of [554] the disposal of the Small Cause Court Judge, and consequently the order for distribution was wrong, and the plaintiff was entitled to the decree she sought.

*Quære*.—Whether an order made by a Court under s. 272 was intended by the Legislature to be a final order?

IN this case the plaintiff held a money-decree of the Munsif's Court against one Gaida Bibee, and the defendant held a similar decree of the Small Cause Court against the same Gaida Bibee. Gaida Bibee had obtained in the same Small Cause Court other decrees against other persons, and having

\* Appeal from Appellate Decree, No. 798 of 1881, against the decree of Baboo Omrto Loli Chatterjee, Subordinate Judge of Nuddea, dated the 17th February 1881, affirming the decree of Baboo Rajendro Coomar Bose, Munsif of Ranaghat, dated the 9th September 1879.

executed those decrees, she had certain property sold, the proceeds of which were in deposit in the Small Cause Court.

The plaintiff executed her decree of the Munsif's Court and attached the sale-proceeds which were in deposit in the Court of Small Causes upon the execution of Gaida Bibee's decree; and after an order of attachment had been issued in the manner provided by s. 272 of the Code of Civil Procedure, there was a further order made by the Munsif on the 25th January, and communicated by the Munsif to the Small Cause Court Judge, directing the payment of the sale-proceeds to the plaintiff. Subsequent to this, the defendant executed his decree against Gaida Bibee in the Small Cause Court, and attached the same surplus sale-proceeds which had already been attached by the plaintiff, and in respect of which the further order of the 25th January had been procured at the instance of the plaintiff. The Small Cause Court Judge then proceeded under the proviso to s. 272 to enquire whether the plaintiff was entitled to the whole of the surplus sale-proceeds or to a part only; in other words, whether the defendant was entitled to participate therein rateably; and he came to the conclusion that the sale-proceeds ought to be divided between the plaintiff and the defendant; and he divided them accordingly. The plaintiff then brought the present suit in the Munsif's Court to recover from the defendant that portion of the sale-proceeds which had been paid over to him under the order of the Small Cause Court Judge, and contended that the Small Cause Court had no jurisdiction to make the order in question, and that he (the plaintiff) having first attached these surplus sale-proceeds, and [555] having procured the order of the 25th January for payment of the money over to him, was entitled to the whole of that money.

Both the lower Courts gave the plaintiff a decree. The defendant appealed to the High Court.

*Baboo Mohil Chunder Bose* for the appellant.

No one appeared for the respondent.

The judgment of the Court (PRINSEP and FIELD, JJ.) was delivered by

**Prinsep, J.** (who, after stating the facts as above, continued):—Both the lower Courts have given the plaintiff a decree; and we are of opinion that this decree is correct. We do not concur in much that the Subordinate Judge has said in his judgment on the question of equity; and much of the law quoted by the Subordinate Judge has no application to a case of this kind. It may be proper to observe also that s. 295 of the Code of Civil Procedure has no application to a case of this kind. That section applies only where the decree-holders have all applied to the same Court for execution of their decrees. Now, in this case, the plaintiff did not apply to the Small Cause Court Judge for execution of her decree, seeing that that decree was a decree of the Munsif, and had never been transferred into the Small Cause Court for execution. Then, with reference to s. 272, we think that the Subordinate Judge has taken a proper view of the proviso, which is merely intended to mean that any question of title or priority is to be determined by the Court in which, or in the custody of which, the property is, and not by the Court which made the order of attachment. We think that so long as the order of attachment was in force, and no further order was made, the Small Cause Court Judge would have had jurisdiction to deal with the question of title or priority between the decree-holders; but we think that, after the further order of the 25th January was made, he had no jurisdiction to deal with this question, seeing that the result of that

order was to transfer to the plaintiff the amount in deposit; in other words, that the effect of this order [556] was to vest in the plaintiff the property in this money and take it out of the disposal of the Small Cause Court Judge. After that order had been carried out, the judgment-debtor, Gaida Bibee, ceased to have any interest in the money which could be attached by the defendant in execution of his decree. Whether an order made by the Court under the proviso of s. 272 was intended by the Legislature to be a final order, is a matter which we do not think it necessary to decide in the present case. It is sufficient for us to say that, under the particular circumstances of this case, the Small Cause Court Judge had no jurisdiction to proceed under the section at the time when he so proceeded. The decision of the lower Appellate Court will be confirmed.

*Appeal dismissed.*

### NOTES.

#### [I. CONDITIONS FOR RATEABLE DISTRIBUTION.—

To entitle a decree-holder to come under section 295 of the Code of Civil Procedure, the following conditions should be present—

(1) The decree-holder claiming rateable distribution should have applied for execution of his decree to the Court which holds the assets realized.

(2) Such application should have been made prior to the realisation of the assets.

(3) The assets must have been realised by sale or otherwise in execution of the decree.

(4) The attaching creditors as well as the decree-holders claiming to participate in the assets should be holders of decrees for payment of money.

(5) Such decrees should have been obtained against the same judgment debtor.

No rateable distribution can be claimed unless all these conditions are present.

See (1909) 14 C. W. N. 395, and 21 Cal. 200.

#### II. STATUTORY CHANGE.—

The conditions (2) and (3) above should now be changed. It is enough if the application is now made before the receipt of the assets, and the assets need not have been realised by sale or otherwise in execution of the decree.

\* See section 73 (1) of the Code of Civil Procedure, 1908.]

[7 Cal. 556]

*The 7th July, 1881.*

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE FIELD.

Sreenath Gooho and others.....Decree-holders

*versus*

Yusoof Khan.....Judgment debtor.\*

*Execution-Proceedings—Limitation—Civil Procedure Code (Act X of 1877), ss. 230, 235, 236, and 237.*

In execution of a decree passed more than twelve years before the date of the Civil Procedure Code (Act X of 1877), certain judgment-creditors applied for the attachment and sale of certain specified property belonging to their judgment-debtor, previous to the date on which

\* Appeal from Order, No. 197 of 1881, against the order of R. F. Rampini, Esq., Judge of Dacca, dated the 9th April 1881, affirming the order of Baboo K. D. Chatterjee, Munsif of that district, dated the 22nd December 1880.

the three years allowed for such execution, under s. 230, would have expired. Subsequently, after the three years had elapsed, they filed a fresh application, praying that certain other property of their judgment-debtor might be attached and sold in lieu of that specified in their former application, and that the latter might be released.

*Held*, that execution of the decree was barred by limitation.

*Per PRINSEP, J.*—Under s. 230\* of the Civil Procedure Code, it was intended by the Legislature that a decree-holder, seeking to execute a decree passed more than twelve years before, should have one opportunity to execute that decree, and that, if he fails to satisfy it on that application, any further application becomes barred.

[537] THE facts out of which this appeal arose were as follows:—The appellants, in execution of a decree, dated the 8th February 1865, filed a petition on the 20th September 1880, asking for the attachment and sale of certain immoveable properties therein specified, belonging to the respondent, their judgment-debtor. On the 12th November 1880, they filed a fresh application, in which they asked that certain properties other than those specified in their former application might be attached and sold, and that the properties attached under their first application might be released. Thereupon the judgment-debtor objected that this decree, which the applicants sought to execute, was barred on the 1st October 1880, under s. 230 of the Civil Procedure Code, seeing that the application of the 20th September had been abandoned, and a wholly new application made on the 12th November. The execution-creditors, however, contended, that the application of the 12th November was merely one in the execution-proceedings, and by way of amendment to that of the 20th September; and inasmuch as that application was within the period prescribed for limitation to take effect, they were entitled to the relief they sought. The Munsif held, that this contention could not be supported, and that the application of the 20th September, though not formally struck off the file, was virtually so, and had been abandoned by

[\*Sec. 230.—When the holder of a decree desires to enforce it, he shall apply to the Court, which passed the decree or to the officer, if any, appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court, then to such Court or to the proper officer thereof.]

Application for execution.

The Court may in its discretion, refuse execution at the same time against the person and property of the judgment-debtor.

Where an application to execute a decree for the payment of money or delivery of other property has been made under this section and granted, no subsequent application to execute the same decree shall be granted unless the Court is satisfied that on the last preceding application due diligence was used to procure complete satisfaction of the decree; and the order of the Court granting any such subsequent application shall be conclusive evidence that due diligence was used to procure such satisfaction.

And no such subsequent application shall be granted after the expiration of twelve years from any of the following dates (namely)—

(a) the date of the decree sought to be enforced, or of the decree (if any) on appeal affirming the same, or

(b) Where the decree or any subsequent order directs the payment of money or the delivery of property by instalments,—the date of the default in paying or delivering the instalment in respect of which the applicant seeks to enforce the decree.

Nothing in this section shall prevent the Court from granting an application for execution of a decree after the expiration of the said terms of twelve years, where the judgment-debtor has by fraud or force prevented the execution of the decree at some time within twelve years immediately before the date of the application.

Notwithstanding anything herein contained proceedings may be taken to enforce any decree within three years after the passing of this Code, unless when the period prescribed for taking such proceedings by the law in force immediately before the passing of this Code shall have expired before the completion of the said three years.]

the judgment-creditors, and consequently that the application of the 12th November could not be looked on as supplemental thereto, but that it was an entirely fresh attempt to execute the decree, and consequently that limitation applied, and the remedy was barred. The application was accordingly refused with costs, and this decision was upheld on appeal before the District Judge.

The judgment-creditors accordingly now specially appealed to the High Court.

*Baboo Bussunt Coomar Bose* for the appellants.

No one appeared for the respondent.

The judgments of the Court (PRINSEP and FIELD, JJ.) were as follows:—

**Prinsep, J.**—It is admitted that the decree under execution [558] in this case was passed more than twelve years ago. On the 20th September 1880, the decree-holders made an application under s. 235 of the Code of Civil Procedure of 1877\* to execute the decree, and simultaneously, by a separate petition, they filed a schedule of the properties which they wished to proceed against, in order to realize the amount of their decree. On the 12th November 1880, they put in a fresh application, asking, as the District Judge says, "not that certain errors in the last preceding application for execution be corrected, but that the whole of the properties attached conformably thereto be released, and certain other property specified in the form be attached in their stead." If this application of the 12th November be regarded as a fresh application to execute, it is barred under s. 230 of the Code. If, however, the application of the 20th September be regarded as the application under which the decree-holders are now proceeding, they cannot enforce their decree as against this particular property. The appellants' pleader, however, contends that having, on the 20th September 1880, applied for execution of decree, they were at liberty to extend that application so as to include properties not mentioned in it, but any other property of the judgment-debtor which they should think fit to specify, in other words, the application having been made with a mind to proceed against certain properties, they should be at liberty to extend it for an unlimited period against other properties. It appears to us, that the object of s. 230 was to exclude applications of this nature, and that it was intended that the decree-holder, seeking to execute a decree passed more than twelve years before, should have one opportunity to execute that decree, and that if he should fail to satisfy it on that application, any further application becomes barred. The order of the lower Appellate Court will, therefore, be confirmed, and such confirmation notified in the usual manner.

**FIELD, J.**—I am of the same opinion. Section 236 of the Code enacts: "Whenever an application is made for the attachment of any moveable property belonging to the judgment-debtor, but not in his possession, the decree-holder shall annex to the application an inventory of the property to be attached."

Contents of application for execution of decree. \* [Sec 235:—The application for the execution of a decree shall be in writing, verified in manner hereinbefore provided for the verification of plaints, and shall contain in a tabular form the following particulars (namely) \*

(J) The mode in which the assistance of the Court is required, whether by the delivery of property specifically decreed, by the arrest and imprisonment of the person named in the application, or by the attachment of his property, or otherwise as the nature of the relief sought may require.]

[559] Section 237 provides, that "whenever an application is made for the attachment of any immoveable property belonging to the judgment-debtor, it shall contain at the foot a description of the property sufficient to identify it, &c." Now, it is quite clear that the application for attachment spoken of in these two sections is the application mentioned in s. 235, and that the above provisions are to be read with cl. (j) of s. 235. From this it appears to have been the intention of the Legislature that an inventory, or sufficient description, of the property sought to be attached, whether moveable or immoveable, should be attached to the application for execution mentioned in s. 235. In the case before us, if the application of the 19th November 1880 be treated as a substantive application under s. 235, it is, in the first place, defective in form; and in the second place, it is barred by limitation, having been made after the *twelve* years mentioned in s. 230\*. But then it is contended that this application may be accepted by way of an application amending and supplementary to the original application of the 20th September 1880. I think that, from what I have just said, it is clear that an inventory of the property, when moveable, must be delivered into Court along with the application for execution under s. 235; and if this supplementary list of property were allowed to be put in after the expiration of the twelve years, the essential portion of the law would be practically defeated.

*Appeal dismissed.*

#### NOTES.

[The ruling that the Legislature intended that a decree-holder, seeking to execute a decree passed more than twelve years before, should have only one opportunity to execute that decree and that if he fails to satisfy it on that application, any further application becomes barred, was not applied by the Allahabad High Court in a case where the judgment-debtor had prevented the execution of the decree within 12 years immediately preceding the application for execution. See 34 All. 20, 21.]

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\*[*q. v. supra* 7 Cal. 556.]



[560] *The 4th July, 1881.* .

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE FIELD.

Krishna Churn Baisack and others.....Plaintiffs

*versus*Protab Chunder Surma, *alias* Rajendro Lall, and others.....Defendants.\*

*Declaration of Title—Adverse Possession—Case made in Pleint—Summons  
to compel attendance of Witnesses—Summons to produce Documents,  
Refusal of—Civil Procedure Code (Act X of 1877), s. 137.*

Where a specific title has been alleged, but not proved, and the plaintiff endeavours, to succeed in the first Court or second Court of Appeal upon a title by twelve years' adverse possession, he must be prepared to show that this other title by twelve years' adverse possession was raised in the Court of first instance with sufficient clearness, to enable his adversary to understand that he claimed to succeed as well by twelve years' adverse possession as by the specific title alleged.

In all cases in which parties apply for a summons to compel the attendance of witnesses, or a summons to produce documents, or apply to have a document sent for under s. 137† of the Code of Civil Procedure, the Court ought not to refuse such application, merely because in its opinion the witnesses cannot be present, or the documents cannot be produced, before the termination of the trial.

IN this case the plaintiffs sued to recover possession of a mirasi taluk, named Chupsara, on the allegations that one Gopal Pershad Thakur was the former owner of the property ; that he granted a miras lease of it to his daughter Fulkumari, and that she was owner and in possession thereof ; that, on the 17th Jeyst 1276, corresponding with 29th May 1869, she sold it to the plaintiffs' father, who entered on, and continued in, possession until his death, and that they (the plaintiffs) then entered into possession of it ; that the defendants instituted a suit against them in respect of this property, which was ultimately decided against them, the defendants, in the High Court ; but that notwithstanding this they applied to the Magistrate, who attached the property under s. 531 of the Criminal Procedure Code, and directed [561] it to be

\* Appeal from Appellate Decree, No. 471 of 1880, against the decree of R. F. Rampini, Esq., Officiating Judge of Dacca, dated the 24th November 1879, reversing the decree of Baboo Gunga Churn Sircar, Subordinate Judge of that district, dated the 25th July 1878.

[Sec. 137:—The Court may, of its own accord, and may, in its discretion upon the application of any of the parties to a suit, send papers from its own records for, either from its own records or from any other Court the record of any other suit or proceeding, and inspect the same.

Every application made under this section shall (unless the Court otherwise directs) be supported by an affidavit of the applicant or his pleader showing how the record is material to the suit in which the application is made, and that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice.

Nothing contained in this section shall be deemed to enable the Court to use in evidence any document which under the Indian Evidence Act would be inadmissible in the suit.]

let out in ijara; and that, consequently, they were obliged to institute this suit to establish their right to, and recover possession of, the land. The defendants, among other pleas, contended, that Gopal Pershad had no personal right in the property, which was debutter land devoted to the maintenance of the idol Lukhi Narain and to other religious purposes, and that he, consequently, could not alienate it; that he did not really, and in good faith, execute the miras lease in favor of Fulkumari, and that she was never owner and in possession; that, by the alleged miras patta set up by the plaintiffs, Fulkumari had only a life-tenure, and therefore could not transfer it; that the plaintiffs' father never purchased it, and that neither he, nor the plaintiffs, had been in possession within twelve years previous to the institution of the suit, but that the property passed from Gopal Pershad Thakur to his son Kishen Pershad Surma, *alias* Raja Babu, and ultimately to the defendant Protab Chunder, who had been in possession for a long time; that Raja Babu was a man of immoral character and extravagant habits, and that even if a miras patta had been granted and Raja Babu had admitted it, they were not bound by his acts, as they were not his personal representatives, but his successors in the post of shebait.

The miras patta was not produced at the hearing. The Subordinate Judge found that the miras title had not been established, but gave the plaintiffs a decree, holding that they had been a long time in possession, and that, in addition, they were in the position of *bona fide* purchasers for valuable consideration. On appeal, the District Judge was also of opinion that the miras title had not been established, and proceeded to dispose of the question of title by twelve years' possession, and held that, on this ground also, the plaintiffs were not entitled to succeed, but he did not specifically deal with the question as to whether or not they were *bona fide* purchasers for valuable consideration. He, accordingly, reversed the decision of the Subordinate Judge. The plaintiffs now specially appealed to the High Court against that decision.

Baboo Hem Chunder Banerjee and Baboo Hurry Mohun Chuckerbutty for the appellants.

[562] Baboo Opendro Nath Mitter for the respondents.

The judgment of the Court (PRINSEP and FIELD, JJ.) was delivered by

**Prinsep, J.**—This case arose out of a proceeding under s. 530<sup>a</sup> of the Code of Criminal Procedure. Under that proceeding the present plaintiffs were, as they allege, turned out of possession, and they have brought this suit to recover possession, alleging the following title: They say that the property originally belonged to one Gopal Pershad Thakur, who granted a miras lease of it to his daughter, Fulkumari. In the plaint the date of this lease is not given, but from subsequent proceedings it appears that the date is Aghran 1244, corresponding with December 1837. They then say that Fulkumari was in possession of this property under this lease, and that, on the 7th Jeyst 1276, corresponding with 17th May 1869, she sold it to the plaintiff's father, who obtained possession, and that the plaintiffs succeeded him in possession, and remained in possession until they were ousted by the proceedings under s. 530 of the Code of Criminal Procedure.

<sup>a</sup>[*q. v. supra*, 7 Cal. 47.]

The Subordinate Judge was of opinion that the miras title had not been established, but he thought that, as the plaintiffs had been for a long time in possession, they ought to recover in this suit; and he further expressed an opinion that the plaintiffs are in the position of *bond fide* purchasers for valuable consideration.

Now, with reference to the finding of the Subordinate Judge that the plaintiffs had been in possession for a long time, we think that a judicial officer of the standing of Baboo Gunga Charan Sircar ought to be well aware, that this indefinite language and the indefinite form in which the fifth issue was framed are wholly inadequate for a judicial decision upon a question of title. In consequence of this indefinite language and of the inexact form of the fifth issue, a considerable amount of unprofitable discussion has arisen in this Court upon a point which is sufficiently simple.

The District Judge, on appeal, was also of opinion, that the miras title had not been established. For this finding he has [563] given a number of reasons, in all of which we are not prepared to concur. It is not, however, necessary for us to enter specifically into these reasons, because we think that there are some of them upon which his finding in respect of the miras patta as a finding of fact can properly be supported.

The District Judge then proceeded to consider the question of title by twelve years' possession, and he was of opinion, upon certain authorities which he has quoted, that the plaintiffs ought not to be allowed to succeed upon a title by twelve years' adverse possession, because this title had not been set out with sufficient distinctness in their plaint.

Now the question here raised is one upon which there are numerous decisions of this Court, which, unless carefully examined, may appear to be conflicting; but what these decisions really come to appears to us to be this, that where a specific title has been alleged but not proved, and the plaintiff endeavours to succeed in the first Court or second Court of Appeal upon a title by twelve years' adverse possession, he must be prepared to show, that this other title by twelve years' adverse possession was raised in the Court of first instance with sufficient clearness, to enable his adversary to understand that he claimed to succeed as well by twelve years' adverse possession as by the specific title alleged. Now, if he apply this principle to the present appeal, it appears to us that there is little to distinguish this case from that of *Shiro Kumari Debi v. Gobind Show Tanti* (I. L. R. 2 Cal., 418). Mr. Justice Markby there says:—"It is quite clear that when a plaintiff claims a title upon twelve years' possession, he must draw the attention of the defendant to the fact that he is going to claim a declaration upon that title, in order that the defendant may give his own evidence and scrutinize the evidence of the plaintiff upon that point, and see whether possession for twelve years is proved, and whether he can contradict it during any portion of that period." And then, referring to the particular facts of that case, he says in a further portion of his judgment:—"The plaintiff says, that he has not been himself in possession for much more than eleven years, and though he is, no doubt, entitled to join the possession of [564] his vendor to his own possession, yet he has not given the date when his vendor came into possession, nor does he even make the general allegation that the possession of his vendor, coupled with his own possession, would amount to a period of twelve years." In the case before us the date of the original miras patta has not been given,

and there is no general allegation that the possession of Fulkumari under the miras patta, if added to the possession of the plaintiffs and their father under the kobala, would altogether make up a period of twelve years' adverse possession, which would constitute a good title. Under these circumstances, we are of opinion that, so far as regards this second title of twelve years' adverse possession, we ought not to interfere with the judgment of the District Judge.

The District Judge did not distinctly deal with the question as to whether the plaintiffs were *bond fide* purchasers for valuable consideration. He says in the ninth paragraph of his judgment, that a certain decision of the Privy Council, in the case of *Ram Coomar Koondoo v. McQueen* (18 W. R., 166), has been quoted in support of the contention raised before him, and "no doubt it is a sound one;" but when he reversed the decision of the Subordinate Judge upon four grounds which he has set out at considerable length, he did not proceed to show on what grounds the plaintiffs, if *bond fide* purchasers for valuable consideration, ought to fail in this case, the miras patta not having been proved.

Then, as to the title under the miras patta, it is contended before us, and we think with reason, that the plaintiffs were entitled to an order in their favor upon the application made by them to the Subordinate Judge to have the original miras patta sent for, this patta being on the Collectorate record. It appears that this patta was mentioned in the list of documents annexed to the plaint; that an application was made on the 4th June to have the original patta sent for from the Collectorate; and that the Subordinate Judge refused this application, because the examination of witnesses had already commenced.

The District Judge observes that the examination of the witnesses was concluded on the following day,—that is, the 5th June. Now it is quite possible that, if the Subordinate Judge [565] had, on the 4th June, complied with this request and sent for the patta from the Collectorate, it would have been produced in Court before him before the trial was terminated or the plaintiffs had closed their case.

We think that, as a general rule, in all cases in which parties apply for a summons to compel the attendance of witnesses, or a summons to produce documents, or apply to have a document sent for under s. 137\* of the Code of Civil Procedure, the Court ought not to refuse such application, merely because, in its opinion, the witnesses cannot be present, or the documents cannot be produced, before the termination of the trial. In this case there was very grave negligence on the part of the plaintiffs in not applying to have this document sent for at an earlier stage; and the Subordinate Judge would have been perfectly justified in saying that, in consequence of this negligence, he would refuse to grant an adjournment of the case in order to enable the plaintiffs to do that which they ought to have done at an earlier stage. But we think that the Court was not justified in refusing to send for the document, and so denying to the plaintiffs an opportunity which might perhaps have been fruitful and favorable to them. For these reasons we think that the case ought to be remanded, and that the Subordinate Judge ought now to send for the original patta. When that patta is produced before him, it will be necessary to decide whether

\*[*q. v. supra*, 7 Cal. 560.]

the miras title alleged by the plaintiffs has been established by the patta. He must then proceed to consider whether this miras interest is transferable, and must reconsider his decision on this point. When these findings of fact are sent by the Subordinate Judge to the lower Appellate Court, that Court will pronounce its own decision thereupon, and will further proceed to dispose of the question whether the plaintiffs are in the position of *bona fide* purchasers for valuable consideration, and, as such, entitled to hold this property, even if the miras patta is not proved, and even if the miras interest should not be found to be transferable. If Fulkumari was allowed by the defendants to hold herself out to the world as the owner of a transferable interest in the property, and so to mislead the plaintiffs, it will be necessary to consider whether the [566] defendants are now estopped by their conduct from saying that she had no such interest. We think that, having regard to the culpable delay made by the plaintiffs in applying to the Court to have the miras patta sent for, no costs of this appeal ought to be allowed. As to the costs of the lower Courts, they will abide the final result of the case.

*Case remanded.*

### NOTES.

#### [NO DISCRETION TO REFUSE SUMMONS TO COMPEL ATTENDANCE OF WITNESSES :

Under section 159 (O.R. 16 R.I.) of the Code of Civil Procedure, the Courts have no discretion to refuse summons to compel the attendance of witnesses even when the application is made negligently or with intent to delay the hearing. But in either of the latter cases, the Court may properly refuse to adjourn the hearing.— 16 All. 218.]

[7 Cal. 566]

*The 2nd June, 1881.*

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Mahomed Ameer and another.....Plaintiffs

*versus*

Peryag Singh and others.....Defendants.\*

*Suit for Cancellation of Mokurari Lease—Forfeiture—Equitable  
Relief against Forfeiture—Beng. Act VIII of 1869,  
s. 52—Act X of 1869, s. 78.*

Where, in a mokurari lease, there was a condition, that, in case of non-payment of one year's rent, and its falling into arrears, the mokurari settlement was to be cancelled, and default was made and a suit for ejectment was brought,—

*Held*, that, independently of the Rent Act, the defendants should be allowed in equity a reasonable time to pay the landlord's dues in order to prevent forfeiture.

*Mothoora Mohun Pal Chowdhry v. Ram Lall Bose* (4 C. L. R., 469), followed.

\* Appeal from Appellate Decree, No. 2310 of 1879, against the decree of J. F. Stevens, Esq., Officiating Judge of Patna, dated the 7th July 1879, affirming the decree of Baboo Poresh Nath Banerjee, Subordinate Judge of that district, dated the 25th January 1879.

Held also, that the provisions of s. 52 of Beng. Act VIII of 1869 are exactly similar to those of s. 78 of Act X of 1859, and applicable to the case of a mokurari lease; and, therefore, that a decree passed in conformity therewith, which allowed fifteen days for the payment of the arrears of rent found due and interest thereon, was a good decree.

THIS was a suit brought by the plaintiffs to recover arrears of rent, for the cancellation of a mokurari lease granted by them to the defendants, and, to recover possession of the lands, the subject-matter thereof. The lease contained a clause as follows:—"In case of non-payment of one year's rent and its falling into [567] arrears, the mokurari settlement will be cancelled; and in that case, we, the declarants, the mokuraridars, or our heirs or representatives, shall have no claim to the nuzurana money." And the plaintiffs alleged in their plaint that the rent had fallen into arrears and claimed Rs. 1,349-9-7½, which sum was made up of the rent, Rs. 593, for the year 1285, corresponding with the year 1877-78, arrears for previous years, and damages calculated at 25 per cent.; and further claimed that the defendants had no right to the return of, Rs. 4,000 paid by them as nuzurana. The defendants, amongst other pleas, denied that the rent had fallen into arrears as stated, or that the sum claimed from them was due; but the Subordinate Judge found that the sum of Rs. 722-4-6 was due by them, and gave the plaintiffs a decree in accordance with the provisions of s. 52, Beng. Act VIII of 1869, directing that, unless that amount, with interest at 12 per cent. from the date of the commencement of the accrual of the arrears up to the date of decree, was paid within fifteen days, the tenure should be avoided and the defendants ejected.

From that decree the plaintiffs appealed to the District Judge, and urged that the basis of the suit was not the provisions of s. 52 of Beng. Act VIII of 1869, but the contract, the terms of which were contained in the mokurari lease, and that s. 52 had, therefore, no application. The lower Appellate Court, however, following *Jan Ali Chowdhry v. Nittyanund Bose* (10 W. R., F. B., 12), which was decided under Act X of 1859, and holding that, so far as it affected the decision in that case, the law under Beng. Act VIII of 1869 had not been altered, upheld the decision of the lower Court, and dismissed the appeal with costs.

The plaintiffs, accordingly, now specially appealed to the High Court, and brought forward the same contentions as they had done in the lower Appellate Court.

Baboo *Mohesh Chunder Chowdhry* and *Moonshi Serajul Islam* for the appellants.

Baboo *Chunder Madhub Ghose* and Baboo *Troyluckyo Nath Mitter* for the respondents.

[568] The judgment of the Court (Mitter and Maclean, JJ.) was delivered by

**Mitter, J.**—This suit was brought to recover arrears of rent and also for the cancellation of the defendants' mokurari tenure, this latter prayer being based upon the following provision in the mokurari patta:—"In the case of non-payment of one year's rent, and on its falling into arrears, the mokurari settlement will be cancelled; and in that case, we, the declarants, the mokuraridars, or our heirs or representatives, shall have no claim to the nuzurana money." The Court of first instance found that Rs. 722-4-6 was due to the plaintiffs, and as regards the claim for the cancellation of the mokurari patta, the decree provides that, "unless the amount, Rs. 722-4-6, with Rs. 12 per cent. interest from

date of the commencement of the accrual of the arrears up to this day, be paid within fifteen days from this day, the tenure will be avoided and defendants ejected." That decree has been upheld by the lower Appellate Court. It has been contended before us, that, under the terms of the patta, the Courts below had no option but to decree that the defendants had forfeited the mokurari tenure. We do not think that this contention is valid. We are supported in this view by the decision in the case of *Mothoora Mohun Pal Chowdhry v. Ram Lall Bose* (4 C. L. R., 469). Pontifex, J., who delivered the judgment in that case, says:—"That the defendants," that is the tenants, "having insisted upon their equity to prevent forfeiture of the lease, provided they pay the whole of the arrears of rent according to the lease, and the costs which have been incurred in these proceedings, are entitled to rely upon such equity." Then he refers to certain decisions of this Court taking a contrary view, which decisions have also been cited before us and relied upon; and after referring also to the Privy Council decision in *Duli Chand v. Meher Chand Sahu* (12 B. L. R., 439), ruling that s. 52 of the Rent Law may be applicable to the case of a mokurari or any other kind of tenure of a perpetual nature, he goes on to say,— "We do not think it necessary to decide in this case whether or not the provisions of the Rent Law actually [569] apply, because we think that, even if they do not in terms apply, we are bound by analogy to that law to apply in favour of the defendants an equity similar to the equity there given. We, therefore, think that if the defendants pay the whole of the rent due up to the present time, with interest according to the stipulations of the original kabuliat and patta, and also pay all the costs of the proceedings in both this Court and of the Courts below, the plaintiffs ought not to have khas possession decreed to them." The decision of the lower Courts in this case is entirely in accordance with the principle laid down here. The District Judge says in one part of his judgment: "On the question of damages at Rs. 25 per cent. claimed by the plaintiffs, but disallowed by the lower Court, I agree with the lower Court in thinking that no special claim for damages has been made out; and that the plaintiffs are amply compensated for the want of punctuality on the part of the defendants by award of interest at 12 per cent. per annum." It is quite clear that the case cited above—*Mothoora Mohun Pal Chowdhry v. Ram Lall Bose* (4 C. L. R., 469)—is an authority in support of the decree which has been passed in this case; but it seems to us further, that the Privy Council case, referred to in that judgment, distinctly lays down that the provisions of s. 78 of Act X of 1859 apply to the case of a mokurari; and we entirely agree with the Judge that the provisions of s. 52 of the present Rent Act are exactly similar to those of s. 78 of Act X of 1859. In one of the cases relied upon by the learned pleader for the appellants, viz., *Mumtaz Bibee v. Grish Chunder Chowdhry* (22 W. R., 376), Kemp, J., who delivered the judgment, says:—"Section 52 does not apply to the cases of taluqdars of the description of the defendants, and, therefore, the Full Bench Ruling, which has been quoted by the pleader for the appellant, to be found in the case of *Jan Ah Chowdhry v. Nittyanund Bose* (10 W. R., F. B., 12), is not applicable to this case; that decision applies to the cases of ryots alone." It is clear from these observations, that the decision in that case proceeded, not upon the ground that there is any difference between the provisions of s. 52 of the present Rent Act and of s. 78 of Act X [570] of 1859, but upon the ground that none of the provisions of either of those sections apply to the case of a taluqdar. But upon that point the ruling of the Privy Council in the case quoted above is just the contrary. We must, therefore, follow the Privy Council's decision quoted above. On both these grounds, viz., that, quite

independently of the Rent Act, the defendants should be allowed, in equity, reasonable time to pay the landlords' dues in order to prevent forfeiture, and also upon the ground that the provisions of s. 52 of the Rent Act are applicable to this case, we think that the decrees of the lower Courts are correct.

The appeal must be dismissed with costs.

*Appeal dismissed.*

[7 Cal. 570]

*The 11th June, 1881.*

PRESENT :

MR. JUSTICE TOTTENHAM AND MR. JUSTICE MACLEAN.

Shib Chandra Chakravarti and others.....Defendants

*versus*

Johobux and another.....Plaintiffs.\*

*Optional and Compulsory Registration—Priority of Registered over Unregistered Documents—Registration Acts (III of 1877), and (XX of 1866), s. 18.*

Documents the registration of which is optional, executed previous to the Registration Act (III of 1877), will not, if unregistered, take effect against later registered documents.

*S*, the owner of a seven-anna share in certain property, on the 19th November 1866, sold a one-anna share thereof to *A* for Rs. 30, the bill-of-sale not being registered, as under the provisions of Act XX of 1866, s. 18, the registration thereof was optional. Subsequently, *S* sold the remaining six annas to other persons; and then, on the 27th September 1876, sold another one-anna share in the same property to *B* for Rs. 140, the bill-of-sale with respect to this purchase being duly registered under the provisions of Act III of 1877. In a suit by *A*, who had never obtained possession of the one-anna share he had purchased, against *S*, *B*, and the purchasers of the other six-anna shares,—*Held*, that he was not entitled to succeed, as his bill-of-sale being unregistered was not entitled to priority over *B*'s, which had been duly registered.

*Lachman Das v. Dip Chand* (I. L. R., 2 All., 851) followed.

*Ogra Singh v. Ablakhi Koor* (I. L. R., 4 Cal., 536) discussed.

[571] THE facts of this case were as follows :—Shib Chandra Chakravarti, the first defendant, owned a seven-anna share in Taluq Kismut Khamar Damawara, and he was ousted therefrom in the year 1270, corresponding with the year 1863, but recovered possession in the month of Pous 1280, corresponding with December 1872. During the times he was out of possession, the plaintiffs alleged that Shib Chandra sold to their father, Sheik Amir, since deceased, a one-anna share out of his seven annas, under a kobala dated the 26th Kartic 1274, corresponding with the 19th of November 1866, the consideration-money being Rs. 30.

\* Appeal from Appellate Decree, No. 1092 of 1879, against the decree of Baboo Kalidas Dutt, Second Subordinate Judge of Tippera, dated the 16th March 1879, reversing the decree of Baboo Ram Chander Dhur, First Munsif of Nassirnuggur, dated the 16th February 1878.



This kobala was not registered, as it was optional to register it under s. 18, Act XX of 1866, the Registration Act then in force; and its genuineness was disputed by the defendants.

Subsequently, between the years 1274 and 1283 (1866—1876) Shib Chandra sold his remaining six annas share in the property to the defendants, appellants, Sheik Mohaju and Sheik Budhya and others; and thus, assuming the sale to the plaintiffs' father to be a genuine one, he had exhausted all his interest in the property. On the 24th Assin 1284, corresponding with the 27th September 1876, however, he sold another one-anna share in the same property to the two appellants, Sheik Mohaju and Sheik Budhya, for Rs. 140, and the bill-of-sale was duly registered under the Registration Act of 1877. It appeared that neither the plaintiffs, nor their father, had ever taken possession of the one-anna share alleged to have been sold under the kobala of the 19th November 1866, and they now brought the present suit to obtain possession thereof against Shib Chandra and all the persons to whom he had sold the property.

The Munsif dismissed the suit, on the ground, amongst others, that the appellant's bill-of-sale having been registered, took precedence over the plaintiffs, which was unregistered; but on appeal the Subordinate Judge reversed that decision, holding that the appellants' purchase was a fraudulent one, and that the [572] plaintiff's kobala was a genuine document, the registration of which was optional at the time of its execution; and that, therefore, the appellants' bill-of-sale was not entitled to any priority over it, and consequently decreed the plaintiffs' claim.

Against this decree the defendants now appealed to the High Court.

Baboo Jogesh Chunder Roy for the appellants.

Baboo Joy Gobind Shome for the respondents.

The **judgment** of the Court (TOTTENHAM and MACLEAN, JJ.) was delivered by

**Tottenham, J.** (who, after stating the facts, continued):—The first Court dismissed the case, holding that the appellants' registered bill-of-sale took precedence of the unregistered one. The second Court reversed the decree and decreed the suit, finding (although the point was not raised in the first Court or put in the form of an issue) that the appellants' purchase was fraudulent; and that, therefore, their bill-of-sale, though registered, could not be allowed priority over the plaintiffs' unregistered document.

We think that the case cannot be decided on the ground of fraud. There is, no doubt, a fraud committed when a person sells the same property twice over, but unless the second purchaser has notice of the first sale, it does not always follow that he is to be saddled with the consequences. Registration of sales has been established for the protection of purchasers, and though sales for small sums may or may not be registered, while sales for larger sums must be registered, a prudent purchaser would always register his purchase as a precautionary measure even if it was for a sum below Rs. 100.

It has generally been held that, prior to April 1877, when Act III of 1877 came into force, a document compulsorily registered did not take precedence of a document of which registration was optional: see *Bholanath v. Baldeo* (I. L. R., 2 All., 198), also *Ogra Singh v. Ablakhu Kooer* (I. L. R., 4 Calc., 536), and cases quoted therein; [573] but the present Act has effected a change in the law, and it must now be taken to be established, that the principle laid down in these decisions no longer applies to documents governed by Act III of

1877. Henceforward, documents executed when the previous three Registration Acts were in force, will not, if unregistered, take effect against later registered documents: see *Ganga Ram v. Bansi* (I.L.R., 2 All., 431), and *Lachman Das v. Dip Chand* (*Ibid.*, 851). This last case is a Full Bench decision of the Allahabad Court, and though it appears to be in conflict with the case of *Ogra Singh v. Ablakhi Kooer* (I.L.R., 4 Calc., 536), we still think that that case was correctly decided under the former law. It was not decided there that Act I of 1868, s. 6, protected a document executed when Act VIII of 1871 was in force against the provisions of Act III of 1877; but it was held, that Act III of 1877 did not apply to the suit at all, as it was instituted while Act VIII of 1871 was in force.

We must reverse the decision of the lower Appellate Court and restore that of the Munsif.

The appeal is decreed with costs.

*Appeal allowed.*

### NOTES.

#### [COMPETITION BETWEEN REGISTERED AND UNREGISTERED INSTRUMENT,

##### A—BEFORE ACT III OF 1877:—

Priority was given on the basis of registration only as between two instruments relating to the same property, the registration of both of which was optional. There was no priority as between two instruments one of which was compulsorily, and the other optionally registrable:—See 2 N. W. P., 37.

##### B—CHANGES INTRODUCED BY ACT III OF 1877:

The effect of the act was to give priority as between instruments one of which is compulsorily and the other optionally registrable.

(1) Where both the documents were executed after the act of 1877 came into force, the document compulsorily registrable and registered undoubtedly takes precedence over another document optionally registrable and not registered:—See 9 C. W. N. 14.

(2) Also where a document optionally registrable was executed before the Act III of 1877, and another compulsorily registrable was executed and registered after Act III of 1877, the latter will undoubtedly prevail over the former.

See 20 Bom. 158; 11 Cal. 661; 2 All. 431; 3 A. W. N. 104; 5 All. 598; 3 A. W. N. 186;

(3) But as between two instruments one of which is compulsorily registrable and registered, and the other which is optionally registrable and not registered, both of them having been executed before the Act III of 1877 (but subsequent to Act XVI of 1864,) decisions are conflicting as to whether priority is given by the Act III of 1877.

##### (a) Bombay High Court:—

Holds that there is no priority on the score of registration.

See 5 Bom. 442; 5 Bom. 653; 6 Bom. 168; 18 Bom. 229.

##### (b) Allahabad High Court:—

Decisions are conflicting. There is no priority according to 2 All. 198; 4 A. W. N. 186; 6 A. W. N. 15; 2 A. W. N. 19.

There is priority according to 5 All. 447; 3 A. W. N. 87.

##### (c) Madras High Court:—

There is priority:—3 Mad. 78; 8 Ind. Jur. 554; 5 Mad. 174.

(d) Calcutta High Court:—

There is priority:—7 Cal. 570; 9 C. L. R. 224.

**C—EXISTING LAW:—**

With the exception of the provision “or to any.....of this Act,” Section 50 of the present act is a verbatim reproduction of section 50 of Act III of 1877. Hence the decisions under that act are still good law.

*N. B.* A person claiming under a registered instrument cannot avail himself of the provisions of section 50 if he took with notice of the earlier unregistered instrument.

See B.L.R. A. C. 8, 5 Cal. 338; 13 Cal. 70; 10 Bom. 105; 20 All. 252, 28 All. 315; 3 M.L.J. 54; 12 Mad. 505.]

[7 Cal. 573]

*The 3rd June, 1881.*

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE McDONELL.

Nobin Krishna Bose and another.....Defendants.

*versus*

Mon Mohun Bose and others.....Plaintiffs.\*

*Voluntary Payment—Arrears of Rent—Mistake—Payment under a Mistake.*

The plaintiffs, believing that they held a four-anna share, and the defendants the remaining twelve-anna share, in a patni, the revenue of which was in arrears, paid to the zemindar, on the 8th of March 1876, a portion of the arrears corresponding to the share in the patni to which they considered themselves entitled. It was afterwards decided, in a suit between the parties, that the plaintiffs were not entitled to any share in the patni, and that the defendants [574] were entitled to the whole sixteen annas thereof. Subsequently to this decision, the defendants, in paying up the arrears of revenue due on the patni, took the benefit of the payment made by the plaintiffs on the 8th of March 1876, and paid in only so much as, together with the previous payment, made up the whole arrear. The plaintiffs then brought the present suit to recover from the defendants the amount of the payment made to the zemindar on the 8th of March 1876.

*Held*, that the payment was not a voluntary payment, and that the plaintiffs were entitled to recover.

THE facts of this case were as follows:—In a certain patni, the jama of which was Rs. 2,011-8-10, the plaintiffs alleged that they held a four anna share, and the defendants the remaining twelve annas; and that the jama which they had to pay was Rs. 504-14-2½. The defendants alleged that the plaintiffs had no interest whatever in the patni, but that they were darpatnidars of a four-

\* Appeal from Appellate Decree, No. 673 of 1880, against the decree of Baboo Bhooputi Roy, Subordinate Judge of East Burdwan, dated the 5th February, 1880, reversing the decree of Baboo Khetter Prosad Mookerjee, Munsif of Culna, dated the 16th June 1879.

anna share under them. In this state of matters the defendants, in 1874, instituted a suit against the plaintiffs to recover certain arrears of the rent of the alleged darpatni. In that suit the extent of jama for which the plaintiffs were liable, namely, Rs. 504-14-2½, was not disputed, nor was there any dispute as to the amount of arrears claimed. The only question was, whether the plaintiffs were some of the patnidars as they claimed to be, or darpatnidars, as the defendants alleged them to be. The Munsif who tried that case dismissed it, on the ground that the plaintiffs were not darpatnidars, but the holders of a four-anna share in the patni mehal. That decree was dated the 29th of March 1875. The defendants appealed, and the cause was remanded. The Munsif who tried the case after the order of remand found, that the plaintiffs and the defendants were descendants of a common ancestor, and that the plaintiffs were entitled to a four-anna share of the patni; but he decreed the claim of the defendants, on the ground that the plaintiffs had always paid their rent through the holder or holders of the twelve annas share. That decree was dated the 2nd of May 1876. Before this decree was made, the plaintiffs, on the 8th of March 1876, paid to the zemindar the sum of Rs. 225 on account of their proportion of certain arrears of revenue then due on the patni mehal.

[575] Two appeals were preferred against the decree of the 2nd of May 1876,—one by the defendants against the finding that the plaintiffs were entitled to a four-anna share in the patni, and the other by the plaintiffs against the decretal order. These two appeals were disposed of in favour of the defendants, and then there was a special appeal by the plaintiffs to the High Court. It was ultimately decided in that suit that the plaintiffs were not entitled to any share in the patni, but were merely darpatnidars of the four annas share of the mouza.

Though the revenue of the patni was in arrear at the time of the payment to the zamindar in March 1876, yet it did not appear that any steps had been taken by the zemindar to recover it. The defendants afterwards proceeded to pay the revenue, but, finding that a portion had been previously paid by the plaintiffs, they paid in only the additional sum required to make up the total amount then in arrear. After this, and after the final decree in the suit of 1874, had settled the respective positions of the parties, the plaintiffs repeatedly demanded from the defendants the sum paid by them to the zemindar; and in consequence of there refusal to pay, the present suit was instituted on the 7th March 1879. The defence was, that the payment was a voluntary one, and made for the purpose of being used as evidence in the suit of 1874. The Munsif dismissed the suit, but this decision was reversed on appeal to the Subordinate Judge, who found on the facts that the plaintiffs had paid the money to the zemindar *bona fide*, believing that they were entitled to four-anna share in the patni. The defendants appealed to the High Court.

*Baboo Rashbehary Ghose* for the appellants.—The defendants are not liable for this money. The payment was made by the plaintiffs not for the purpose of paying a debt of the defendants', but for paying a debt of the plaintiffs' own. The payment was made prematurely—*Luckhee Kant Doss v. Shib Chunder Chuckerbutty*; (12 W. R. 462), and being purely voluntary, cannot be recovered: *Mussamut Ashibun v. Baboo Ram Proshad Das*, (1 Shome's Law Rep., 25), *Ram Tuhul Singh v. Biseswur Lall Sahoo* (L. R., 2 I. A., 131, 143-4). Section 69 of [576] the Contract Act is in my favour. [GARTH, C. J.—If the money was paid to the landlord by mistake, as the Court below finds, the plaintiffs could recover it from the landlord. Now you have adopted the payment made to the

landlord as if it had been made by yourself. This is not money paid to your use. It is money paid under a mistake, which you have taken the benefit of—taken it into your possession as it were.]

Baboo *Hemchunder Banerjee* for the respondents was not called upon.

The **judgment** of the Court (GARTH, C. J., and McDONELL, J.) was delivered by

**Garth, C. J.**—This is a suit for the recovery of Rs. 225 from the defendants under these circumstances :

The plaintiffs had sued the defendants to recover possession of four annas of a patni estate, of which the defendants claimed the whole, and were admittedly entitled to the other twelve annas. The real question in that suit was, whether the plaintiffs were entitled to the four annas as patnidars, or whether they held them as darpatnidars, the defendants being the holders of the whole patni.

In that suit the plaintiffs got a decree as patnidars in the first Court; but on appeal the case was remanded for some further evidence to be taken. In that state of things, and whilst the plaintiffs *bond fide* believed themselves to be entitled to the four annas, they paid into the zemindar's sherishta Rs. 225 on account of the revenue for that share. But as it was eventually decided that the plaintiffs held the four annas, not as patnidars, but as darpatnidars, it turned out that the Rs. 225 was paid for the defendants' benefit, and as part of their revenue to the Government, so the plaintiffs brought this suit to recover from the defendants that sum.

The first Court dismissed the plaintiffs' suit, on the ground (amongst others) that it was paid in bad faith, with the object of making evidence of their alleged patni right.

The Subordinate Judge, in a very careful judgment, has come to the conclusion that the plaintiffs' claim should be decreed, [577] on the ground (amongst others) that, in making this payment, the plaintiffs believed themselves interested in doing so.

We think that this conclusion of the Subordinate Judge may be properly confirmed, though we doubt whether his judgment can be supported upon the grounds which he mentions. We think that his conclusion may be supported upon this principle that where a payment is made by one person for the benefit of another, and that other afterwards adopts that payment, and avails himself of it, the sum becomes money paid for his use.

The plaintiffs, *bond fide* believing themselves to be the owners of the four-annas share, paid the revenue of it to the zemindar. The defendants then paid the revenue on the remaining twelve annas; when they did so, they must have found that the revenue on the four-annas had been paid by the plaintiffs; and they availed themselves of that payment by the plaintiffs, only paying, or offering to pay, to the zemindar the revenue on the remaining twelve annas. We think that, under these circumstances, the Rs. 225 so paid by the plaintiffs became money paid to the use of the defendants; and that the judgment of the Court below can be supported upon that ground. No doubt the justice of the case is entirely with the plaintiffs.

The appeal is dismissed with costs.

*Appeal dismissed.*

[7 Cal. 577]

*The 31st May, 1881.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE McDONELL.

Parbath Chund Deb.....Plaintiff.

*versus*

Ain-ud-Deen and others.....Defendants.\*

*Co-Sharers—Partition—Portion of an Estate—Parties.*

The owner of a twelve annas share in a joint zemindari granted to the plaintiff a mokurari lease of his share in a small portion of land within the zemindari. The owners of the remaining four annas share granted a patni of his share in the whole zemindari to the defendants. The plaintiff brought a suit against the defendants for partition of the small plot of land.

[578] *Held*, that such a suit would not lie, because the zemindars were not made parties; and also that a partition could not be enforced of a part of the estate held by the defendants, who, if the plaintiff's claim was allowed, might, in respect of the same estate, be subjected to many claims for partition at the suit of persons in the plaintiff's position.

IN this case it appeared, that one Monwar Ali was a twelve annas shareholder in a certain undivided zemindari, the remaining four annas of which were held by certain persons known as the heirs of Nasiruddin. On the 4th of August 1877, Monwar Ali gave to the plaintiff a mokurari lease of a certain plot of land within the zemindari, which plot was defined by metes and bounds, and was in extent about one-fiftieth of the whole zemindari. The whole zemindari being joint, this lease, of course, only covered twelve annas of the rents and profits of the plot of land. The heirs of Nasiruddin had given a patni of their four annas share of the whole zemindari to the defendants; and this suit, which was for partition, was instituted, on the 13th of November 1878, by the plaintiff, the mokuraridar of the twelve annas share of the small plot, against the defendants the patnidars of the four annas share of the whole estate.

The suit was dismissed in the Court of first instance, on the ground, that the plaintiff, being interested in a fractional part of the estate only, could not sue the co-sharers of the whole estate for a partition. This decision was upheld on appeal by the Subordinate Judge, the material portion of whose judgment is as follows:—“The plaintiff and defendants are not sharers in the same tenure under one and the same proprietor. Their tenures are separate, under different proprietors. The law says, that a sharer may sue for partition. As neither the plaintiff is the sharer of the patni held by the defendants, nor the defendants are the sharers of the Mokurari tenure held by the plaintiff, I consider that the plaintiff has got no power in him to call upon the defendants by notice to join him in apportioning the lands of two separate tenures. Such a partition will,

\* Appeal from Appellate Decree, No. 2472 of 1879, against the decree of Baboo Uma Churn Kastogiri, Subordinate Judge of Tippera, dated the 30th July 1879, affirming the decree of Baboo Ram Chunder Dhur, Munsif of Bamunberia, dated the 10th March 1879.

in fact, be a partition between the proprietor of a twelve annas share and the proprietors of a four annas share in the zemindari, and this cannot be done in a suit in which they are not parties. There is also another difficulty [579] of assorting the jama of each of the two shares. To allow the plaintiff to hold separately a certain portion of the lands as lands of the twelve annas share, while the proprietors of the two shares hold all other lands jointly, is to annihilate the right of the proprietors of four annas share thereto. Neither has the proprietor of the twelve annas share authorized the plaintiff, nor have the proprietors of the four annas share given power to the defendants, by express terms, in the pattas, to make a partition between them. The appeal is dismissed with costs." The plaintiff appealed to the High Court.

*Baboo Joy Gobind Shome* for the appellant. —The learned Judge was wrong in holding that this suit could not be maintained; the case is on all fours with that of *Rani Samasundari Devi v. Jardine, Skinner, and Co.* (3 B. L. R., App., 120; S. C., 12 W. R., 160); see also *Ram Pershad Narain Tewaree v. The Court of Wards* (21 W. R., 152).

*Moonshi Serajul Islam* for the respondents. —This suit is not maintainable. A partition of a portion of a share cannot be had, unless all the portions are included in the suit. The person who bought the interest of the zemindar in one plot, cannot compel a partition of that plot alone; the zemindar could not do it, and a purchaser from him has no higher rights than he himself could have. In *Rani Samasundari's case* (3 B. L. R., App., 120; S. C., 12 W. R., 160), the whole sixteen annas were divided; and in *Ram Pershad Narain Tewaree v. The Court of Wards* (21 W. R., 152), all the parties were before the Court. In this case the titles under which the parties hold are distinct and separate. The respondents are not joint with the appellant. [The cases of *Baboo Laljeet Singh v. Baboo Raj Coomar Singh* (25 W. R., 353), and *Ruttun Monee Dutt v. Brij Mohun Dutt* (22 W. R., 333) were referred to].

*Baboo Joy Gboind Shome* in reply. —The patnis in *Rani Samasundari's case* (3 B. L. R., App., 120; S. C., 12 W. R., 160), were given by different parties as in this case; and, as in that case, the owners of the whole sixteen annas of the plot of which we seek partition are before the Court. It is not necessary that the interest of each party should extend [580] to the whole estate in order to get partition: Suppose there were twenty zemindaries, why should not the mokuridar of one or more get a partition if he pleased? The zemindar's rights do not limit ours; these are all the lands we hold jointly with the defendants, and we are entitled to a partition of them.

The judgment of the Court (GARTH, C. J., and McDONELL, J.) was delivered by

**Garth, C. J.** —The plaintiff sued for a partition, and the facts are these: Monwar Ali is the owner of an undivided twelve annas share in a mouza, and Ali Kasim and others are entitled to the remaining four annas. The defendants have obtained a patni of the four annas share, and the plaintiff has obtained from Monwar Ali a mokurari of a small portion of the twelve annas share. Under this mokurari, he has an undivided twelve annas share in a small area of a mouza. The entire mouza held in joint possession consists of upwards of 100 drones of land; and the portion in which the plaintiff has a twelve-anna share is less than two drones. Under these circumstances, the plaintiff sues the defendants for a partition,—that is to say, he prays to have the small area in which he has a twelve-anna share divided as between him and the

four annas patnidar. Neither of the zemindars is made a party to the suit ; and the defendants object that, in point of law, the plaintiff is not entitled to the partition.

Both the lower Courts have dismissed the plaintiff's suit. The Munsif has dismissed it upon the ground, that the lessee of twelve annas of part of the joint estate has no right to a partition against a lessee of four annas of the entire estate ; and also, that if such a partial partition were allowed between tenure-holders of portions of entire properties, it would lead to great expense and inconvenience. The Subordinate Judge gives several reasons for his decision. He says,—*first*, that the plaintiff and defendants are not sharers in the same tenures under the same proprietors. They have separate tenures under different proprietors ; and that, as the plaintiff is not a sharer in the defendants' patni, nor the defendants sharers in the plaintiff's mokurari, neither party has a right to enforce a [581] partition against the other ; *secondly*, he says, that such a partition would be an unlawful interference with the rights of the zemindars, that they are not made parties to the suit, and that such a partition cannot be made without their concurrence ; and *thirdly*, he considers, that to allow the four annas share to be thus subdivided, would be injurious to the four annas patnidar.

It has been argued here on special appeal, that a partition may legally be enforced as between tenure-holders of the same zemindari, as long as between them they are entitled to the whole sixteen annas in the particular area sought to be partitioned ; and that it is no objection to such a partition that the parties hold separate tenures under separate owners of the zemindari. It is said that partition would not affect the rights of the zemindars, either *inter se* or as against their respective lessees ; and it would only be in force during the lessees' interests. If either the defendants' patni or the plaintiff's mokurari were to determine, the partition would be at an end.

We think that the judgment of the lower Courts should be confirmed, for the following reasons :—

*First*, that a partition of this kind cannot legally be enforced without the zemindars being made parties to the suit ; and *secondly*, that a partition cannot be enforced of a part of the estate held by the defendants. The defendants are entitled, by right of their patni, to an undivided four annas share in a large estate of 100 drones ; and if the plaintiff was entitled to compel a partition as against the defendants of an area of two drones only, the defendants might, in respect of the same estate, be subjected to forty or fifty claims for partition at the suit of forty or fifty different persons, each of whom is in the plaintiff's position, and might be put to great expense in consequence of his estate being divided into forty or fifty separate areas.

The appeal is dismissed with costs.

*Appeal dismissed.*



**NOTES.**

**[PARTIAL PARTITION—2 cases:—**

- (1) When some only of the co-owners separate, the others remaining joint.
- (2) When a portion only of the family properties are divided, while the rest continues undivided.

**I Case:—**

As regards the question whether the separation of some of the members of a joint family effects a separation of all, the decisions of the various High Courts are by no means uniform. But the following propositions are fairly settled:—

- (a) When some co-parceners separate from the others there is no presumption that the latter remain joint. This is settled by the Privy Council decision in 30 Cal. 725, followed in 33 Mad 356.
- (b) Not is there any presumption under the same circumstances, that the others have become divided.—See 31 Mad. 482.
- (c) Any agreement between the remaining co-parceners to remain united must be proved like any other fact.—30 Cal. 725 (P. C); 16 C. L. J. 311; 6 Ind. Cas 795; 13 Bom. L. R. 287.
- (d) The separation of some of the co-parceners is not *ipso facto* a separation of all:— 4 M.I. A. 137, 168; 11 M. I. A. 369, 380; 4 I. A. 247, 255.
- (e) But where it is necessary, in order to ascertain the share of an outgoing co-parcener to fix the shares of the others, the separation of one may amount to the virtual separation of all. 31 Mad. 482; 6 Ind. Cas. 795. See however, Sircar's Hindu Law p. 279 (4 Edn.)

**II Case:—**

- (a) **By agreement of parties.** There can be a partial partition in this sense, by agreement of parties. 25 Mad. 149, 157.
- (b) **By Suit.**

**GENERAL PRINCIPLES.**

The general principles that can be deduced from the many conflicting cases on the subject are that there is no hard and fast rule against partial partition in all cases, that the rule does not belong to Hindu Law, but is a creature of judiciary law, and being based primarily on considerations of equity and convenience, belongs more to the province of processual than substantive law. See 34 Mad. 269 (F. B.) at p. 270; 23 M. L. J. 64 at 70.

Hence the defendants in suit to partial partition are not entitled to have the suit dismissed but are entitled to ask that all property liable to be divided should be brought into the hotch-pot and all the equities between the parties should be finally adjusted. See 23 M. L. J. 64 at p. 70.

**Four classes of Cases.**

The four classes of cases in which a suit may be brought for partial partition, with their different results are shown below in a tabular form.

Cases.	Result.	Decisions.
(1) Co-owner v. Co-owner.	Suit does not lie for partial partition.	7 Cal. 577; 9 Cal. 817; 12 Cal. 566; 16 Mad. 98; 14 Cal. 122 27 Mad. 361.
(2) Alienee from one co-owner v. Other co-owner.	<div style="display: flex; align-items: center;"> <div style="font-size: 3em; margin-right: 10px;">{</div> <div> <p>(a) Suit does not lie generally.</p> <p>(b) Suit lies if there are no equities to be adjusted and if there is inconvenience caused.</p> </div> </div>	<p>16 Mad. 98; 24 Bom. 128; 20 Mad. 243; 4 Cal. 723; 13 Mad. 275.</p> <p>34 Cal. 1026; 34 Mad. 402; 23 M. L. J. 64.</p>
(3) Co-owner v. Alienee from other co-owner.	Suit lies.	5 Mad. 196; 19 Mad. 267; 13 C. W. N. 815.
(4) Alienee from one co-owner v. Alienee from other co-owner.	Suit lies.	34 Mad. 269 F. B.]

[522] *The 2nd June, 1881.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE McDONELL.

Bibee Syefun.....Plaintiff

*versus*

Rudder Sohay.....Defendant.\*

*Landlord and Tenant—Suit for Rent—Evidence—Plea of Payment—Onus  
of Proof.*

In a suit by a landlord against his tenant for arrears of rent due for a portion of the year 1283 (1876), the defendant pleaded payment and called as his witness the plaintiff's agent who admitted the receipt of certain payment, from the defendant's under-tenants during the time for which the arrears were demanded ; but swore that they were payments made in respect of arrears due on account of previous years. The lower Appellate Court, reversing the decree of the Court of first instance, gave the defendant credit for the payments so admitted.

*Held*, that the lower Appellate Court was wrong ; that the defendant having 'pleaded payment was bound to prove that the admitted payments were in respect of that portion of the year 1283 for which the arrears were claimed.

Section 12 of the Rent Law applies to receipts given directly by the landlord to the tenant, and not to receipts given to third persons.

THIS was a suit by a landlord against his tenant, instituted in the Revenue Court of the Assistant Commissioner of Pachamba, under cl. 4, s. 23, Act X of 1859, and s. 12, Act VI of 1862, for the recovery of Rs. 1,000 as principal, and Rs. 250 damages, being arrears of rent for the year 1283 (1876). The defence was, that the plaintiff collected the rent claimed from the defendant's under-tenants, and the plaintiff's agent was called as a witness for the defendant. He admitted payment of certain sums from under-tenants in 1283 (1876), but stated they were not paid on account of rent for 1283 (1876), but for the previous year. The Court of first instance gave the plaintiff a decree for the full amount claimed with costs, on the ground that the defendant had failed to prove the payments alleged by him.

\* Appeal from the Appellate Decree, No. 414 of 1880, against the decree of R. Towers Esq., Officiating Judicial Commissioner of Chota Nagpore, dated the 8th December 1879, modifying the decree of Major L. Blathwayt, Assistant Commissioner of Pachamba, dated the 10th March 1879.

[583] The defendant appealed to the Court of the Judicial Commissioner of Chota Nagpore, who gave him a decree for the sums paid in 1283 (1876). The plaintiff appealed to the High Court.

Mr. *Sandel* for the Appellant.

*Baboo Nil Madhub Sen* for the Respondent.

The **Judgment** of the Court (GARTH, C. J., and McDONELL, J.) was delivered by

**Garth, C. J.**—We think that the lower Appellate Court has made a very serious mistake in this case in finding in favour of the defendant upon the plea of payment, without any evidence whatever to support that finding.

It was not denied that a certain sum for rent had become due to the plaintiff from the defendant for the year 1283, but the defendant's plea was that those sums had been paid. The *onus* was entirely upon the defendant to prove this plea, but instead of going into the witness-box himself, or at any rate calling his agent in order to prove the payments (which, if the pleas were true, they could readily have done), what the defendant did was this: He called the plaintiff's agent as his own witness, and he produced certain receipts of sums which had been paid in 1283; and the plaintiff's agent was then asked, whether those sums were not received. The plaintiff's agent acknowledged that they were received, but not in payment of rent for the year 1283. He stated that they were paid for the previous year, 1282. That is really the only evidence that was given upon the subject. It directly negatives the defendant's case, and yet, strange to say, the Judge has found in the defendant's favour. The very fact of the defendant and his agent not coming into the witness-box afforded of itself a strong presumption against the truth of the defendant's case. If the payments were really made for the year 1283, no one could know it better than the defendant and his agent, and there does not appear the least reason why one or both of them should not have been called. Instead of that the defendant chooses [584] to call the plaintiff's agent, and the plaintiff's agent proved the case against him.

It does not at all follow, because certain sums were paid to the plaintiff in the year 1283, that they were therefore paid for the rent of the year 1283. The Judge himself says, that the accounts between the plaintiff and the defendant appear to have been kept in a very loose manner, and that there is no doubt that Khajah Mahomed Jan, who is the plaintiff's agent, was allowed to receive rent from the under-tenants, and to place it to the defendant's credit. This circumstance made it, in our opinion, the more necessary, that the defendant's plea of payment should have been strictly proved; instead of which, all that appears is this. It is shown by certain receipts, A, B, and C, that the plaintiff's agent received from under-tenants of the defendant in the year 1283 certain rents due from those under-tenants for that same year; but it does not at all follow that the defendant's rent, in payment of which those sums were received from the under-tenants, was the rent due for the year 1283. If he had not in fact paid his rent for the year 1282, the sums received from the under-tenants would have been properly credited to the rent of the year 1282.

The defendant has no right to abstain from offering (either by himself or his agent) any evidence or information to the Court; and then to call the plaintiff's agent as a witness, and ask the Court to discredit him when he disproves his case.

Then the Judge seems to think, that because in the receipts which the plaintiff gave, the year was not stated in respect of which the rent was paid, that raises a presumption against the plaintiff that the rent was paid for the year in which the payment was made. We entirely dissent from this view. In the first place, we think that s. 12 of the Rent Law, to which the Judge refers, applies to receipts given directly by the landlord to the tenant, and not to receipts given by the landlord to third persons, who probably would not understand anything of the state of accounts as between the landlord and his tenant; and in the next place, the fact of the landlord not stating in respect of what year the payment is made, cannot raise any presumption in favour of the tenant, that the rent was paid in respect [585] of any particular year. The tenant himself should take care, when he makes the payment, that the receipt is in the proper form. If he does not see to that, he has no right to ask the Court to presume anything in his favour from the omission in the receipt.

The case will be remanded to the lower Appellate Court to be re-tried with reference to these observations; and the Judge will be at liberty to receive further evidence on either side.

*Case remanded.*

[7 Cal. 585]

*The 14th June, 1881.*

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE McDONELL.

Godadhar Dass.....Third Party

*versus*

Dhunput Singh.....Second Party.\*

*Land Acquisition Act (X of 1870)—Apportionment of Compensation-money—Zamindar—  
Patnidar—Darpatnidar—Construction of Document.*

Where a patni and a darpatni has been given of land, which is afterwards acquired by the Government for public purposes, under the provisions of the Land Acquisition Act, the zamindar is, generally speaking, entitled to as much of the compensation-money as the patnidar is.

As a rule, ryots having a right of occupancy in such land, and the holders of the permanent interest next above the occupancy ryots, are the persons entitled to the larger portion of the compensation-money.

The principles on which compensation-money should be apportioned among the different holders discussed and explained.

Construction of darpatni lease.

IN this case it appeared that the Raja of Burdwan granted a patni lease of a certain zamindari in the district of Dinagepore to Roy Dhunput Singh, who granted a darpatni lease thereof to one Godadhar Dass on the 6th February 1868. A portion of this land, amounting to about five bighas, was taken up by the Government for public purposes under the provisions of the Land Acquisition Act, X of 1870; and the question in this case was, how the money which was

\* Appeal from Original Decree, No. 386 of 1879, against the decree of L. B. B. King, Esq., Judge of Dinagepore, dated the 24th September 1879.

awarded by the Government should be apportioned. The kabuliati given by [586] the darpatnidar to the patnidar on the 6th of February 1868 provided, that "should any land included in the lot, be taken by Government when required, or should it be included in the road, in that case you will allow me a deduction of the rent-jama for that portion of the land, if you get deduction from the patni-jama of the zamindar for the same; I have no concern with the consideration-money paid." The District Judge of Dinagapore, whose judgment was as follows, awarded the whole of the compensation to the patnidar:—

"This reference has arisen from the acquisition of certain land for railway purposes. The parties claiming interest in the land have agreed to the amount of compensation awarded, and the question for determination is the apportionment of that amount between these claimants—the zamindar, the patnidar, and the darpatnidar. The zamindar's interest in the land is not affected so long as he receives the rent reserved by his lease. His security for this rent is not appreciably lessened, since only a small fraction of the tenure has been taken up, and the amount of rent cannot be lessened, as the patnidar, through his pleader, undertakes to make no claim for remission. The zamindar can, therefore, lose nothing; and has, in consequence, no just claim to any part of the compensation. On similar grounds, it is argued that the patnidar has no claim as against the darpatnidar, and that the latter should receive the entire amount awarded; but this is stated on the part of the patnidar to be opposed by a special provision of the darpatni lease. The clause so relied on runs as follows:—'If any land belonging to the estate is taken up for roads, or at the necessity of Government, and in case of your having an abatement in the rent of the said land in the patni dowl jama from the zamindar, you shall have to allow me too, a reduction accordingly. I have no concern with the price.' For the patnidar it is contended that the word 'price' here means the price paid by Government for land taken up, while for the darpatnidar the word is said to mean the price paid for the darpatni lease to the patnidar. The latter construction does not appear to me to be admissible. The darpatnidar could not well say he would have no concern with the price he was paying, and there being [587] no reference in the immediate context to this price, it would scarcely be referred to thus briefly as 'the price.' The word naturally refers to the land supposed in the same sentence to be taken up by Government, and the darpatnidar must be considered to have waived any claim to the price of that land. By virtue then of his special contract with the darpatnidar, the patnidar is entitled to the compensation awarded, and will receive the whole of this amount with his costs in equal proportion from the zamindar and the darpatnidar." The latter appealed to the High Court.

Baboo *Grya Sunker Mozoomdar*, for the Appellant, argued, that all the compensation ought to have been awarded to the darpatnidar, as he was the person solely affected, and that the Court below was wrong in its construction of the darpatni lease.

Baboo *Gurudas Banerjee* and Baboo *Srinath Das*, for the Respondent, argued that, under the general law, the patnidar was entitled to the abatement—*Horokissen Banerjee v. Joy Kissen Mookerjee* (1 W. R., 299), *Deen Dyal Lal v. Mussamut Thukroo Koonwar* (6 W. R., Act X Rul., 24), *Raye Kissory Dassee v. Nilcant Day* (20 W. R., 370); *Sreenauth Mookerjee v. Maharajah Mahatap Chund Bahadoor* (S. D. A., 1860, p. 308), *Gordon, Stuart and Co. v. Maharajah Mahatap Chund Bahadoor* (Marshall, 490); and that there was nothing in the darpatni lease to take away the patnidar's legal right.

Cur. ad. vult.

The Judgment of the Court (GARTH C. J., and McDONELL, J.) was delivered by

**Garth, C. J.**—We think that the District Judge has taken an erroneous view of the rights of the parties. The amount in question is inconsiderable; but the principle upon which the case depends is an important one; and as we had some doubt whether the view which we were at first disposed to take was correct, we have had the case argued a second time.

[588] Under the Land Acquisition Act of 1870, the Government took a small piece of land, containing rather more than four bighas, in the district of Dinagore, for the purposes of the northern Bengal State Railway. The agreed amount of compensation in respect of the whole of this land was Rs. 104-4-2; and three claimants only appeared—the Raja, who was the zamindar, the patnidar, and the darpatnidar. The District Judge held, that so long as the zamindar continued to receive from the patnidar his entire rent under the patta, without any abatement in respect of the land in question, his interests would not be affected; and as at the hearing of the case, in the Court below the patnidar undertook, through his pleader, to pay the whole rent to the zamindar, without diminution, the District Judge held, that the zamindar was entitled to no part of the compensation. Then, as regards the darpatnidar, the District Judge held, that, under a particular clause in the darpatni patta, he was disentitled to any compensation. That clause ran as follows:—

“If any land belonging to the estate is taken up for roads, or at the necessity of Government, and in case of your having an abatement in the rent of the said land in the patni dowl jama from the zamindar, you shall have to allow me too a reduction accordingly. I have no concern with the price.”

The only question which appears to have been raised in the Court below with reference to this clause, was as to the meaning of the word ‘price.’ The patnidar contended that it meant the compensation paid by the Government for the land taken; whilst the darpatnidar contended, that it meant the price or premium paid by him to the patnidar for his darpatni. Upon this point the Judge decided, very justly in our opinion, that the patnidar was right, and that the word ‘price’ meant clearly the compensation payable by the Government; and as he considered that this was the only question between the parties, he held that, by this clause, the darpatnidar had relinquished his right to any compensation; and he, consequently, awarded the whole sum to the patnidar.

We think that he was wrong in two respects. In the first place, he should have awarded some portion at least of the com-[589]pensation to the zamindar; and in the next, we think that, in the construction which he put upon the clause in the darpatnidar’s patta, one very material point was overlooked.

As regards the zamindar it is a mistake to suppose, that his interest in the land is confined entirely to the rent which he receives from the patnidar. He is the owner of it under the Government; and in the event of the patni coming to an end by sale, forfeiture, or otherwise, the property would revert to the zamindar, who might deal with it as he pleased in its improved state; and although in some cases, and possibly in his, the chances of the patni coming to an end may be more or less remote, there is no doubt that, in all cases, the zamindar is entitled to some compensation (small though it be) for the loss of his rights. At any rate, he would generally be entitled to receive at least as much as the patnidar, to whom in this instance the whole compensation has been awarded. If the latter continues to pay and receive the same

rent which he did before, or if, on the other hand, he both makes an abatement to the darpatnidar, and obtains an abatement from the zamindar, as a rule he is no sufferer; because, generally speaking, the difference between the amount of rent which he pays and the rent which he receives, represents the improved value of the land which he gets from the darpatnidar. It may be of course, that his patni interest would sell in the market for a price larger than the capitalized value of the rent which he receives from the darpatnidar; and if so, he would be entitled to be compensated for the loss of the difference out of the sum payable by the Government. But as a rule, the capitalized value of the darpatni, over and above the value of his own outgoings, would represent the market value of his patni interest.

The parties who usually suffer most from lands being taken for Government purposes are either the ryots with right of occupancy, or the holders, whoever they may be, of the first permanent interest above the occupying ryots. The actual occupier is of course turned out by the Government, and if he is a ryot with a right of occupancy, he loses the benefit of that right, besides being driven possibly to find a holding and a home elsewhere, and the holder of the tenure immediately [590] superior to the occupying ryots, whatever the nature of his holding may be, loses the rent of the land taken during the period of his holding. These two classes, therefore, would, generally speaking, be entitled to the larger portion of the compensation, and if the darpatnidar in this instance belongs to the latter class, the larger portion of the compensation ought, presumably, to have gone to him.

But the Judge thought him disentitled by the clause in his darpatni, and certainly his case does not appear to have been argued very clearly in the Court below. The whole compensation was given to the patnidar, who, as far as we can see, has neither lost nor gained anything at present by the taking of the land. He pays the same rent to the zamindar, and he has hitherto received the same rent as before from the darpatnidar. It may be, that the darpatnidar has a claim against him for abatement of rent; and if this claim is enforced, the patnidar may be a loser to the extent of the capitalized value of the abatement. But at present there seems to be no evidence that he has lost, or is likely to lose, anything.

But then is the darpatnidar disentitled to receive compensation by the clause in his patta? We think not, because in this instance the condition has not happened which would disentitle him. As we read the clause, it only provides that, in the event of the Government taking land, &c, and *also in the event of an abatement of rent being made by the zamindar to the patnidar*, then the patnidar agrees to be content with a corresponding abatement from the rent which he pays to the patnidar, and in that case he relinquishes his claim to the Government compensation. But this relinquishment is to depend upon the two events, the taking of the land by Government, and the abatement being made in the patnidar's rent. No abatement has been made in this instance in the patnidar's rent; and consequently the condition upon which alone the clause was to take effect has not happened.

The case must, therefore, go back to the Court below to have the compensation divided in accordance with the principles which we have laid down. The zamindar has not thought fit to appeal, probably because the smallness of the amount did [591] not make it worth his while to do so; and he, therefore, must be excluded. There are only the two claimants therefor; the District Judge

will endeavour to make a fair division of the sum between them; and before doing so, he will do wisely to make the parties come to some arrangement as to the abatement or otherwise of the darpatnidar's rent.

The appellant having substantially succeeded, will be entitled to the costs of this appeal; and the costs in the Court below will abide the result.

*Case remanded.*

# NOTES.

## [APPORTIONMENT OF COMPENSATION-MONEY AMONG DIFFERENT HOLDERS OF INTEREST—

The rule laid down in this case that the zamindar is entitled generally to an equal share with the patnidar in the compensation-money was applied in (1897) 3 C. W. N. 202; the same rule was applied to a case between a zamindar and his talookdar (1897) 2 C. W. N. 453.

In (1887) 14. Cal. 749 the authority of this case was accepted and it was held that the question of distribution would depend upon the bonus paid, the amount of rent and the amount of the collections which he received. But in (1903) 30 Cal. 801, MACLEAN, C. J. treated the observations in this case as mere *obiter* and held that the zamindar was not entitled to more than the capitalized value of the rent. See also (1902) 7. C. L. J. 284 where the Judges preferred to follow the observations of COUCH, C. J. in 20 W. R., 370 and held that the zamindar was not entitled to any compensation if there was no abatement of rent.]

[7 Cal. 591]

*The 31st May, 1881.*

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE AND MR. JUSTICE McDONELL.

Mohabeer Pershad Singh.....Defendant

*versus*

Mohabeer Sirgh.....Plaintiff.\*

*Recovery of possession—Dispossession—Ejectment—Evidence—Onus—Proof of title.*

In June 1878, the plaintiff sued the defendant for the recovery of possession of certain land. At the trial it was proved, that he had been continuously in peaceable possession of the land until the month of May 1878, when he was forcibly and illegally dispossessed by the defendant.

*Held*, that the evidence was sufficient to call upon the defendant to show his title to the land.

THIS was a suit, instituted on the 28th of June 1878, for the recovery of possession of land, from which the plaintiff had been dispossessed by the defendant. The plaint stated, that the land of the plaintiff adjoined that of the defendant on the south and east; that, on the 26th of May 1878, the defendant moved the southern boundary-mark, and on the 29th of May 1878 he moved the eastern boundary-mark, the combined effect of which was, that the defendant took possession of 10 biswas of land, which, up to that time, had been in possession of the plaintiff, and held by him as moafi land under a

\* Appeal from Appellate Decree, No. 712 of 1880 against the decree of Baboo Kally Prosonno Mookerjee, Second Subordinate Judge of Sarun, dated the 30th January 1880, affirming the decree of Baboo Tara Prosonno Banerjee, Sudder Munsif of Chupra dated the 15th February 1879.



sanad, dated the [592] 28th July 1810, from the then owner of the land. The defendant alleged that the plaintiff had never been in possession of the land claimed; that the sanad relied on was a forgery; and that the suit was barred by limitation.

At the trial, the plaintiff put in evidence two registered documents relating to the defendant's land, and which were admittedly executed by the defendant—one in 1871, and the other in 1877. These documents convinced the Court of first instance and the lower Appellate Court that the defendant had therein described the land in dispute as the plaintiff's agricultural land.

The Court of first instance found that the plaintiff had been continuously in possession of the land in dispute until his dispossession by the defendant in May 1878; that the title under the sanad was proved; and that the dispossession took place as alleged. The lower Appellate Court found that the sanad was not proved; that "the witnesses examined by the plaintiff, and whom the lower Court believed, and for disbelieving whom no valid reason has been shown," proved that the land in question was in the plaintiff's possession; that he was dispossessed by the defendant in May 1878; and that the documents of 1871 and 1877 showed that the defendant had then considered the land in dispute as belonging to the plaintiff. In this state of matters, the Judge considered that the plaintiff's failure to prove his title under the sanad was immaterial; and that the plaintiff's previous peaceable possession entitled him to a decree for possession as against the defendant, who was "no better than a trespasser." The Judge went on to say:—The facts disclosed in this case are, that the plaintiff was in possession of the disputed land, and dispossessed therefrom by the defendant. Under such circumstances, the *onus* of proving title is shifted upon the latter, and unless he could prove a better title to the land, the plaintiff would be entitled to possession. This view is consonant with the principle laid down in *Jadubnath v. Ram Soondur Surmah* (7 W. R., 174), *Khajah Enaetoollah Chowdhry v. Kishen Soondur Surmah* (8 W. R., 386), *Radha Bullub Gossain v. Kishen Gobind Gossain* (9 W. R., 71), *Dabjee Sahoo [593] v. Shakh Tumeezooddeen* (10 W. R., 102), *Ayesha Bibee v. Kanhye Mollah* (12 W. R., 146), *Sham Soonduree Debia v. The Collector of Maldah* (12 W. R., 164), *Trilochun Ghose v. Koylasmath Bhattacharjee* (12 W. R., 175), *Gour Paroy v. Wooma Soonduree Debia* (12 W. R., 472), *Nagore Monee Debia v. Smith* (23 W. R., 291) and *Daitari Mohanti v. Jugo Bundhoo Mohanti* (23 W. R., 293).

The defendant appealed to the High Court.

Mr. Sandel for the Appellant.

Baboo Chunder Madhub Ghose and Baboo Nil Madhub Sein for the Respondent.

The **Judgments** of the Court (GARTH, C.J., and McDONELL, JJ.) were as follows:—

**Garth, C. J.**—I think that, in a case of this kind, where the plaintiff is dispossessed by a person who is found to have no title, and to be a trespasser, it is sufficient for the plaintiff to prove that he was in quiet possession at the time when he was so dispossessed. It seems to me, that this ought to be sufficient to establish a *prima facie* case as against the defendant. I am aware that there is some difference of opinion in the Court upon this point; and that some learned Judges consider, that the remedy by a possessory action, which is now provided by s. 9 of the Specific Relief Act, and which was formerly given by the Limitation Act, has the effect of doing away with

the English rule, that possession is *prima facie* evidence of title. I do not see why that should be. The rule seems to me a very wise and convenient one, and I should be sorry to see it abolished. I think, therefore, that the Court below is right, and that the appeal should be dismissed with costs.

**McDonell, J.**—I concur in dismissing the appeal. I think that, apart from the reasons given by the learned Chief Justice for dismissing the appeal, the Subordinate Judge has shown by his judgment that he agrees with the Munsif in holding that the plaintiff has acquired a statutory title.

*Appeal dismissed.*

#### NOTES.

#### [PERSON IN POSSESSION DISPOSSESSED—RIGHT TO SUE ON PREVIOUS POSSESSION—

This case was followed in (1882) 11 C. L. R. 133, where it was held that the onus lay upon the defendant to prove his title if the plaintiff had been dispossessed forcibly by the defendant within twelve years. But subsequently the Calcutta High Court took a different view and held that if the plaintiff who was dispossessed did not sue within six months from the date of dispossession he could succeed only by proving title, (1889) 17 Cal. 256; (1899) 26 Cal. 579. This view proceeds upon the ground that the person dispossessed has his remedy under the Specific Relief Act and if he does not sue within six months he cannot maintain an action on bare possession without proving title and reliance is placed upon the decision of Privy Council in 7 I. A. 73. The High Court of Allahabad referring to the conflict, held in (1887) 12 All. 46 that possession for forty years was sufficient evidence of title in an ejectment suit by the plaintiff. The Madras High Court's view on the point is in accordance with this case.]

#### [594] ORIGINAL CIVIL.

*The 30th August, 1881.*

PRESENT :

MR. JUSTICE BROUGHTON.

Rajnarin Bose and others

*versus*

The Universal Life Assurance Co.

*Life Policy—Assignment—Death of assignee—Death of assured—Notice by assignee to Company—Payment of premia by executors of assignee—Absence of legal personal representative of assured—Refusal to pay over—Interest—Act XXXII of 1839—Estoppel—Act I of 1872, s. 15.*

A, having insured his life in a certain Life Insurance Co., assigned his rights under the policy to B, the assignment on the face of it expressing no consideration whatever. The fact of the assignment was notified to the Company. B, after paying all premia due, died, appointing C and D his executors, who took out probate of his will and paid all subsequent premia on the policy. A died, and C and D then demanded payment of the policy-money. The Company, however, refused payment unless C and D first obtained the concurrence of the legal representative of A to the payment.

*Held*, that the Company were justified in refusing to pay the money in the absence of the legal representative of A.

Interest is given under Act XXXII of 1839 by way of damages on the ground that a debtor has wrongfully refused to pay ; but where there is no hand to receive payment, and to give a complete discharge, there can be no wrongful refusal.

Section 115 of the Evidence Act, which contemplates a person " by his declaration, act, or omission intentionally causing or permitting another person to believe a thing to be true and to act on that belief," in which case he cannot " deny the truth of the thing " refers to the belief in a fact and not in a proposition of law.

On the 22nd March 1848, one Frederiek John Woodhouse insured his life for Rs. 25,000 in the Universal Life Assurance Company. The Company, in such policy, covenanted to pay to the executors, administrators, and assigns of the insured Rs. 25,000 two months after his decease, provided that all premia due under the policy were duly paid. Subsequent to the payment of the first premium, and on the 28th March 1848, F. J. Woodhouse assigned his rights under the policy, by endorsement, to one Hurrish Chunder Bose. The assignment was [595] unstamped, and ran as follows :—" I do hereby assign all my right, title, and interest of the within to Babu Hurrish Chunder Bose." It appeared on the face of the endorsement that notice of the assignment had been given to the agents of the Company.

Hurrish Chunder Bose, after paying all premia due since the date of the assignment, died on the 7th December 1857, appointing by his will Rajnarain and Debnarain Bose his executors. They took out probate, and continued to pay the premium on the policy as it became due.

On the death of F. J. Woodhouse in 1879, Rajnarain and Debnarain Bose demanded payment of the amount due under the policy. But the Insurance Company, stating that they were ignorant of the terms upon which the endorsement had been made, and whether or no any consideration had passed, refused to pay the claim, unless the executors obtained the authority or concurrence of the representatives of F. J. Woodhouse.

The executors thereupon brought this suit to recover the amount due under the policy.

Mr. *Bonnerjee* and Mr. *J. G. Apcar* for the Plaintiffs.

[Mr. *Jackson* for the defendant Company took a preliminary objection that the assignment required a stamp.]

Mr. *Bonnerjee*.—The 13th Geo. III, c. 63, ss. 36 and 37 empowered the Governor-General to issue rules and regulations for the government of the Settlement of Fort William in Bengal and all places subordinate thereto ; such regulation to be invalid unless registered in the Supreme Court of Judicature ; and under that Act of Parliament, the Governor-General passed Reg. X of 1829, which provides for the stamping of policies ; but that Regulation, I submit, does not apply to the High Court, inasmuch as it was not recognized and registered by the Supreme Court. [BROUGHTON, J.—Inasmuch as Reg. X of 1829 was not recognized by the Supreme Court, I hold that policies before 1860 do not require a stamp.] In the case of *Mathew v. The Northern Assurance Co.* (L. R., 9 Chan. Div., 80), the Company [596] raised the same defence to an action brought against them as the defendants in this present case have done, but they paid the claim into Court, which the present defendants have not done. Notice of the assignment was given in both cases, and the Company were held bound to pay over the money, they being held to be debtors and the assignee a creditor.

Mr. *Jackson* (with him Mr. *Salé*) for the defendant Company.—We contend that, without making Mr. Woodhouse's legal representative a party to

the suit, the plaintiffs are not entitled to succeed. The consent of the legal representative is necessary before we can safely pay over. It is also necessary, before the plaintiffs can succeed, to show that valuable consideration was given for the assignment—*Ashley v. Ashley* (3 Sim., 149). This they have not done. An assignment of a possibility in equity will only be allowed for valuable consideration—*Wright v. Wright* (1 Ves. Sen., 409). As to assignment of debts and choses in action, where the assignor has given notice, the debtor, if he disputes the debt, can call upon the assignee to interplead: Judicature Act, s. 25, subsect. 6. *Webster v. British Empire Mutual Life Assurance Co.* (L. R., 15 Chan. Div., 169) was decided under the Judicature Act, and it is submitted, that the assignment there under the English law put it beyond doubt that the plaintiffs had a complete title. But, apart from legislative enactment, there is no authority to show that choses in action could be assigned without consideration. Under 30 and 31 Vict., c. 144, which is an Act to enable assignees of policies of life assurance to sue thereon in their own names, the schedule to the Act clearly shows that consideration must be stated in the assignment. The case of *Crossley v. The City of Glasgow Life Assurance Co.* (L. R., 4 Chan. Div., 421) shows that where there is no agreement for an assignment, and no consideration stated, there can be no equitable assignment, and in such case the Company are entitled to a legal discharge; see also the judgment of James, L. J., in *Webster v. British Empire Mutual Life Assurance Co.* (L. R., 15 Chan. Div., 169). Moreover, the present suit is bad, it is brought by the executors of Rajnarain Bose, and it cannot [597] be maintained. The executor of a Hindu does not possess any of the rights which the executor of an English testator possesses. Under Hindu Law, there is no distinction between moveable and immoveable property. We have further received notice telling us to pay a one-fifth share over to another claimant. [BROUGHTON, J.—Why did you not inform the plaintiffs of this.] That would not affect the suit, the Company are entitled to call on the claimant to prove his title. There is no presumption arising as to the payment of consideration except in the cases of bills of exchange. As to the position of the executor of a Hindu, see *Sreenuttu Dossee v. Tarrachurn Coondoo* (Bourke's Rep., part vii, p. 48), *Brajanath Dey Sirkar v. S. M. Anandamayi Das* (8 B. L. R. 208), and *Kadumbince Dossee v. Koylash Kaminee Dossee* (I. L. R., 2 Cal., 433).

Mr. Bonerjee in reply.—Section 18 of Act XX of 1860 repeals Act XX of 1841, Act VIII of 1842, Act X of 1851, and Act VIII of 1854, and gives the same effect to a Hindu probate as to any other probate. As to the position and powers of a Hindu executor, see *Treepoora Soondery Dossee v. Debendronath Tagore* (I. L. R., 2 Cal., 46) and the cases therein cited. It is not necessary that we should show consideration for the assignment to enable us to bring the suit in our name. The case of *Ashley v. Ashley* (3 Sim., 149) does not apply, as the Insurance Co. was not a party to the suit. Neither does *Webster v. British Empire Mutual Life Assurance Co.* (L. R., 15 Chan. Div., 169) apply, as there was no written assignment of the policy, no recognition of it by the Company, and no notice was given to the Company. The defendants have brought themselves within the 115th section of the Evidence Act, and they are estopped from saying that we ought to show consideration, and that we ought to show the consent of Woodhouse's representatives, as they noted the assignment in their books and received premia from the assignee and his executors after the death of Woodhouse, and by thus acting they led us to believe that we were entitled to the sum due under the policy when it fell in. As to the case of *Crossley v. The City* [598] *of Glasgow Life Assurance*

*Co.* (L.R., 4 Chan. Div., 421), there had been in that case no assignment of the policy either in law or in equity. The covenant in our case was an express covenant between the Company and the assignee, as the covenant with Woodhouse ran "his heirs, executors, administrators, and assigns." We claim interest under the Interest Act, as we expressly gave them notice by a letter, at and from the date of our demand for payment of the claim.

**Broughton, J.**—The plaintiffs, executors of the will of Hurrish Chunder Bose (their father) seek to recover Rs. 25,000 upon a life policy which was assigned to their testator. They also seek to recover interest at the rate of 12 per centum per annum from the 27th May 1881.

The defendants state in their written statement that they are willing to pay the amount secured by the policy to any one having a valid title and capable of giving them a sufficient discharge, but they contend that the plaintiffs are bound to obtain the concurrence of the representative of the assured. They submit that such representative is a necessary party to this suit, and state that they are ready to pay, but they have not paid, the money into Court.

The circumstances of the case are as follows :—

The policy was effected by Frederick Woodhouse, now deceased, on the 22nd March 1848, and Rs. 675 were paid by him as premium from March 23rd for six months.

By this policy it is witnessed that "whilst the aforesaid premium shall be duly and continually paid to the said Society . . . the capital, stock, and funds of the said Society shall be subject and liable according to the conditions of the said Society's deed of settlement . . . to pay and satisfy the executors, administrators, and assigns of the said Frederick Woodhouse in Calcutta, within three calendar months after his decease shall have been proved to the reasonable satisfaction of the Directors of the said Society, the full sum of Company's Rs. 25,000."

The policy is signed by three Directors of the Indian Branch of the Society.

[599] The following endorsement appears upon the back of the policy :—

"I do hereby assign all my right, title, and interest in the within to Baboo Hurrish Chunder Bose.

(Sd.) FK WOODHOUSE.

*Calcutta, 28th March 1848."*

And below this: "Endorsement noted, Calcutta, 29th March 1848. (Signed) Bagshaw and Co., Agents and Secretaries, U. L. A. S."

The defendants, in their written statement, say, that they believe the policy was endorsed in favour of Hurrish Chunder Bose, and the said endorsement was noted, etc.; but they say they were not informed, nor were, nor are, aware of the terms on which such endorsement was made, nor whether the same was made for consideration or not. There is no question about the endorsement or the noting, but the plaintiffs decline to go into evidence of consideration.

The defendants admit that Hurrish Chunder Bose, and after his death the plaintiffs, or some other person on account of his estate, paid the premia due from time to time in respect of the policy.

Hurrish Chunder Bose died on the 7th of December 1857, leaving a will appointing the plaintiffs, with Surjo Kumar Bose and S. M. Russick Money Dasse, both since dead, his executors, etc. The plaintiffs and Surjo Kumar Bose obtained probate in December 1857.

Frederick Woodhouse died in 1879, and the fact of his decease was proved to the satisfaction of the defendants. On the 24th February 1880, the policy was adjusted by order of the Directors, and it was then returned to the plaintiffs with a letter from Messrs. Gisborne and Co., the agents for the Society, stating that it was duly adjusted for Rs, 25,000 payable *with the consent of the legal representatives, on the 23rd May next.*"

The plaintiffs represented to Mr. Moseley, of the firm of Messrs. Gisborne and Co., that they did not consider they were bound to obtain the consent of any party. Mr. Moseley, who [600] is now dead, told Rajnarain Bose in a friendly way that he might write to Mrs. Woodhouse, and she might give her consent.

If the consent of the representatives was necessary, the consent of Mrs. Woodhouse would not alter the case, unless she proved her husband's will, he left one, or, if he died intestate, took out letters of administration to his estate. It does not appear that Mrs. Woodhouse has done either. The plaintiff Rajnarain Bose says, no further reason were given by Mr. Moseley for his refusal, and nothing occurred until the 22nd of May 1880, when Rajnarain Bose obtained from the Agents the following certificate:—

"UNIVERSAL LIFE ASSURANCE SOCIETY,  
40 Strand, Calcutta, 22nd May 1880.

"We hereby certify that policy No. 286, for Rs. 25,000, dated 23rd March 1848, on the life of F. Woodhouse, was assigned over to Hurrish Chunder Bose on the 28th March 1848, and that premiums amounting to Rs. 27,177-12-0 have been paid by the said assignee or his estate.

(Sd.) GISBORNE & Co.,  
*Agents and Secretaries."*

On the 27th May 1880 the plaintiffs wrote as follows:—

"Calcutta, 27th May 1880.

MESSRS. GISBORNE & CO.,  
*Agents and Secretaries,*  
*Universal Life Assurance Society.*

DEAR SIRS,—Subject to your refusing payment to us, as heirs of the late Baboo Hurrish Chunder Bose, of Rs. 25,000 due on the policy on the life of the late Mr. Frederick Woodhouse, and for which we made a demand to you on the 22nd instant, our solicitors say that they do not see the necessity of our asking for or even requiring the consent of the heirs of the deceased. The transfer of the policy to our late father has been duly registered by the Universal Office, and it has recognized our rights by accepting the premium from us and granting [601] us receipts personally. We have administered to our father's estate, and are prepared to show you letters of administration. Should you yet insist on asking for the consent of the heirs of Mr. Woodhouse, please state your reasons.

Please note that we shall charge interest on the amount due to us, Rs. 25,000, at the rate of 12 per cent. per annum from this date till we are paid. Your early attention to this is requested.

We are, dear Sirs,

Yours faithfully,

RAJNARAIN BOSE,  
DEBNARAIN BOSE."

To this the following reply was sent :—

" UNIVERSAL LIFE ASSURANCE SOCIETY,  
10, Strand, Calcutta, 28th May 1880.

BABOOS RAJNARAIN BOSE and DEBNARAIN BOSE,  
Calcutta.

DEAR SIRS,

*Pol. No. 2086. Rs. 25,000. F. Woodhouse, deceased.*

Your letter of the 27th instant was placed before our committee at their monthly meeting this morning, and we are instructed to inform you that a payment of the above policy cannot be made to your late father's estate without the concurrence of the legal representative of the late life assured.

We have already explained the informality of the assignment, and, whilst regretting any delay in the settlement, the Society cannot entertain the question of interest, but, if necessary, will be prepared to pay the Rs. 25,000 into Court.

We trust, however, you will avoid this course, and act upon the suggestion made to Baboo Rajnarain on the occasion of his last call.

Yours faithfully,  
(Sd.) GIBBORNE & Co.,  
*Agents and Secretaries."*

[602] The plaintiff Rajnarain Bose says, that no explanation was given to him, and what occurred on the occasion of his last call does not appear.

It appears, however, that a claim to a fifth share of the money was made by a sister of the plaintiffs, and was preferred by Messrs. Watkins and Watkins acting on her behalf. Their letter of the 17th May to the Agents, per power-of-attorney, and some subsequent correspondence, have been put in evidence, but no question arising on this demand was raised by the defendants by way of objection to the plaintiffs' claim until the trial of this cause. The subject is not even alluded to in the written statement filed on the 21st March 1881, a month and eleven days after the plaint was filed.

It appears, however, from the evidence of Mr. Watkins, that the defendants refused to recognize the claim of his client.

These letters and the power, etc., were put in evidence, subject to an objection to their relevancy raised by Mr. Bonnerjee, counsel for the plaintiffs, and an argument was founded upon them to the effect, that the executor of a Hindu, who obtained probate prior to the passing of the Hindu Wills Act in 1870 and the recent Act V of 1880, does not completely represent the estate of his testator, and that it would be necessary for the security of the defendants to obtain the consent of all the heirs. It is shown that Hurrish Chunder Bose left other heirs besides the plaintiffs.

This question cannot arise where a Hindu will has been proved under the Hindu Wills Act, XXI of 1870, or Act V of 1880; for, under each of those Acts, the executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased vests in him as such; see Act XXI of 1870, s. 2\* applying Act X of 1865, s. 179†, and Act V of 1880, s. 4.

\* [Sec. 2 : Enumerates the portions of the Indian Succession Act, 1865, applying to wills of Hindus, Jains, Sikhs and Buddhists.]

Character and property of executor or administrator as such.

†[Sec. 179 :—The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes and all the property of the deceased person vests in him as such.]

Several cases were cited in support of the contention that other heirs are interested, but I am of opinion that Mr. Bonnerjee rightly contends that the evidence ought not to be admitted, and for this reason, the objection, as it seems to me, comes too late. It is in reality another objection for want of parties distinct from the objection raised in the written statement and, [603] it should have been made at the earliest opportunity. Such an objection must be made in all cases before the first hearing, otherwise, under s. 34 of the Code of Civil Procedure, it must be deemed to have been waived by the defendants. Had this objection been made in time, the plaintiffs might have taken steps to join the other heirs either as co-plaintiffs or co-defendants.

It is not, in my opinion, necessary for the Court, of its own motion, to add these parties under s. 32 at this stage of the suit in order to effectually adjudicate. The plaintiffs, on recovering the money, would hold it only in their representative character, as is shown in the case of *Brajanath Dey Sirkar* (8 B.L.R., 208), cited by Mr. Jackson.

There is, then, the chief defence which was put forward in the written statement,—namely, that the estate of Mr. Woodhouse should be represented in this suit, and that the defendants are not bound to pay the sum secured by this policy without the concurrence of his representatives. The law and practice was to require the assignee to sue in the name of the assignor, which in this case would require the presence of the personal representative. By Statute 30 and 31 Vict., c. 144, by the Judicature Act 1873, s. 25, sub-sec. 6; and in India by s. 15\* of Act V of 1866, the assignee can sue in his own name under certain conditions. But the English Acts have no application to a suit instituted in a Court in India, and the Indian Act is only applicable to Marine and Fire policies. It was apparently expressly intended, when the Indian Act was passed, to exclude *life* policies, and it is to be observed that the English Act, 30 and 31 Vict., c. 144, which was passed in the following year, 1867, as already stated, has not been extended to this country. Not only so, but Act VI of 1854, which amended the practice of the Supreme Courts on the Equity Side, and which contained a section (23) corresponding to s. 44 of 15 and 16 Vict., c. 86 (Chancery amendment) was repealed the year afterwards by Act VI of 1868, and has not been re-enacted. That repealed clause enabled the Court to dispense with the personal representatives. Had that clause been now in force, I should have considered this a case in which it certainly should have been [604] applied, for this case is far stronger in favour of the plaintiffs, than the case of *Crossley v. The City of Glasgow Insurance Co.* (L.R., 4 Chan. Div., 421) and *Webster v. The British Empire Mutual Insurance Co.* (L.R., 15 Chan. Div., 169), in which the appearance of the representative was dispensed with. In those cases there had been no formal assignment. Here there has been an assignment, and no claim has been put forward by Mr. Woodhouse's representatives. But then, had I been able to dispense with the representative, although the plaintiffs would have been entitled to recover the principal sum, they could not have recovered interest: *Webster v. The British Empire Mutual Insurance Co.*, which was a case decided with reference to the Interest Act, 3 and 4 Will. IV, c. 32, corresponding to the

\* [Sec. 15:—Every assignee, by endorsement or otherwise, of a policy of marine insurance, or of a policy of insurance against fire, in whom the

Rights under marine and fire policies to vest in assignees.

property in the subject insured shall be absolutely vested at the date of the assignment shall have transferred to and vested in him all rights of suit, as if the contract contained in the policy had been made with himself.]



Indian Act, XXXII of 1839 ; for interest is given under those Acts by way of damages, on the ground that the debtor has wrongfully refused to pay, and there can be no wrongful refusal if there is no hand to receive payment and to give a complete discharge.

There remains the question of estoppel under s. 115 of the Evidence Act, which contemplates a person "by his declarations, act, or omission, intentionally causing or permitting another person to believe a thing to be true and to act on that belief," in which case he cannot "deny the truth of the thing."

This enactment seems to me to refer to the belief in a fact, not in a proposition of law, and the illustration confirms me in the opinion.

The defendants in this case do not seek to deny that the policy was assigned by Mr. Woodhouse, nor that they recognized the assignment, nor do they say now that it has not, or ought not to have, its full operation according to law.

There is, it seems to me, no estoppel.

I feel bound, therefore, to hold that the defendants were justified in asking that the personal representative of Mr. Woodhouse should concur in giving them a discharge.

The suit must be dismissed with costs on scale No. 2.

Attorneys for the Plaintiffs : *W. C. Bonnerjee and Co.*

Attorneys for the Defendant : *Roberts, Margan, and Co.*

#### NOTES.

#### [ESTOPPEL—ESSENTIALS NECESSARY—

Followed in (1882) 14 Bom. 312 where it was held that in order to raise an estoppel the representation must have been believed to be true and must have been acted on under that belief.] .

## [605] SMALL CAUSE COURT REFERENCE.

*The 23rd June, 1881.*

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE McDONELL.

Nobin Krishna Chakravati.....Plaintiff

versus

Ram Kumar Chakravati.....Defendant.

Bunnijan Bibi.....Plaintiff

versus

Mahammad Hossain.....Defendant.\*

*Contribution—Co-sharers—Small Cause Court—Jurisdiction.*

No suit for contribution between coparceners in a revenue-paying estate, or for contribution between coparceners in a jama, will lie in the Small Cause Court.

*Khettermoney Dossee v. Madhub Chunder Ghose* (No. 726 of 1878, unreported) doubted, but followed.

*Ram Bux Chuttanjo v. Moodhoosoodun Paul Chowdhry* (B.L.R., Sup. Vol., 675 ; S.C., 7 W.R., 377) followed.

THIS was a reference from the Officiating Judge of the Small Cause Court at Sealdah, the material portion of which is as follows:—In the first case, the plaintiff alleges, that he and the defendant hold a jama in coparcenary. The jama fell into arrears, and the landlord sued them, and ultimately obtained a decree. The decree in due course was executed, and the amount of it was realized from the plaintiff. The plaintiff now sues the defendant for recovery of the money paid in excess of his legitimate share of the debt. The claim is instituted, not upon any contract subsisting between the parties, but upon grounds of equity.

In the second case, the parties are joint owners of an estate under Government. The plaintiff alleges that she has paid the entire revenue and other rates to the Collector ; that as her coparcener, the defendant, is bound, in law and equity, to contribute according to the quantum of his share ; and that he has not contributed. This claim also is not based upon any contract to [606] so contribute. It is simply stated that the plaintiff has the right to recover in the shape of contribution so much as she has paid in excess of her share of the debt.

In each of these cases the defendant contends, *inter alia*, that the Court of Small Causes is not competent, under s. 6 of Act IX of 1865, to entertain them.

The question to be determined with reference to the above contention is—Whether, under s. 6 of the above Act, the Court of Small Causes has jurisdiction to maintain the present suits ?

That section enacts :—“The following are the suits which shall be cognizable by Courts of Small Causes, *viz.*, claims for money due on bond or other contract, or for rent, or for personal property, or for the value of such property,

\* *Small Cause Court Reference*, No. 3 of 1881, from an order made by Baboo Bulloram Mullick, Officiating Judge of the Small Cause Court at Sealdah, dated the 29th January 1881.

or for damages." The plaintiffs urge that the claims they have instituted are for money due on 'contract,' and they rely upon a Full Bench ruling of the Allahabad High Court—*Nath Prasad v. Baij Nath* (I.L.R., 3 All., 66)—and chap. v of the Indian Contract Act of 1872. The defendants' contention is, that there is no element of contract, either express or implied, involved in the payment of the moneys in respect of which contribution or refund is prayed for by the plaintiffs; that the relation between the adverse parties was only quasi-contractual; and that the remedy prayed for by the plaintiffs is one afforded by Courts of Equity upon merely equitable considerations. They rely upon a Full Bench ruling of the Calcutta High Court—*Ram Bux Chittanjo v. Moodhoosoodun Paul Chowdhry* (B.L.R., Sup. Vol., 675; s.c., 7 W. R., 377), uniformly followed by other Divisional Benches of the same Court.

The Judge, having discussed the law and the authorities on the point at considerable length, said:—"I think this Court has no jurisdiction under s. 6 of Act IX of 1865. But as the question is not free from doubt, I should respectfully submit it to their Lordships of the High Court for an authoritative opinion. The suits will be dismissed contingent upon the opinion of the Honourable Court, but without costs."

The case was not argued.

[607] The Judgment of the Court (GARTH, C. J., and McDONELL, J.) was delivered by

**Garth, C. J.**—We think that, for the purposes of this reference, both the cases must be considered as governed by authority in this Court.

The Full Bench case of *Ram Bux Chittanjo v. Moodhoosoodun Paul Chowdhry* (B. L. R., Sup. Vol., 675; s.c., 7 W. R., 377) clearly shows, that, in the case of co-sharers of an estate, where one co-sharer pays the whole revenue, he cannot recover contribution in a Small Cause Court from his co-sharer; co-sharers paying revenue to Government are not co-contractors in any sense, and therefore the principle laid down in the Full Bench case and in other subsequent cases with regard to them, is perfectly plain.

But the case of joint tenants who hold a tenure under a zemindar or other landlord at an entire rent, seems to fall within a different principle. Such co-tenants are to all intents and purposes co-contractors, as much so as persons who jointly purchase goods or borrow money; and if one should be compelled by the landlord to pay the whole rent, there seems no reason why, in accordance with the English and the Civil law, the others should not be bound by contract to repay him their proper proportions. This principle was acted upon by the Full Bench in *Shaboo Majee v. Noorai Moollah* (B. L. R., Sup. Vol., 691), in the case of a principal and surety, where it was held, that a surety having paid the debt could sue the principal in the Small Cause Court. But this distinction does not appear to have been recognized in later cases, and we have ascertained that, in an unreported case, *Khethermoney Dossee v. Madhub Chunder Ghose* (No. 726 of 1878, unreported), heard on the 20th June 1878 by MARKBY and PRINSEP, JJ., where the circumstances were similar to the present, it was held, apparently on the authority of *Shaboo Majee's Case* (B. L. R., Sup. Vol., 691), that a suit for contribution would not lie in the Small Cause Court.

We find that a different view has been taken of such cases by the Madras and Allahabad High Courts [see *Nath Prasad v. Baij Nath* (I. L. R., 3 All., 66) and *Govinda Muneya Tiruyan v. Bapu* (5 Mad. H. C. Rep., 200)], and

[308] having regard to the number of petty cases of this nature, which must occur in the mofussil, we think that, on some fitting opportunity, it would be desirable that the subject should be reconsidered by a Full Bench of this Court. As we have not had the advantage in this case of hearing counsel on either side, we think it right to follow the rulings of this Court, and to confirm the judgment of the lower Court.

**NOTES.**

**[JURISDICTION OF SMALL CAUSE COURT—SUIT FOR CONTRIBUTION—**

Suit for contribution in respect of money paid by one judgment-debtor under a joint decree held not maintainable in Small Cause Court :—(1882) 9 Cal. 395.]

**[7 Cal. 308]**

*The 23rd June, 1881.*

**PRESENT:**

**SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE McDONELL.**

Shiboo Narain Singh.....Plaintiff

*versus*

Mudden Ally and others.....Defendants.

Natabar Nandi.....Plaintiff

*versus*

Kali Dass Pali and others.....Defendants.\*

*Small Cause Court—Jurisdiction—Civil Procedure Code (Act X of 1877), ss. 280, 281, and 283—Limitation Act (XV of 1877), sched. ii, art. 11.*

Section 283 of the Civil Procedure Code enables a party, against whom an order has been made in execution-proceedings, to bring a suit to establish his rights, whatever they may be; but it says nothing as to the nature of the suit, or the Court in which it is to be brought. Whether the party is to sue in the Civil Court or in the Small Cause Court, depends entirely upon the nature of the claim and the right which is sought to be enforced.

A person whose goods are illegally sold under an execution, does not lose his right to them, although he may have claimed them unsuccessfully in the execution-proceedings. He may follow them into the hands of the purchaser or of any other person, and sue for them or their value without reference to anything which has taken place in the execution-proceedings, except that, under art. 11†, sched. ii, Act XV of 1877, he must bring his suit within one year from the time when the adverse order in the execution-proceedings was made.

\* Small Cause Court Reference, No. 7 of 1881, from the order made by Sreenath Roy, Judge of the Small Cause Court at Howrah.

† [Art. 11 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
By a person against whom an order is passed under Sec. 280, 281 282 or 335 of the Code of Civil Procedure, to establish his right to, or to the present possession of, the property comprised in the order.	One year ...	The date of the order.]

Where goods have been illegally seized and sold in execution, a suit by the owner thereof against the purchaser for the goods or their value, will lie in a Small Cause Court, if the value of the goods is within the amount limited by law for the jurisdiction of such Court; but if the plaintiff makes the decree-holder and the judgment-debtor parties to the suit, and requires a declaration of his right to the property, such a suit will not lie in the Small Cause Court.

[608] A suit for a declaration of right by a person against whom an order has been passed under s. 280 of the Civil Procedure Code, will not lie in the Small Cause Court.

*Ram Dhun Biswas v. Kefal Biswas* (10 W. R., 141), *Moosdeen Gaze v. Dinobundhoo Gossamee* (13 W. R., 99), and *Womesh Chunder Bose v. Muddun Mohun Sircar* (2 W. R., 44), discussed and explained.

THIS was a reference from the Judge of the Small Cause Court at Howrah, the terms of which were as follows:—The question raised in these cases is, whether a party against whom an order under ss. 280 and 281 of the Civil Procedure Code is passed, may institute a suit to establish his right in the Small Cause Court, where the property in dispute is moveable property, and is valued at an amount cognizable by such Court? As the question is an important one, I beg to submit it for the decision of the High Court.

The plaintiff in the first mentioned of these cases was the unsuccessful claimant; and that in the other case, was the defeated decree-holder.

Before the passing of the Civil Procedure Code, Act X of 1877, the rule laid down by the Calcutta High Court was, that such suits either by the decree-holder or by the unsuccessful claimant, could not lie in the Small Cause Court—*Ram Dhun Biswas v. Kefal Biswas* (10 W. R., 141) and *Moosdeen Gaze v. Dinobundhoo Gossamee* (13 W. R., 99). The contrary decision passed in the ruling in *Womesh Chunder Bose v. Muddun Mohun Sircar* (2 W. R., 44) was referred to in the first mentioned of these precedents. That being the law when the old Procedure Code, Act VIII of 1859, was in force, it remains to be seen if the new Code has changed matters or extended the jurisdiction of the Small Cause Court. The words of s. 283 of the new Code are: that "the party against whom an order under ss. 280, 281, or 282 is passed, may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive." This section is made applicable to the Small Cause Courts by sched. ii of the Act. It does not seem to me clear, however, that this application of the section to the Small Cause Courts has extended the jurisdiction of these Courts [610] to try suits to establish rights to properties, moveable and immoveable. The section provides for remedies to the defeated party, but is quite silent as to the Court which should have jurisdiction to entertain such suits. It appears from s. 5 of the Code that the sections of the second schedule of the Act extend to the Small Cause Courts, so far only as they are applicable, and this leaves no room to doubt that the jurisdiction of the Small Cause Courts has not been enlarged by the Code. The section alluded to (No. 283) is not qualified by any sentence, under parentheses as "so far as relates to moveable property" as appears against the following section, which refers to sales in execution. It would also appear from a note under s. 283 of Broughton's Civil Procedure Code, that "the suit to establish the right of the claimant must be brought in the Court having jurisdiction to try it, not necessarily that in which the proceedings have taken place." Under these grounds I am fully of opinion that these cases are not cognizable by the Small Cause Courts.

The decision of the Bombay High Court in *Nathu Ganesh v. Kalidas Umed* (I. L. R., 2 Bomb., 365) shows a contrary view of the question; but since that Court has refrained from interpreting the present state of the law, and is not in

unison with the view taken by the Calcutta High Court in connection with the past law, I think I am not in a position to take it for my guide.

The case of *Ram Soondur Sein v. Krishno Chunder Goopto* (17 W. R., 380) would, I think, justify me in following the rule laid down by the Calcutta High Court.

Under these grounds I think I have no jurisdiction to entertain these suits, and therefore dismiss them both, contingent upon the decision of the High Court.

The Judgment of the Court (GARTH, C. J., and McDONELL, J.) was delivered by

**Garth, C. J.**—We think that there is no real difficulty about the point referred to us; and that the new Civil Procedure Code has made no material difference in the law upon the subject. Section 283 of the Code enables a party against whom an order has been made in execution-proceedings to [611] bring a suit to establish his rights, whatever they may be; but it says nothing as to the nature of the suit, or the Court in which it is to be brought. Whether, therefore, the party is to sue in the Civil Court or in the Small Cause Court, depends entirely upon the nature of the claim, and the right which is sought to be enforced. If the claim can be made in the Small Cause Court, the suit must be there. If not, it must be brought in the Civil Court.

The first case reported upon the subject, to which we have been referred, is *Womesh Chunder Bose v. Muddum Mohun Sircar* (2 W. R., 44). In that case, some bricks were sold in execution of a decree. The plaintiff claimed in the execution-proceedings to be the owner of them, and this claim was refused. The bricks were then sold in execution; and the plaintiff brought his suit against the purchaser in the Civil Court. It was held in that case by the High Court, that, as the value of the bricks was less than Rs. 500, the plaintiff was bound to have sued in the Small Cause Court.

The case of *Ram Dhum Biswas v. Kefal Biswas* (10 W. R., 141) was of a very different character. A claim was there made to certain goods which the decree-holder was about to sell in execution, and the claim was allowed. Whereupon the decree-holder brought a suit in the Small Cause Court to establish his right to sell the property as being that of the judgment-debtor. This was a suit which, from its very nature, could not be brought in the Small Cause Court. It was a suit to obtain a declaration from the Court, which the Small Cause Court had no jurisdiction to make. Sir BARNES PEACOCK and Mr. Justice MITTER, therefore, decided, that the suit ought to have been brought in the Civil Court.

In the next case, *Moozdeen Gazee v. Dinobundhoo Gossamee* (13 W. R., 99), the circumstances were very similar to those in *Womesh Chunder Bose v. Muddum Mohun Sircar* (2 W. R., 44). A claim had been made to certain goods about to be sold in execution, and the decision had been against the claimant. The property was then sold, and the claimant brought a suit in the Small [612] Cause Court to recover them or their value as against the purchaser. The learned Judges in that case, however, do not appear to have had their attention drawn to the case of *Womesh Chunder Bose v. Muddum Mohun Sircar* (2 W. R., 44), and supposed (erroneously as we think) that the case ought to be governed by the decision in *Ram Dhum Biswas v. Kefal Biswas* (10 W. R. 141). We fear that this ruling has been followed in many cases, and has led to some misapprehension.

The distinction between the two classes of cases is so clearly marked, that it seems almost unnecessary to explain it. A person whose goods are illegally sold under an execution does not lose his right to them, although he may have claimed them unsuccessfully in the execution-proceedings. He may follow them into the hands of the purchaser or of any other person, and sue for them or their value without reference to anything which has taken place in the execution-proceedings, except that, under art. 11 of the Limitation Act, he must bring his suit within a year from the time when the adverse order in the execution-proceedings was made.

The plaintiff's only difficulty in the first of these causes is one of his own creation. If he had simply sued the purchaser under the execution for his goods or their value he might have enforced his claim as a matter of course. But he has chosen to make both the decree-holder and the judgment-debtor defendants in the suit, for which there was clearly no occasion, and which was obviously a mistake. In sending this case back, therefore, to the Small Cause Court, we would recommend that the names of the decree-holder and judgment-debtor should be struck out of the record, the plaintiff paying their costs, which he avows his readiness to do; and the plaintiff may then proceed to enforce his claim, if it is a just one, against the purchaser only.

The other suit, which is brought by the decree-holder to obtain a declaration from the Court as to his right, comes within the other class of cases, in which the Small Cause Court has clearly no jurisdiction.

#### NOTES.

#### [SMALL CAUSE COURT JURISDICTION—SUIT FOR DECLARATION NOT MAINTAINABLE—

Following this case it was held that a suit for establishing right to standing crops was not maintainable in the Small Cause Court; (1893) 21. Cal. 430, So also a suit for establishing right to moveable property attached in execution, (1883) 7. All. 152, F. B.

Referred to in (1892) 16. Bom. 608 where it was held that s. 283 of the Civil Procedure Code of 1882 does not prevent a party from claiming partition in a suit to set aside an order of attachment.]

### [613] APPELLATE CIVIL.

*The 7th July, 1881.*

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE FIELD.

Thakoor Mahatab Deo and others.....Judgment-debtors

*versus*

Leelanund Singh and others.....Decree-holders.\*

*Execution—Irregularity in publishing and conducting a sale—Waiver of irregularity by the judgment-debtor.*

Previous to the date fixed for the sale of certain property in execution of a decree, the judgment-debtors presented a petition, praying for a month's further time to be allowed them in order that they might complete the arrangements they were making for the purpose

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\* Appeal from Order, No. 55 of 1881, against the order of Hafez Abdul Karim, Subordinate Judge of Bhagalpore, dated the 24th January 1880.

of paying off the debt, and stating that the decree-holder had attached and advertised the property for sale. That petition being refused, the sale took place; and subsequently the judgment-debtors came in and objected to the sale, and asked to have it set aside, on the ground that there had been material irregularity in the publication of the attachment and sale-proclamation, and that, consequently, they had suffered substantial injury. The Subordinate Judge refused to hear evidence on this point, holding that the petition was an admission that the proceedings were in order.

*Held*, that the petition presented prior to the sale did not amount to an admission by the judgment-debtors that the publication and proclamation of the sale had been duly made; and that, consequently, the Court was bound to hear the evidence tendered by the judgment-debtors on that point, and to find whether there had been such irregularities in publishing and conducting the sale as to occasion substantial injury to the judgment-debtors.

*Gurdhari Singh v. Hurdeo Narain Singh* (L. R., 3 I. A., 230) distinguished.

THIS was an appeal from an order of the Subordinate Judge of Bhagalpore, refusing to set aside the sale of certain property belonging to the appellants, the judgment-debtors, which had been purchased by the decree-holders. It appeared that the sale had been fixed for the 6th October 1879, and that, on the 27th September, the judgment-debtors had presented a petition, setting out that the decree-holders had attached and advertised for sale the property in question, but that they were making arrangements to pay off the debt, and desired a month's [614] time to enable them to complete such arrangements. That petition was refused, and the sale was proceeded with on the 6th October 1879, the decree-holders becoming the purchasers. The judgment-debtors then applied to have the sale set aside, on the ground that there had been a material irregularity in the publication of the attachment and sale-proclamation on the property, and that the boundaries of the mouza sold had not been stated; and that, consequently, they had suffered a substantial injury by the property having been sold much under its value. The Subordinate Judge held, that the petition of the 27th September amounted to an admission by the judgment-debtors that the publication of the attachment and sale-proclamation had been made in due order, and that there had been no such irregularity in specifying the boundaries as alleged, as they had been sufficiently stated; and consequently, having refused to hear the petitioners' evidence with respect to the irregularity in the publication of the attachment and sale proclamation on the property, dismissed the petition.

The judgment-debtors, accordingly, now appealed to the High Court against that order.

*Baboo Kasi Kant Sen* for the Appellants.

*Mr. R. E. Twidale* for the Respondents.

The **Judgments** of the Court (PRINSEP and FIELD, JJ.) were as follows:—

**Prinsep, J.**—This is an appeal against an order of the Subordinate Judge of Bhagalpore refusing to set aside a sale. The Subordinate Judge proceeded mainly upon a petition presented by the judgment-debtors on the 27th September 1879, asking for a postponement of the sale fixed for the 6th October following, on the ground that they had not been able to close their negotiations to raise money to pay off the debt. The Subordinate Judge considered that it was clear from that petition that the judgment-debtors had, before the sale, acknowledged and admitted the publication of the attachment and sale-proclamation.



[618] We find nothing in that petition in any decree amounting to such an admission, or to a waiver on the part of the judgment-debtors of any objection to any irregularity. In fact, had the application been granted, it would have been necessary to issue a fresh proclamation, unless the judgment-debtors had consented by some subsequent act of theirs to waive such formality.

The other objection taken is, that the Subordinate Judge did not examine the witnesses for the judgment-debtors, who were present at the hearing of the case. It appears from the record at the end of the examination of the first witness, that there are ample grounds for this contention. The Subordinate Judge having erroneously proceeded upon the petition, which had been made by the judgment-debtors, and having in consequence refused to examine the witnesses produced by the judgment-debtors to prove material irregularity in publishing or conducting the sale, which resulted in substantial injury to them, it becomes necessary to return the case to the Subordinate Judge, in order that he may examine all the witnesses tendered by the parties, and then return the case to this Court with a distinct finding as to whether there has been a material irregularity in publishing or conducting the sale, which has resulted in substantial injury to the judgment-debtors.

Field, J.—I am of the same opinion. I think that this case is distinguishable from the case of *Girdhari Singh v. Hurdeo Narain Singh* (L. R., 3 I. A., 230), decided by their Lordships of the Privy Council. In that case, the judgment-debtor applied for a postponement of the sale, and his petition contained the following passage: "Under such circumstances, it is prayed that a postponement of one month be granted, *the attachment and the notification of sale being maintained.*" Now the words italicized were held by the Privy Council to amount to an admission, that there was no such mistake or irregularity as would be likely to mislead. There are no such words in the present case, and further it is to be observed, that the petition made by the judgment-debtors (appellants) was disallowed by the Court,

*Case remanded.*

#### NOTES.

#### [ESTOPPEL—OMISSION TO STATE IRREGULARITIES IN THE PETITION PRESENTED BEFORE SALE—

Omission to state irregularities affecting sale in a petition for adjournment of sale does not estop the judgment-debtor from setting aside the sale on account of irregularities (1898) 17 Mad. 304.]

[616] The 28th June, 1881.

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE FIELD.

Gogun Chunder Ghose.....Plaintiff

versus

Dhuronidhur Mundul and others.....Defendants.\*

*Fraud—Altering a document—Material Alteration—Bond—Forgery.*

A person, who had a bond executed in his favour by one of three brothers, forged the signatures of the other two brothers to the bond, and brought a suit upon it in its altered form against the three brothers. The forgery having been established, the Court of first instance dismissed the suit as against all the three defendants, and this decision was affirmed on appeal. On second appeal to the High Court,—

*Held*, that the decision was correct, as a material alteration in a bond is, if fraudulently made, sufficient to render the bond void.

A party who has the custody of an instrument made for his benefit is bound to preserve it in its original state, and any material alteration of it will vitiate the instrument.

Where a person brings a suit upon a document which, when produced in evidence, is found to have been fraudulently altered to the knowledge of the plaintiff, no Court ought to allow an amendment to enable him to succeed upon it in its original state.

*Davidson v. Cooper* (13 M. & W., Ex. Ch., 352) and *Gardner v. Walsh* (24 L. J., Q. B., 285) followed.

THE facts of this case, and the contention of the parties, are set out in the judgment of the lower Appellate Court, which is as follows :—

“ The suit was on a kistbandi, said to have been executed on the 14th February 1876 by the three defendants—Dhuronidhur, Baburam, and Bashiram—jointly, binding themselves to pay to the plaintiff Rs. 599 by instalments. The three defendants are three brothers. They deny execution of the bond, and charge the plaintiff with having forged the document. The three defendants did not make a joint defence, but Dhuronidhur filed a separate written statement, and the other two brothers made a joint statement. The plaintiff gave his evidence, and [617] examined his gomasta and two witnesses by the names of Kepait Gazi and Poyat Paik. The Court below disbelieved their evidence, and observed that the bond had been very materially changed from what it originally was. The learned Munsif is of opinion that the bond was made by Dhuronidhur himself, and that the names of the two others are interpolations. He is confirmed in his suspicion by the further change of the pronoun “ami” into *amara* wherever it occurs. I perfectly agree with the Court below in finding that the plaintiff has materially changed the bond. The same evidence which binds Dhuronidhur binds the other two brothers. If it were open to me to give a decree against Dhuronidhur, I would have done so; but it is not at all safe to do so, as there is no trustworthy evidence to bind Dhuronidhur. The plaintiff, having changed the bond in the way it now stands, must take the consequence of his own wicked act. I only wonder that the plaintiff was not asked to explain the erasures, either by his own pleader or by the cross

\* Appeal from Appellate Decree, No. 384 of 1880, against the decree of Baboo Brojendra Coomar Seal, First Subordinate Judge of the 24-Parganas, dated the 4th February 1880, affirming the decree of Baboo Shosi Bhushun Chatterjee, Second Munsif of Diamond Harbour dated the 30th September 1878.

examining pleader. The plaintiff, however, does not make that a ground of complaint in his memorandum of appeal. This shows that he was perfectly aware that he had made the alteration. I have no hesitation to confirm the judgment of the Court below, and to dismiss the appeal with costs."

The plaintiff appealed to the High Court.

Baboo *Rashbehary Ghose* and Baboo *Boskantanath Dass* for the Appellant.

Baboo *Troyluckhonath Mitter* for the Respondents.

The **Judgment** of the Court (GARTH, C.J., and FIELD, JJ.) was delivered by

**Garth, C. J.**—We think that this appeal must be dismissed. This suit is brought upon an instalment-bond against three brothers, the defendants. The plaintiff alleges that these three brothers executed the bond jointly. The suit has been dismissed in both Courts and the lower Appellate Court finds, as a fact, that two of the defendants never executed the bond, and that their names were not upon it as it was originally executed; and further, that the plaintiff, in whose custody the bond [618] has been, has forged the names of those two defendants upon the instrument, and attempted to enforce it against them all. Upon that ground the Subordinate Judge has dismissed the suit.

So far as I understand him, I think he also means to dismiss it upon another ground—namely, that he cannot trust the evidence even against the one brother; but it is not necessary to consider this point, because we are clearly of opinion that a fraudulent addition, such as has been made to this bond, is sufficient to vitiate it as against all the defendants. See the case of *Davidson v. Cooper* (13 M. & W., Ex. Ch., 352). It was there laid down, that "a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state, and that any material alteration of an unsealed paper will vitiate the instrument."

In the case of *Gardner v. Walsh* (24 L. J., Q. B., 285), an alteration had been made very much like the present. A promissory note had been altered by another party being added. The alteration was apparently no disadvantage to the defendants; and yet because it had been made, whilst the document was in the plaintiff's possession, it was held to be invalid as against the defendant. Chief Justice CAMPBELL there says:—"We conceive that the defendant is discharged from his liability if the altered instrument, supposing it to be genuine, would operate differently from the original instrument, whether the alteration be or be not to his prejudice. If a promissory note payable at three months after date were altered by the payee to six months or if, being made for £100, he should alter it to £50, we conceive that he could not sue the maker upon it after the alteration, either in its altered or original form. The alleged maker was no party to a note at six months, or for £50; and the note at three months or for £100, to which he was a party, is vitiated by the alteration."

Mr. Justice BYLES also, in his book upon Bills, p. 318, 11th edition, lays down the rule in this way:—"By a recent solemn decision—*Davidson v. Cooper* (13 M. & W., Ex. Ch., 352)—a deed, bill of exchange, promissory note, guarantee, or any other executory [619] written contract, is avoided by an alteration in a material part made while it is in the custody of the plaintiff, although that alteration be made by a stranger. For, a person who has the custody of an instrument is bound to preserve it in its integrity; and as it would be avoided by his fraud in altering it himself, so it shall be avoided by his laches in suffering another to alter it."

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It has been argued, that, in this country, the law of England in this respect does not apply. I am sure I do not know why it should not; and I see much reason why it should. The law of England, so far as it is consistent with the principles of equity and good conscience, has generally prevailed in this country, unless it conflicts with the Hindu or Mahomedan law. The learned pleader who appears for the defendants, seems to think that, in equity and good conscience, the plaintiff in this case ought to succeed against one of the defendants. But we are clearly of a different opinion. Where a man has been wicked enough to alter a document fraudulently in this way, we do not think it consistent with equity and good conscience, or with sound policy, (especially in a country like this, where forgery and fraud is so lamentably common), that he should be entitled to recover upon it.

Even looking at the question as one of proof merely, the plaintiff ought to fail in his contention, because he has not proved the instrument upon which he founds his claim.

No doubt, so long as mistakes are made in ignorance, and not from dishonesty, great latitude is very properly allowed by the Courts here in the way of amendment; but all amendments are in the Court's discretion; and what my learned brother, Mr. Justice FIELD, said just now, is undeniably true, that where a man brings a suit upon an instrument which, when produced in evidence, is found to have been fraudulently altered to the knowledge of the plaintiff, no Court ought to allow an amendment to enable him to succeed upon it in its original state.

The appeal is dismissed with costs.

*Appeal dismissed.*

#### NOTES.

##### [MATERIAL ALTERATION HOW FAR VITIATES THE INSTRUMENT—

This case was followed in *Gour Chunder Das v. Prasanna Kamar Chandra* (1906) 33 Cal. 812=10 C. W. N. 788=3 C. L. J. 318, where the name of another executant was added without the consent of the first executant. Justice MOOKERJEE laid down in that case the test for finding out what is material alteration. Whatever changes the legal identity or the character of the instrument either in its terms or in relation to the parties is a material alteration. The addition of another executant's name vitiates the instrument as against the original executant (*ibid.*). Alteration with reference to date of payment and rate of interest is a material alteration; *Christacharl v. Karibasardyya* (1885) 9 Mad. 399 F. B., where the majority held that the rule laid down in this case ought to be applied as a rule of justice, equity and good conscience, but MUTTUSAMI IYER held that the rule is a penal rule but ought to be applied as the Courts have been applying this rule. Even if the alteration is beneficial, the rule applies—MOOKERJEE, J., in 33 Cal. 812. The addition of the name of a witness in a document not required to be attested is not a material alteration: (1885) 12 Cal. 313; (1910) 38 Cal. 75 (a case under Sec. 461 of Penal Code). But see (1889) 7 Bom. 418, where it is held that it was a material alteration as it increases the apparent evidence of the genuineness of the document. But the insertion of a clause in a sale-deed of moveables 'excepting the claim on a former account,' is not a material alteration: (1893) 3 M. L. J. 266. Again, the rule does not apply if the alteration is made in the acknowledgment on an instrument as it is not the foundation of suit: (1901) 25 Bom. 616, (1905) 9 C. W. N. 695.

Again, the rule does not apply to executed contracts as mortgages where title vests in the transferee under the instrument: (1908) 25 All. 580 F. B., where the mortgage instrument had been tampered and the extent of the share mortgaged had been altered. See also 23 Mad. 187. But see 33 Cal. 812, where MOOKERJEE, J., leaves the question open.]

[620] *The 14th July, 1881.* .

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE FIELD.

Gopal Sahu Deo.....Judgment-debtor

*versus*

Joyram Tewary and others.....Decree-holders.\*

*Execution of Decree—Limitation—Appellate Court—Privy Council—Limitation Act (IX of 1871), sched. ii, arts. 167, 169—Act VI of 1874, s. 21—Limitation Act (XV of 1877), sched. ii, arts. 177, 179, and 180—Interest, rate of.*

The term 'appeal' in art. 167 of sched. ii of the Limitation Act (IX of 1871) includes an appeal to the Privy Council, and the term 'Appellate Court' in the same article includes the Judicial Committee of the Privy Council sitting for the purpose of hearing appeals from orders passed by British Courts in India.

Where an appeal had been preferred to Her Majesty in Council from a decree of the High Court reversing the decree of the Court of first instance, and the High Court's decree was affirmed by an order of Her Majesty in Council, dated the 15th February 1873, and an application for execution of the High Court's decree was made on the 17th November 1875, more than three years after the date of the decree, but within that period of the order of Her Majesty in Council,—

*Held*, that, under art. 167 † of sched. ii, Act IX of 1871 the limitation of such application must be computed from the date of the order of Her Majesty in Council and consequently that the application for execution was not barred.

Where, in the course of executing a decree, accounts, in which interest was entered and charged, had, from time to time, been filed in Court, and no objection had been taken thereto by the judgment-debtor from 1870 up to 1880,—

*Held*, that it was too late to object to interest being allowed, and that the High Court would not interfere to alter the rate where it appeared that the District Judge had found that the rate ruling in the District was 12 per cent., and had allowed that rate accordingly.

\* Appeal from Original Order, No. 327 of 1880, against the order of A. W. B. Power, Esq., Deputy Commissioner of Lohardugga, dated the 14th September 1880.

† [Art. 167 :—

Description of application.	Period of limitation.	Time when period begins to run.
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For the execution of a decree or order of any Civil Court not provided for by No. 169.	Three years	
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The date of the decree or order, or (where there has been an appeal) the date of the final decree or order of the Appellate Court, or (where there has been a review of judgment) the date of the decision passed on the re-

view, or (where the application next hereinafter mentioned has been made) the date of applying to the Court to enforce, or keep in force, the decree or order, or (where the notice next hereinafter made has been issued) the date of issuing a notice under the Code of Civil Procedure, section two hundred and sixteen, or (where the application is to enforce payment of an instalment which the decree directs to be paid at a specified date) the date so specified.]

IN this case it appeared that the judgment-creditors, the respondents, had lost the original suit, out of which these execution-proceedings arose, in the Court of first instance, and that their adversary had thereupon taken out execution, although an appeal had been preferred and was then pending in the High Court. When the appeal came on to be heard, the decree of the lower [621] Court was reversed, and subsequently the order of the High Court was confirmed, on appeal, by the Privy Council. This present appeal arose from an attempt made by the judgment-creditors to recover the mesne profits for the time during which they had been dispossessed in consequence of the execution of the decree of the first Court previous to its being set aside by the High Court. It appeared that the first application in the present proceedings had been made on the 17th November 1875, and it was contended by the judgment-debtor, the appellant, that limitation applied, inasmuch as it had been made more than three years after the final decree or order of the Appellate Court, and that though the case was not finally decided by the Privy Council till the 15th February 1873, the Limitation Act (IX of 1871) did not apply to orders of the Privy Council. The Deputy Commissioner, however, decided this point against the judgment-debtor, and also allowed interest at 12 per cent., to which the appellant objected.

He accordingly now appealed to the High Court on both these points.

Baboo *Trailokyanath Mitra* and Baboo *Jogesh Chunder Day* for the Appellant.

Mr. *M. L. Sandel* for the Respondents.

The **Judgments** of the Court (PRINSEP and FIELD, JJ.) were as follow :—

**Prinsep, J.**—In this case it is first objected by the appellant's pleader that execution is barred, inasmuch as the previous application, made on the 17th of November 1875, was not made within three years from the date on which the notice was served on the debtor,—that is, on the 29th October 1872. It appears that the judgment-creditors now before us lost the original suit in the first Court. Execution was then taken out by their adversary while an appeal was pending in the High Court. The High Court set aside that order, and in 1873, the Privy Council affirmed the order of the High Court.

The present matter relates to restitution on account of mesne profits for the period during which the judgment-creditors now [622] before us were out of possession in consequence of the execution of the decree of the Court of first instance, which was ultimately reversed. In answer to the objection as regards limitation it is pointed out that, inasmuch as the case was not finally decided by the Privy Council until 1873, the application of the 17th of November 1875 is within time, calculating from that date. The appellant's pleader, however, contends, that the terms of art. 167 of the second schedule of Act IX of 1871 do not apply to the present case, inasmuch as the second clause, which gives the term of three years from the date of the final decree or order of the Appellate Court, "does not apply to orders of the Privy Council; and he bases this argument upon the consideration that Act IX of 1871 nowhere refers to orders passed by the Privy Council in the same way as the present Law of Limitation (Act XV of 1877) does. I observe that Act VI of 1874 s. 21, which was passed before the application which we are now considering, added to art. 169 the words which are now reproduced in art. 180 of Act XV of 1877, and so provided a period of limitation for the enforcement of any order of Her Majesty in Council. But it cannot be rightly contended that the terms of

s. 177\* do not apply to any order passed by the Privy Council on appeal from a decree of the High Court, because, if it were so, the consequence would be that, in order to preserve his rights, a successful party in this country would have to run the risk of executing a decree which might be set aside by the Privy Council, and that is a result which could never have been contemplated by the Legislature. It appears to me rather, that although perhaps not strictly accurate, the term 'Appellate Court' in art. 167 includes the Privy Council sitting for the hearing of appeals from orders passed by Courts of British India. So far then as limitation is concerned, it appears to me that the application of the 17th of November 1875 is not barred, because limitation 'did not begin to run until 1873, when the final order in the case was passed by the Privy Council.

The next objection raised is, that interest should not have been charged on the mesne profits of the year 1924 Sumbut (1867-68). The order passed by the Deputy Commissioner is certainly not clear in its terms, but, as I understand it, the [623] Deputy Commissioner divided it into two parts, dealing with the mesne profits of 1924 (1867-68) according to an adjustment between the parties, and fixing the amount which was payable as regards the three months' mesne profits of 1925 (1868-69), on which he declared that interest at the usual rate should be paid. Now, although there was no express order regarding payment of the mesne profits of 1924 (1867-68), it appears that the amount agreed on, namely, 9,895 rupees, has been paid through the Court, and that, from time to time, in the course of execution of their decree, the decree-holders have attached to their application for execution an account showing that they claimed interest on that sum. No objection from 1870 up to the present time has been made to this account; payments have been made, and I find myself unable to believe that such payments having been made, the items of the account were not known to the judgment-debtor and accepted by him. I therefore consider that interest was payable by the judgment-debtor on the mesne profits of 1924.

As regards the rate at which such interest was payable, not only on the mesne profits of 1924 (1867-68), but also on the mesne profits for the broken period of 1925 (1868-69), I think that 12 per cent. should be the rate allowed.

That is the rate which has been considered by the Courts to be the usual rate where no mention of any specific rate has been made, and that is the rate which has been given by the lower Court as the rate current in the District.

The appeal is, therefore, dismissed with costs.

**Field, J.**—With reference to the rate of interest, I think it may reasonably be assumed that the lower Court, in allowing 12 per cent. considered this to be the rate of interest usually allowed by the Courts in that part of the country, and I think we ought not to interfere with the rate so allowed.

Then as to the interest on Rs. 9,895, the mesne profits of the year 1924 (1867-68) up to the two dates, the 20th of December 1869, when 7,274 rupees were paid, and the 5th of April 1870, when the balance, namely, 2,621

\* [Art. 177 :—

Description of application.	Period of limitation.	Time from which period begins to run.
For the admission of an appeal to Her Majesty in Council.	Six months ...	The date of the decree appealed against.]

rupees, was paid, I agree with my learned colleague that it is too late now to take this objection, seeing that accounts were, on previous occasions, [624] filed in Court, in which accounts this interest was entered and no objection taken thereto.

Then as to the third point concerning limitation, the contention is, that this decree was barred when the application of the 17th of November 1875 was made, and that the principle "once barred for ever barred" must be applied. Now it is admitted that this contention cannot be successful, if we are to yield to the argument advanced on the other side, namely, that the decree-holders are entitled to three years from the 5th of February 1873, being the date on which the original decree of the Court in India was confirmed in appeal by the Judicial Committee of the Privy Council. In order to dispose of the question thus raised we have to determine whether the word 'appeal' in the third column, opposite art. 167 of the second schedule of the Limitation Act (IX of 1871), is to be interpreted so as to include an appeal to the Privy Council, and the words 'Appellate Court' in the same column, so as to include the Judicial Committee of the Privy Council.

An argument, based upon the reasoning in the case of *Narsingh Das v. Narain Das* (I. L. R., 2 All., 763), has been addressed to us to this effect, that, although in the corresponding column and article of the Limitation Act of 1877, the term 'appeal' may be well taken to include an appeal to the Privy Council, and the term 'Appellate Court' to include the Judicial Committee, a similar construction cannot be put upon these terms in the Act of 1871 for the following reason. The later Act contains specific provisions (in arts. 177 and 180\* of the second schedule) which govern appeals to, and orders of, Her Majesty in Council; but the earlier Act of 1871 contains no such provision, and therefore could not have contemplated appeals to Her Majesty in Council, or the exercise of the appellate jurisdiction of the Judicial Committee.

So far as regards the case now before us (in which the order of the Judicial Committee was made on the 15th February 1873), that argument may be effectually disposed of by a reference to s. 21 of Act VI of 1874, which amended art. 169 of the second schedule of the Act of 1871, by the addition of the [625] words "or any order of Her Majesty in Council." The Act of 1874 operated to make the Limitation Act of 1871 contemplate the Judicial Committee of the Privy Council, before the decree had become barred.

But it appears to me, that the fact of the Act of 1877 containing two additional articles (177 and 180), which expressly mention appeals to, and orders of, Her Majesty in Council, or the absence of such provisions from the

\*[Art. 180 :—

Description of application.	Period of limitation.	Time from which period begins to run.
To enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction, or an order of Her Majesty in Council.	Twelve years	When a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right: Provided that when the judgment, decree or order has been revived, or some part of the principal money secured thereby, or some interest on such money has
been paid, or some agreement of the right thereto has been given in writing, signed by the person liable to pay such principal or interest, or his agent, to the person entitled thereto or his agent, the twelve years shall be computed from the date of such revivor, payment or acknowledgment, or the latest of such revivors, payments or acknowledgments, as the case may be.]		



Act of 1871, does not really affect the question which we have to decide. These two additional articles contain additional substantive provisions of limitation, but the presence or absence of these provisions does not, I think, affect the meaning of the terms 'appeal' and 'Appellate Court' in the other parts of the Act.

The term 'appeal,' standing alone and without words to qualify or restrict it, is wide enough to include any appeal, and therefore an appeal to Her Majesty in Council. So the term 'Appellate Court' standing alone and without words to qualify or restrict its meaning, is wide enough to include any tribunal exercising appellate jurisdiction. Do we thus find either in the Act itself or in the rest of the Statute-Book anything which qualifies or restricts the general meaning of these terms? The Act itself contains no definition of either term. Further, it gives no enumeration or description of Appellate Courts, of the tribunals to which an appeal lies. We must, in fact, travel outside the Act and search the rest of this Statute-Book in order to discover what tribunals exercise appellate jurisdiction. The term 'Appeal' is used in the Act and the schedule of appeals under the Codes of Civil and Criminal Procedure and other Acts, and of appeals to different Courts. We cannot, therefore, merely from the use of the term in the Act, invent any definition of 'appeal,' which will apply in all places in which the word is used in the same Act,—i. e., so far as concerns the procedure under which, or the tribunal to which, the appeal is made.

Then when we get outside the Act, there is no definition of either term in the General Clauses Act; and if we search the Indian Statute-Book, in order to find what tribunals exercise appellate jurisdiction in respect of cases tried and decided in India, we find no less than four enactments,—viz., Reg. [626] XVI of 1797, Reg. V of 1803, Act XXV of 1852, and Act II of 1863,—which were wholly or partially in force when the Limitation Act of 1871 was passed; and which provided for appeals to Her Majesty in Council. We find no express language cutting down the general meaning of the terms 'appeal' and 'Appellate Court,' and it is not easy to suppose, having regard to the existence of these four enactments in the Statute-Book, that the Legislature intended to restrict this general meaning, so as to exclude appeals to Her Majesty in Council and the Appellate tribunal mentioned in those enactments. Then with reference to a doubt which has been started as to whether Her Majesty in Council or the Judicial Committee of the Privy Council can be properly termed an 'Appellate Court.' It appears to me that there is nothing in this. It may be quite true that Her Majesty, exercising the appellate jurisdiction which she is pleased to exercise with the aid of the Judicial Committee of the Privy Council, does not use exactly the same forms and the same procedure which is used in her other Courts. For example, the so-called decrees of the Judicial Committee are really orders in Council made upon the recommendation of the Committee; see *Kristo Kinkur Roy v. Raja Burrodacant Roy* (14 Moore's I. A., 465, cf. p. 493). But I take it that this does not affect the question. The essentials of a Court are (i) the *actor*, or plaintiff; (ii) the *reus*, or defendant; and (iii) the *judex*, or judicial power, which ascertains the facts, applies the law, and, if injury has been done, affords a remedy by its officers or otherwise. An examination of the Statutes which regulate the Judicial Committee of the Privy Council will show that this tribunal possesses all these essential elements of a Court; see more especially 2 and 3 Will. IV, c. 92; 3 and 4 Will. IV, c. 41, ss. 14, 15, 16, 19 and 28; and 6 and 7 Vict., c. 38, ss. 5 and 7. The Committee is a judicial committee. The law speaks of its jurisdiction to hear causes (17 and 18 Vict., c. 18, s. 34). The Statute 39 and 40 Vict., c. 59, s. 14, speaks of paid Judges of

the Judicial Committee of the Privy Council. In *Tronsoy v. Dent* (8 Moore's P.C., 419. cf. p. 432), the Lords of the Committee speak of "treating this Court" as [627] Court of Error." According to the constitution of England the sovereign is the fountain of all justice. In ancient days, he sat in Court in *propria persona*, and is still supposed to do so, although he does not determine, and is not by law empowered to determine, any cause or motion otherwise than by the mouth of his judges, to whom he has committed his whole judicial authority. Part of the business now transacted by the Judicial Committee of the Privy Council used to be transacted by "The High Court of Delegates." The Judicial Committee of the Privy Council, like Her Majesty's High Court of Chancery (the 2 and 3 Will. IV, c. 92, speaks of the Queen's Majesty in Her Highness' Court of Chancery" or Her Majesty's High Court of Justice, 36 and 37 Vict., c. 66, 85) as one Chamber of the Aula Regia; and so far as concerns its jurisdiction to hear appeals, it is most undoubtedly an 'Appellate Court' in the proper sense of the term.

I am, therefore, of opinion that the term 'appeal,' in the column of the Limitation Act of 1871, includes an appeal to the Privy Council; and the term 'Appellate Court,' in the same column, includes the Judicial Committee of the Privy Council; and the effect of this construction is, that the execution of this decree is not barred by limitation.

*Appeal dismissed.*

[7 Cal. 627.]

ORIGINAL CIVIL.

*The 19th August, 1881.*

PRESENT:

MR. JUSTICE WILSON.

Lawless

*versus*

The Calcutta Landing and Shipping Co., Ltd.

and

The Calcutta Landing and Shipping Co., Ltd.

*versus*

Lawless.

*Limitation Act (XV of 1877), s. 17—Right of Employer to call on Manager for Account—Accrual of Right on Death of Manager against Representatives.*

A manager is bound to account to his employer whenever he is called upon to do so under reasonable circumstances.

On the death of such manager a fresh right to an account accrues to the employer as against the manager's representatives.

[628] In a suit for such an account accruing to the employer on the death of his manager, limitation will not commence to run until administration has been taken out to such manager's estate.

THESE were original and cross suits brought by A. W. S. Lawless against the Calcutta Landing and Shipping Co., and by the Calcutta Landing and Shipping Co. against A. W. S. Lawless; the former being a suit by A. W. S.

Lawless, as the administrator of his father's estate, to recover a sum due, as salary and commission, to his late father from the Company; and the latter being a suit by the Company against A. W. S. Lawless, as the administrator of his father's estate, to recover from it a sum of Rs. 5,707, as a debt due by the deceased to the Company.

In the original suit the plaintiff stated that his father, W. H. Lawless, had been engaged, in March 1876, as manager to the Calcutta Landing and Shipping Co., at a monthly salary of Rs. 400, with a commission of 10 per cent. on the earnings of the Company; and that, previous to his father's death, which happened on the 29th August 1877, a sum of Rs. 400 as salary for the month of August 1877, and commission to the amount of Rs. 2,758 for the first half-year of 1877, had then fallen due, and that having taken out administration to his father's estate on 27th August 1879, and having demanded the sum abovementioned from the Company, he, on their refusal to pay the debt, brought this suit on the 30th August 1880, to compel them to do so.

The Company denied that any sum, either as salary or commission, was due to the plaintiff as administrator of the estate of W. H. Lawless; and stated that W. H. Lawless, in his lifetime, had drawn, from the cash under his control belonging to the Company, a sum of Rs. 5,348 in excess of the salary and commission to which he was entitled to up to his death; and submitted that the plaintiff ought to be decreed to pay that sum to the Company; and they further submitted that the plaintiff's suit was barred by limitation.

In the cross-suit filed on the 22nd day of February 1881, the plaintiff Company admitted that W. H. Lawless had been appointed their manager in March 1876, but stated that his duties were, as such manager, to collect or cause to be collected, [629] all sums due to them,—to cause proper entries to be made of such moneys in the Company's books,—to spend, or cause to be spent, portions of such sums *bona fide* for the business and purposes of the Company, and to send, or cause to be sent, the remainder thereof to the Company's Bank and to render full and true accounts of all moneys belonging to the Company to their Directors. That, shortly after the death of W. H. Lawless in August 1877, the Company learnt for the first time, that W. H. Lawless had, without their knowledge and consent, been in the habit of taking sums from the cash belonging to the Company for his own private purposes, over and above the salary and commission to which he was entitled, causing such sums to be entered not in the books of account, but in a separate account headed "Received from Cash," which was kept concealed from the Company; and that, at the time of his death, the balance appearing in the separate account was Rs. 3,773 in favour of the Company. They further stated, that W. H. Lawless had not kept proper accounts since November 1876, and that he misappropriated various sums of money, and had caused false entries to be made in the books of the Company; that he had failed to collect debts due to the Company; and that, after an investigation had been made by a public accountant into the books of the Company, it had been ascertained that a sum of Rs. 5,707 was due by the said W. H. Lawless to the Company.

That these facts having been fraudulently kept from the Company, their right of suit only accrued after the death of the said W. H. Lawless, when the facts were discovered; and that they were unable to bring their suit until a legal representative had been appointed to the estate of W. H. Lawless, and that they brought their suit, therefore, against A. W. S. Lawless, the administrator of the estate of W. H. Lawless, asking that the suit brought by

A. W. S. Lawless against themselves and this suit might be consolidated and heard together, and praying for a decree against the estate for Rs. 5,707, and for an account.

The defendant contended that the plaintiff's suit was barred; and stated that the Company, in 1877, had instituted a suit against one Shoshee Coomar Gangooly (their cashier) charging him with being accountable to them for the sum of Rs. 5,707 [630] which was in the present suit being sued for; and that, on the 10th December 1877, they had obtained a decree against S. C. Gangooly for a sum of Rs. 4,128, being a portion of the said sum of Rs. 5,707; and he further stated that he had no assets belonging to his father's estate in his hands.

The two suits came on for hearing together, the pleadings and judgment in the case of the Company v. S. C. Gangooly were put in, and it was admitted that the sum of Rs. 5,707 sued for in that suit was identical with the item of Rs. 5,707 sued for in the cross-suit by the Company against A. W. S. Lawless.

It appeared from the plaint in the suit which the Company had brought against Shoshee Coomar Gangooly, that the plaintiff Company had stated that Shoshee Coomar Gangooly acted as cashier to the Company, and that, as such cashier, it was his duty to send out bills for collection, to enter all sums received in the Company's books, to pay all such sums into the Company's Bank, to pay bills owing by the Company when passed by the manager (W. H. Lawless), and to render true and faithful accounts; and further stated that the defendant had received various sums of money on account of the Company, and that he had accounted for all such sums save and except the sum of Rs. 5,707, for which they prayed judgment. On the 11th December 1878, the Company obtained a decree against Shoshee Coomar Gangooly, which decree was affirmed on appeal, but, was never satisfied.

The issues settled were: (i) Is the debt to the Company barred by limitation? (ii) Is it barred by the former suit against Gangooly? (iii) Whether any sum is due from the estate of W. H. Lawless to the Company.

Mr. Bonnerjee (with him Mr. T. A. Apcar), for the plaintiff Company in the cross-suit, and for the defendant Company in the original suit, contended, that the Company's right to sue accrued on the death of W. H. Lawless when they became aware of the defalcation.

Mr. Jackson (with him Mr. Trevelyan) for the defendant in the cross-suit and the plaintiff in the original suit.—The [631] Company having proceeded against Shoshee Coomar Gangooly for the very debt, and having obtained judgment against him, cannot now sue us—*Kendall v. Hamilton* (L. R., 4 App. Cases 504), *King v. Hoare* (13 M. & W., 494), *Hemendro Coomar Mullick v. Rajendrolall Moonshee* (I. L. R., 3 Cal., 353; s. c., 1 C. L. R., 488). I don't admit, but say for argument's sake, that, at the death of Lawless, the Company might have said his accounts were wrong to the extent of several thousands, and that, as we the Company owe him money, we will write his debt off against our debt to him. They might have done this prior to suit, but as they did not give us credit for the amount, they cannot do so now; and after the decree obtained against Gangooly the debt was merged. As regards the question of an account, unless Lawless could justify his taking the money on the ground that a debt was owing to him, no question of account could arise. The plaintiff's suit is barred; limitation runs from the time the right to sue accrued, and the right accrued in the lifetime of Lawless. The Company were

aware of the defalcation more than three years before the date of their suit, as evidenced by the report of the Directors, dated the 20th December 1877. [WILSON, J.—The agent is bound to account within a reasonable time: the cause of action in his lifetime would accrue on demand; there was no demand made in the lifetime of Lawless, and so the cause of action accrued on the day of his death.]

**Wilson, J.**—These are cross-suits. The one is brought by the administrator of Captain Lawless for arrears of salary and commission due to Captain Lawless before his death as manager of the Calcutta Landing and Shipping Company. The other suit is for money for which the defendant is said not to have accounted. There is no dispute as to the amount of the administrator's claim. On the other hand, it is admitted, that Captain Lawless was bound to account for the money which came to his hands as manager. Two grounds of dispute were raised to the cross-claim: *first*, they claim to set off what is due, and in the cross action they claim the same relief. The objection to their claim is this: *first*, it is said the claim is barred by limitation. Now in the case of a person employed as manager [632] the right of the employer is to have an account rendered by the person employed whenever he is called on to do so under reasonable circumstances. There is nothing to show that Captain Lawless was ever called on to account for those moneys or to account generally. He died on the 29th August 1877, and his agency terminated. I think, by his death, the Company acquired a fresh right to have an account rendered by his representative, and that right is recognized by art. 89\* of the second schedule of the Indian Limitation Act. As he died on the 29th August 1877, the right accrued then but no administration was taken out till the 27th July 1880. The case, therefore, is protected by s. 17 of the Limitation Act, which says, "when a person against whom, if he were living, a right to institute a suit or make an application would have accrued, dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased against whom the plaintiff may institute or make such suit or application." Therefore time did not begin to run against the Company till the 27th July 1880, and inasmuch as the cross suit was brought on the 22nd day of February 1881, and the written statement in the other suit was filed earlier, the Company is not barred, nor precluded, from setting off the amount in the first suit. The second objection to the right of the Company is this. It is said the Company's claim is barred by their having obtained a decree in suit No. 699 of 1879, against Shoshee Coomar Gangooly. It is admitted that the aggregate sum for which the decree was obtained in that suit, is the same as is claimed in this suit, and made up of the same items. On these facts it is contended, though recovery was not obtained of the whole amount claimed, that the decree is a bar to the present suit. In support of this contention, *Kendal v. Hamilton* (L. R., 4 P. C., 504) and *Hemendro Coomar Mullick v. Rojendrolall Moonshee* (I. L. R., 3 Cal.,

\*[Art. 89 :—

Description of suit.	Period of limitation.	Time from which period begins to run.
By a principal against his agent for moveable property received by the latter and not accounted for.	Three years	When the account is, during the continuance of the agency, demanded and refused, or where no such demand is made, when the agency terminates.]

353; s. c., 1 C. L. R., 488) were cited. But they do not bear on this case. In those cases the liability was a joint liability, and the recovery was against one of the persons jointly liable. There is no trace in this case of a joint liability, the claim against Shoshee Coomar Gangooly was as banian, and the claim [633] against Lawless is as manager, and, as such, liable for sums which came to his hands. The liability was not joint, they are based on distinct contracts, one by Shoshee Coomar Gangooly as banian, and the other by Lawless as manager. The liability is distinct. The fact is, that money came to Shoshee Coomar Gangooly as banian, and the same money came to Lawless as manager. There is no ground for saying that the recovery of a decree in the former suit is a bar to the present suit, or to the Company's right of set-off. There will have to be an account taken of the moneys which come to Lawless's hands, and the hearing of the two suits will be reserved till after the account has been taken.

Attorneys for the Company : Messrs. *Roberts, Morgan, & Co.*

Attorney for Lawless : Mr. *Chick*.

#### NOTES.

#### [PRINCIPAL AND AGENT—AGENT'S DUTY TO ACCOUNT—

"The agent is not only bound to account but must be ready to explain the account and produce the vouchers : *Shibchandra Roy v. Chandra Narain Mukerjee* (1905) 32 Cal. 719= 1 C. L. J. 23.]

7 Cal. 633

#### FULL BENCH.

*The 17th June, 1881.*

#### PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE PONTIFEX,  
MR. JUSTICE MORRIS, MR. JUSTICE MITTER, AND MR. JUSTICE McDONELL.

Chuni Singh and others.....Plaintiffs

*versus*

Hera Mahto and others.....Defendants.\*

*Arrears of Rent—Enhancement—Notices of Enhancement—Beng. Act VIII of 1869, s. 14.*

*Per* GARTH, C. J., PONTIFEX and MITTER, JJ. (MORRIS and McDONELL, JJ. dissenting).—A suit for arrears of rent at an enhanced rate brought by all the shareholders will lie, notice under s. 14 of Beng. Act VIII of 1869 having been issued at the instance of some of the persons entitled to the rent.

THIS case was referred to a Full Bench by MITTER and MACLEAN, JJ., on the 4th May 1881, with the following opinion :—

MACLEAN, J.—The plaintiffs in this suit, who are the appellants before us, are the proprietors of Mouza Kazibigha, in [634] which the defendants cultivate 16 bighas 11 biswas 6 dhurs. The plaint alleges that this land was formerly held on a bhowli rent, then a cash rent was paid for it for some time, and now a bhowli rent has been reverted to. The claim is for a bhowli rent for 1285 F., and for a kabuliat for five years from 1286 F. The rent demanded is at the rate of nine-sixteenths of the produce, valued at Rs. 106-13-6, for the year

\* Full Bench Reference in appeal from Appellate Decrees, Nos. 1820 to 1823 of 1879 made by Mr. Justice MITTER and Mr. Justice MACLEAN, dated the 4th May 1881.

1285, and it is stated in the plaint that a notice was served on the defendants, under s. 14, Beng. Act VIII of 1869, calling on them to execute a kabuliat to pay nine-sixteenths of the produce as enhanced rent.

The defendants plead that the notice served upon them was not according to law, inasmuch as it was served on the application of some of the proprietors only,—viz., 14 annas 15 cowri 18 bowri 1 bhowri shareholders. They also plead that cash rent cannot be converted into produce rent, and that by a decision dated 22nd December 1875, their rent was declared to be payable in cash. Exemption from enhancement is claimed.

In the first Court it was held, that the suit was bad so far as it referred to the claim for enhanced rent by these proprietors, who had not caused the notice of enhancement to be served. The other issues, save as to the quantity of lands in the defendants' occupancy, to be decided in favour of the plaintiffs.

The lower Appellate Court dismissed the suit, on the ground that all the proprietors had not joined in causing the notice of enhancement to be served, which was therefore defective.

The only question submitted for our consideration is, whether a suit by all the proprietors, based upon a notice of enhancement issued at the instance of some of them, will lie.

The Full Bench decision in *Guni Mahomed v. Moran* (I. L. R., 4 Cal. 96) has been held by the lower Appellate Court to be in point; but that case, when examined, is really no authority in the present case. There the suit was by the izardar of a share of a village or estate entitled to receive his share of the rent separately. The learned Judge of this Court, who decided the case in special appeal, held, that it was not necessary for the plaintiff to make the persons entitled to the remainder of the rent parties to the [635] suit. On appeal under the Letters Patent, the question referred to the Full Bench was, whether the plaintiff "could sue to enhance the rent of that share separately without joining the other co-sharers of the tenure," and the Full Bench answered that question in the negative.

That case, therefore, is authority for the proposition that a co-sharer cannot enhance his share of a tenant's rent, unless he makes the other persons entitled to the rest the real parties; and if it went no further than that, it would not be authority for the proposition that one co-sharer could not enhance his share if he did make other co-sharers parties. But there is another passage in the judgment which seems to meet this proposition.

Towards the close of their judgment, the learned Judges remarked:—"The Rent Law, in our opinion, does not contemplate the enhancement of a part of an entire rent; and the enhancement of the rent of a separate share is inconsistent with the continuance of the lease of the entire tenure." There is, however, direct authority—*Troylochhotaran Chowdhry v. Muthoorra Mohun Dey* (W. R., 1864, Act X Rul., 41) and *Ram Lochun Dutt v. Petamber Paul* (W. R., 1864, Act X Rul., 41, III)—for a contrary view, which does not seem to have been discussed before the Full Bench. For my part I should be glad to have the question reconsidered.

Premising that the rent was originally payable in one sum to the co-sharers jointly, but that by arrangement between the co-sharers on the one hand and the tenant on the other, the latter has been in the habit of paying a portion of the rent to each co-sharer in respect of his particular share, we have abundant authority for the right of each co-sharer to realise his share by suit, subject to the rule that he must join his co-sharers either as plaintiffs or



defendants; and it is difficult to see why he is to be confined to suing for rent, but prohibited from suing for rent at enhanced rates. Suppose the tenant agrees to pay enhanced rent to one co-sharer, but refuses to do so to the rest, the latter would surely be allowed to claim the same increase as their more fortunate partners. But they must proceed according to law, and serve a notice of [636] enhancement—*Salgram Opadhya v. Maharaja Moheshur Bux Sing* (W. R., 1864, Act X Rul., 94). It may be said that the tenant has agreed to vary the rent of his tenure in favour of one of his landlords, but why may not one of his landlords compel him to vary it? This raises the question of the interpretation of the words "person to whom the rent is payable" in s. 14, Beng. Act VIII of 1869. If these words mean "all the persons to whom the entire rent is payable," then the authority last quoted is bad law. The co-sharer to whom the tenant has agreed to pay enhanced rent could not be compelled to join in a notice, the other co-sharers would not be "all the persons to whom the rent is payable." I must say that on the premises I do not see why a co-sharer should not sue for enhanced rent of a share conditional on his causing a notice for enhancement of the entire rent to be served through the Collector.

The object of the notice is to give the tenant the opportunity of surrendering his land, if unwilling to agree to enhancement, and he can do that just as well on a notice by some of his landlords as on a notice by all of them. If he elects to contest the liability of his rent to enhancement, he can do so on better terms, if all his landlords are arrayed against him than if some of them are neutral. In fact, all that is necessary for the suit is, that notice shall have been served upon him, that he will, for the ensuing year, be liable to pay more rent than in the previous year. If on such a notice by one co-sharer, a suit will lie for a share of the enhanced rent, all co-sharers being parties, and separate payment being proved or admitted, *a fortiori*, a suit can be brought by all the co-sharers for the whole enhanced rent.

But this view is opposed to the views of the Judges in *Kashee Kishore Roy v. Ahip Mundul* (I. L. R., 6 Cal., 149). PRINSEP, J., expresses himself thus:—"One co-sharer would not be competent to issue a notice of enhancement of the rent of the entire tenure, nor could he, under the terms of the judgment of the Full Bench, issue notice of enhancement of the rent due on his own particular share," &c. The first of these propositions is opposed to the authority I have quoted, which the learned Judge himself would have followed if [637] he had not felt bound by the Full Bench decision. MORRIS, J., remarks, that "the notice of enhancement prescribed by the Act is defective if it be not served on the application of all the co-sharers in the tenure." And again—"But inasmuch as the readjustment of the rent to which he agrees does disturb the terms on which the tenant holds the tenure equally from him and his co-sharer, it is necessary, before any such readjustment of rent can be made, that he, as well as his co-sharer, should sign the notice and apply to have it served upon the tenant."

It is however to be remarked, that that suit was a suit for enhanced rent of a share on a notice in which the plaintiff only claimed the rate due on his own share, calculated on what would be due on the entire tenure. It differs therefore somewhat from the suit under appeal, the notice in which referred to the rent of the entire tenure, and not to a portion of it.

Nevertheless, the principle upon which the judgment proceeds is applicable to suits for the entire rent, upon notice of enhancement of the entire rent, and in this principle I do not concur. I think it should therefore be referred to a Full Bench for decision:—(i) Whether a suit can be brought by a co-sharer in actual separate receipt of a share of the rent for enhanced rent of



his share, notice having been served in respect of the whole rent, and all the co-sharers being made parties to the suit? and (ii) Whether a suit for arrears of rent at enhanced rate brought by all the shareholders will lie, notice under s. 14, Beng. Act VIII of 1869, having been issued at the instance of some of the persons entitled to the rent?

MITTER, J.—I agree to his order of reference to a Full Bench.

Baboo Mohesh Chunder Chowdry and Baboo Chunder Madhub Ghose for the Appellants.

Baboo Omarendronath Chatterjee for the Respondents.

The following **Judgments** were delivered :—

**Garth, C. J.**—(PONTIFEX and MITTER, JJ., *concurring*).—I think that the point referred to us in the first question does not arise upon the appeal.

[638] *Second*.—The second question, in my opinion, should be answered in the affirmative. The practice hitherto, so far as we have been able to ascertain it, seems to have been to treat a notice to enhance as insufficient, unless it has been signed by or on behalf of all the co-sharers. I believe that this is the first occasion on which the question has been referred to a Full Bench; and I therefore consider myself at liberty to decide it according to what appears to me the reasonable construction of s. 14 of the Rent Law.

The right to enhance rent from time to time, as occasion arises, is, in my opinion, one of those incidents of a contract of tenancy which the landlords or any of them have, as much right to enforce, as a covenant to pay the road-cess, or to cultivate the land in any particular manner. It is true that all the co-sharers *ought* to join in bringing any suit of the kind. But suppose that some of them refuse to join as plaintiffs. Section 32 of the Civil Procedure Code provides, that no one shall be made a plaintiff in a suit against his will. In that case are those who desire to bring a suit to be deprived of their rights, because the others will not join as plaintiffs?

The reason of their refusing to join may be, that they are colluding with or influenced in some way by the tenant. Are these recusants to be allowed to deprive their co-sharers of the means of enforcing their just dues, or on the other hand to drive them to the expensive, tedious, and inconvenient alternative of a butwara? I think not. The simple and obvious remedy for such a state of things is to allow the co-sharers who wish to sue to do so, but making the recusant co-sharers defendants in the suit. The Court will thus have all the parties before it and the means of doing justice between them. If the claim made by the plaintiffs is unfounded, they will probably be made to pay the costs, not only of the tenants, but of their co-sharer defendants. If, on the other hand, their claim is a just one, and the conduct of the co-sharer defendants has been unreasonable, the latter would probably be made to pay the plaintiffs' costs. The Court would have no difficulty in fairly adjusting, in a suit so framed, the rights of all the parties.

[639] Then is there any difference in point of principle between a suit brought to enhance the rent, and a suit brought to enforce any other right of the landlords? It appears to me, that the rule which applies to bringing a suit, is applicable also to giving the notice necessary to the suit. The notice is to be given by "the person in receipt of the rent," which is the phrase used generally in the Rent Law as signifying the landlord or landlords; and I think that those persons who are entitled to sue as landlords have also the right under this section to give the necessary previous notice. No mischief, as it

seems to me, can follow from this construction ; whereas the contrary construction might lead to great injustice.

I think therefore that the decision of the lower Appellate Court should be reversed, and that the case should be remanded to that Court to be tried upon its merits. The costs in this and in the lower Appellate Court will abide the result.

The same decree will be made in the analogous cases.

**Morris, J.**—In my opinion, both the questions which form the subject of this reference should be answered in the negative.

The real question, which underlies both the questions of the reference, appears to be, whether a notice of enhancement of rent, served by order of the Collector on the application of a proprietor or proprietors of a fractional share of the land held by the tenant cultivator, whose rent is sought to be enhanced, is a good notice under the Rent Law, provided that subsequently all the proprietors join in a suit brought to enforce payment of the rent at the rate specified in the notice. If the notice is a good one, then clearly a suit, brought by all the proprietors on the basis of such notice, would lie, though it by no means follows that a co-sharer in a joint undivided estate, who can bring a suit for his fractional share of the gross stipulated rent on the strength of what the Full Bench, in the case of *Guni Mahomed v. Moran* ( I. L. R., 4 Cal., 96), describe as a private arrangement between himself, his co-sharers, and the tenant, is competent [640] to bring a suit for rent at an enhanced rate in the proportion due upon his share when the payment of rent at such enhanced rate forms no part of that 'arrangement.' The notice necessarily conveys an intimation to the tenant that the terms on which he has hitherto paid the rent, and held his land, are to be altered ; and that he must accept a potta, or, as I understand it, a new contract of lease, and give a counterpart kabuliat on the terms specified, or relinquish his tenure. But if this is so, and the tenant agrees to the terms proposed, can the part-owner, who has served the notice, act independently of his co-sharers, and grant a potta and take a kabuliat accordingly ? Under the Full Bench decision just referred to, he is not competent to do so, because, to use the language of the Full Bench, the notice and the potta and kabuliat based upon it are " obviously inconsistent with the continued existence of the original lease of the tenure." This presents one strong objection to the validity of such a notice.

Then again the Rent Act, s. 14, requires that " the notice shall be served by order of the Collector on the application of the person to whom the rent is payable." When more persons than one are entitled to receive the rent, then " the person to whom the rent is payable" must signify all such persons. This is the natural meaning which these words convey, and this is, as it seems to me, the meaning which they are intended to convey wherever they are used throughout the Act. Take the case of a potta, which, under s. 2 " every ryot is entitled to receive from the person to whom the rent of the land held or cultivated by him is payable." It need hardly be said that a potta which purports to give in lease a certain property, would be an incomplete instrument if signed by a proprietor possessed of only a partial interest therein, and not authorized to sign on behalf of the other proprietors.

The right to measure is given (ss. 25 and 38) " to every proprietor of an estate or tenure or other person in receipt of the rents of an estate or tenure." Repeated decisions of this Court have held that this right cannot be exercised at the instance of a proprietor of a fractional share of a joint

[641] undivided estate. The application to the Civil Court, or to the Collector must be made by all the proprietors. See *Santiram Panja v. Bycunt Panja* (10 B. L. R. 397), *Moolook Chand Mundul v. Modhoosoodun Bachusputty* (16 W. R., 126), and *Shoorender Mohun Roy v. Bhuggobut Churn Gungopadhya* (18 W. R., 382).

When a tenant has been illegally ejected, and under s. 27 seeks to recover the occupancy of his land "from the person entitled to receive rent for the same," he would, in the event of there being more persons than one entitled to receive the rent, necessarily frame his suit against all, and not against one only.

So a deposit received by a Court under s. 47 would not be paid to a shareholder as "the person in receipt of the rent of the land" of the tenant depositor, unless he showed his authority from the other sharers to receive the money.

Nor would a suit under s. 53, for ejectment of a cultivator not having a right of occupancy, lie on the part of a person in receipt of only a fractional share of the rent.

The law in the matter of distraint also supports this view. By s. 68 the power of distraint is limited to "the zamindar or other person entitled to receive the rent of the land immediately from the actual cultivator." But as a sharer in a joint estate of the class referred to in the preceding section (64) is entitled to receive his quota of the rent direct from the cultivator, an express proviso is made that he shall not exercise this power of distraint independently of his co-sharers.

It appears to me that the questions of this reference, bearing on the relation of landlord and tenant in the matter of enhancement of rent, cannot be determined by considerations arising out of any general or abstract rights of property, for it must be remembered that rights incidental to property in one country are not necessarily rights incidental to property in another country. We see that, throughout the Rent Act, the Legislature treat the various persons who compose the proprietary body in a joint undivided estate as one person. There is supposed to be a *mal gutcheri* or other common place "where rents are usually payable," at which receipts are to be given [642] and moneys are to be tendered (see s. 46 and sched. A), whence, in fact, the administration of the joint estate proceeds, and whence consequently all notices of enhancement of rent should issue. This is only in accordance with the joint family system which prevails in the country, and gives to the *kurta*, or head of the family, the entire responsibility of management. In a joint undivided estate, the *kurta* of the family, or a joint manager, is sole administrator; and if by reason of family dissension, or the intrusion of a stranger, any shareholder desires to deal separately with his own share and manage independently, he can follow what is the recognized custom of the country, and obtain a partition of his share. This course is, no doubt, somewhat tedious and oftentimes expensive; but it is the course which both law and custom sanction, and which a purchaser of a share voluntarily accepts as one of the incidents of a joint undivided estate. Nor is it an argument that as one of several joint tenants has a right to contest his liability to pay the enhanced rent demanded of him, so a part-proprietor of a joint undivided estate has a corresponding right to enhance the rent. The answer to this is, that enhancement of rent, where it is not accepted without demur by the *ryot*, is a right which a proprietor can only exercise subject to the restrictions imposed by s. 14 of the Rent Act. That section, as it affects prejudicially the interest of the *ryot*, ought, in my opinion, to be construed strictly. The *ryot* has a right to say that he shall be assured in the uninterrupted possession and

enjoyment of his holding at the rent hitherto paid by him, unless and until all the persons entitled to receive the rent from him combine to serve him with a notice specifying the grounds on which they claim higher rent, and are prepared to establish those grounds in a Court of Law. The succeeding section (15) enacts, that any under-tenant or ryot on whom such notice has been served, may contest his liability. Therefore, if several tenants who hold land jointly are served with the notice, the law expressly allows one or all of them (though it is hardly to be supposed that all would not join if there was good ground for so doing) to contest the enhancement. In this matter of enhancement [643] therefore joint proprietors and joint tenants are not placed upon an equal footing so far as their rights in the property are concerned under the law. If a ryot can be served with notice of enhancement of rent at the instance of a part-proprietor of the land held by him, it is immaterial for the purposes of this argument, how small may be the fractional share which such part-proprietor possesses. Any proprietor, however minute his interest may be, may set the law in motion and disturb pre-existing arrangements without the previous consent of his co-sharers. And if the first question be answered in the affirmative,—that is, if it be sufficient for a part-owner, after issue of a general notice, to make his co-sharers parties as defendants to an enhancement suit, then a tenant is always liable to be exposed to the caprices of individual shareholders, and perhaps to prolonged litigation, for I can see nothing to prevent year after year a fresh suit for enhancement being brought by each separate shareholder. The plaintiff in each suit would take care to remedy the defects in proof of his predecessor, and so the tenant would be forced eventually to succumb.

But apart from this possible abuse of separate notice on their own account by individual shareholders, I think it is not an unimportant fact, that, so far as my experience extends, and I am given to understand so far as the experience of my brother Civilian Judges of this Court extends, the custom of the country and of the Courts in the matter of notices of enhancement of rent is to issue them at the instance of *all* the proprietors, and not of a part-proprietor only. This custom appears to me to be in conformity both with the letter and the spirit of the law as it now stands, and I think, therefore, that it should be maintained.

**McDonell, J.**—I am of opinion that both the questions should be answered in the negative. I concur in the view of the law taken by Mr. Justice MORRIS and the judgment just delivered by him.

*Case remanded.*

#### NOTES.

#### [CO-SHARERS—BENGAL TENANCY ACT—RIGHT TO SUE—

Though the Full Bench did not decide the question whether a suit could be brought by a co-sharer for enhanced rent of his share of rent after serving notice, it was held in *Bidhee Bushan Basu v. Kamaraddi Mandal* (1883) 9 Cal. 864 that a suit for enhanced rent may be brought when all the co-sharers are either joined as plaintiffs or defendants to the suit. But it was held in *Kalichandra Singh v. Raj Kishen* (1885) 11 Cal. 615 that a suit for his portion of enhanced rent could not be brought by a co-sharer even if the other co-sharers are made defendants to the suit, unless he had asked them to join as plaintiffs and they have refused. Though an application for measurement under sec. 38 of Act. VIII of 1869 could be made by one of the co-sharers when all the other co-sharers are parties to the suit, *Abdool Hossein v. Lall Chand* (1888) 10 Cal. 36 application under s. 158 of Bengal Tenancy Act should be made by all the co-sharers: *Mohib Ali alias Dummey v. Ameer Rai* (1890) 17 Cal. 538.]

[644] ORIGINAL CIVIL.

The 19th August, 1881.

PRESENT :

MR. JUSTICE WILSON.

Lokenath Mullick and others.....Plaintiffs

versus

Odoychurn Mullick and others.....Defendants.

*Administration Suit—Supplemental Suit—Debts due by Appointed Managing Members under the Will of the Testator—Limitation.*

*A* and *B*, two of the sons of one *N*, had been declared, in a suit brought to administer *N*'s estate, to be indebted to the estate ; it was also declared in such suit that a certain sum of money should be set apart for the performance of certain religious ceremonies, and paid into Court.

*A* and *B* died without having satisfied their debt.

In a suit supplemental to the former suit, the descendants of the sons of *N*, amongst whom were the descendants of *A* and *B* claimed to be entitled to their share in the interest on the funds in the hands of the Court, and sought for a division of such accumulation of interest.

*Held*, that, notwithstanding that the debt due from *A* and *B* to the estate was barred, the descendants of *A* and *B* could not be allowed to share in the accumulations of interest in the hands of the Court without first satisfying the debt due by their ancestors to the estate.

In the year 1807, a certain suit was brought in the Supreme Court for the administration of the estate of one Nemyechand Mullick ; and in that suit, on the 11th July 1808, a decree was passed, declaring that certain testamentary papers executed by the said Nemyechand Mullick were valid ; that his estate was joint and undivided ; that his eight sons were entitled to the estate ; Ramrutton and one Ramgopal being entitled to the management of the estate, and certain enquiries were ordered to be made as to what sums would be required for the performance, in a suitable manner, of the several acts and ceremonies directed to be performed by the testator Nemyechand Mullick, and a direction was given to the Master to take an account.

By another decree, dated the 23rd August 1823, a partition of the joint undivided property was ordered to be carried out, and, amongst other things, it was ordered, that the Master should [645] take an account of the rents and profits of the moveable property received by Ramgopal and Ramrutton from the date of the death of Nemyechand.

By another decree in the same suit, dated the 6th of April 1837, certain sums of money were ordered to be set apart for the performance of the acts, works, and ceremonies mentioned in the said testamentary papers ; and a sum of Rs. 2,07,226 was also ordered to be paid out to the surviving sons of Nemyechand Mullick (excepting the said Ramrutton) as trustees for the due performance of the said ceremonies ; but owing to certain disagreements between the parties this sum remained in Court, and the ceremonies remained unperformed. It was further declared by the said last-mentioned decree, that there was in the hands of the said Ramrutton and the heirs of the said Ramgopal a sum of Rs. 33,65,018 belonging to the estate of the said Nemyechand Mullick, and a further sum of Rs. 9,95,887 in Court, which sums were divisible between the

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surviving sons and the representatives of the then deceased sons, and were ordered to be paid to them by the said Ramrutton and the representatives of the said Ramgopal, and in default of such payment being made by the representatives of Ramgopal, that the Master should sell the immoveable estate of the said Ramgopal. Default was made, and the estate of Ramgopal was sold. Certain parts\* of these sums were paid as directed, but a balance due from the estate of Ramgopal and from Ramrutton, amounting to Rs. 20,00,000, still remained unpaid.

In the year 1880 the plaintiffs, who were the descendants of one of the eight sons of Nemyechand Mullick, instituted this suit against the representatives of the remaining seven sons of Nemyechand, asking that their suit might be taken as supplemental to the former suit (inasmuch as several members of the family who were defendants had since died, and the suit had not been revived against their representatives), and that they might be entitled to the benefit of the decrees already passed.

That the sums of money now in Court to the credit of the cause might be paid out, and distributed after due performance of the ceremonies, &c., and that the shares of such moneys [646] receivable by the representatives of Ramrutton and Ramgopal might be applied in payment of the sums due by their estates to the estate of Nemyechand, and that a scheme might be framed by the Court for the performance of the ceremonies.

The defendants, who were the representatives other than the plaintiffs, of the other sons of Nemyechand, put in various written statements: Odoychurn, the sole surviving son of Ramgopal, contending that, under the decree of the 6th of April 1837, his father's estate was sold by the Court and the proceeds applied to the debt due by his father to the estate of Nemyechand, and that, therefore, further execution of that decree against his estate was barred by limitation; and that, on the death of one of the descendants of Nemyechand in October 1875, the suit then subsisting abated, and was not revived against his representatives, and that, therefore, he (Odoychurn) could not now be deprived of his right to participate in the accumulation in Court.

Toolsee Doss, who was the representative of Ramrutton's estate, put in the same defence.

Mr. Jackson (with him Mr. Bonnerjee and Mr. Ameer Ali) for the Plaintiffs.

Mr. Stokoe (with him Mr. Hyde) for Odoychurn.

Mr. Collinson for Toolsee Doss.

Mr. Branson, Mr. T. A. Apcar, Mr. Handley, Mr. Mitra, Mr. White, Mr. Trevelyan, Mr. Agnew, Mr. C. C. Dutt, Mr. Beeby, Mr. Chatterjee and Mr. K. Mitter appeared for the other Defendants.

**Wilson, J.**—This is a suit in which the plaintiffs ask to revive certain causes which have abated, and ask that the present suit may be taken as supplemental to the said causes, and that the plaintiffs may be declared entitled to the benefit of the various decrees and orders made therein from time to time.

The original suit was instituted in the Supreme Court on the 26th October 1807, and then there have been a series of [647] other suits by which the older suit has been revived from time to time. The original suit was for the administration of the estate of Nemyechand Mullick, and the parties to it were his grandsons, of whom two were defendants.

The parties to the present suit all claim under one or other of those grandsons. In 1808, a decree was made, under which certain testamentary papers were established and the grandsons declared entitled to shares, &c. Another decree was made in 1837, under which certain moneys were set apart for certain

purposes which are said to have been satisfied, and it was declared that there were then in the hands of Ramgopal and Ramrutton Mullick and in those of the heirs of, &c., over thirty lacs, and it was ordered that Ramrutton should pay the balance after deduction of certain sums to be retained in diminution of the debt. It is further admitted that the debt was reduced by the sale by the Master of the late Supreme Court of the immoveable estate of Ramgopal Mullick.

There is now a sum in Court arising from accumulations of interest on the sum set apart for the performance of certain acts, works, and ceremonies which were to be performed; and the specific object of the present suit is a division of such accumulations. The only serious controversy is, whether the sons and representatives of Ramgopal and Ramrutton should share without satisfying the debt declared to be due from their respective ancestors. They cannot in my judgment receive any shares. It is held in England that an executor is justified in retaining a share, though the debt is barred by limitation—*Courtenay v. Williams* (3 Hare, 539), and the series of cases collected in L. R., 20 Eq., 644, establish this. There is no difference between the state of the law in England and the state of the law here, see *Mohesh Pal v. Bussunt Kumaree* (I. L. R., 6 Cal., 340). Executors would be justified in withholding payment of a residue distributable to the two estates till the debt is satisfied. It is clear, what would be the duty of executors is the duty of the Court. It follows, therefore, that the representatives of Ramgopal and Ramrutton are not entitled to share, and their shares must be divided amongst the other parties entitled. The decree will declare [648] there must be this division, and that the suit is supplemental to the old one.

There must be an enquiry whether trusts 1 to 9 have been carried out, and what sum is divisible. There will also be an enquiry as to the devolution of the estates since the decree of 1837 to ascertain who are now entitled to share. This enquiry may be assisted by investigation of the records and supplemented by affidavit. The costs of suit will be reserved.

Attorneys for the Plaintiffs: Messrs. *Symhoe & Co.*

Attorney for the defendants Odoychurn and Toolsee Doss: Mr. *Palologus*.

Attorneys for the other defendants: Messrs. *Beeby and Rutter*, Mr. *H. H. Remfry*, Baboo *Gonesh Chunder Chunder*, Messrs. *Watkins and Watkins*, Baboo *N. C. Bural*, Baboo *U. L. Bose*, Baboo *B. C. Bonnerjee*, and Baboo *W. C. Bonnerjee*.

The 5th April, 1881.

PRESENT :

SIR B. PEACOCK, SIR M. E. SMITH, SIR R. P. COLLIER, AND SIR R. COUCH.

Dulichand.....Defendant

versus

Ramkishen Singh and others.....Plaintiffs.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

*Money paid, but not due, and paid under compulsion.*

A mortgagee of two separate properties became by purchase the owner of the equity of redemption of one of them, and of this property the value was so proportioned to his payments that the mortgage-debt was in effect satisfied. This mortgagee, however, obtained a decree and order in execution for the sale of the other property, on which his mortgage was the second. Of the latter property, the plaintiffs, who also represented the first mortgagee, had become purchasers, and they filed objections to the sale. These were disallowed, and they thereupon paid into Court money sufficient to satisfy the decree in order to prevent the sale.

[642] *Held*, that this was not a voluntary payment, nor a payment of money equitably due ; but one made under compulsion of law, i. e., under pressure of the execution-proceedings. And *held*, that this might be recovered in a suit for a money-decree, the remedy not being confined to the execution-proceedings.

APPEAL from a decree of the High Court (July 20th 1878), confirming a decree of the Judge of Patna (July 29th, 1876).

The respondents sued to obtain a refund of Rs. 78,393, with interest, from the appellant. They had paid this sum to him in order to prevent the sale, in execution of a decree which he, as mortgagee, had obtained against a third party, of lands forming a mouza, in which the plaintiffs had an interest as purchasers. The claim of the latter (preferred under ss. 278, 279\* of the Code of Civil Procedure) having been disallowed, they paid into Court an amount sufficient to satisfy the decree. The question now raised on this appeal was whether the suit would lie.

Mr. *Leth*, Q. C., and Mr. *Arathoon* for the Appellant.

Mr. *Cowie*, Q. C., and Mr. *Doyne* for the Respondents.

The facts, as well as the orders of the Courts in India, are stated in their Lordships' Judgment, which was delivered by

**Sir M. E. Smith.**—This is a suit brought by the respondents, Ramkishen and others, against Dulichand, the appellant, to recover back a sum of Rs. 78,393, which the respondents had paid to the appellant to prevent the sale of a mouza called Korina, which had been attached and put up for sale in execution of a decree obtained by the appellant against one Neoghi. The suit claimed, in the alternative, that the amount of Rs. 78,393 should be apportioned between Korina and another mouza of the name of Nandan. The point, upon the facts found in the Courts below, is a short and plain one, but in order to make it intelligible, it is necessary to refer to the transactions which took place between the parties, though not at great length.

Evidence to be adduced by claimant.

\*[Sec. 279 :—The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached.]



Ram Button Neoghi, a zamindar, was the owner of several mehals, and amongst others of two mouzas called Korina and [650] Nandan. These mouzas were mortgaged in the way which will be hereafter described. The first mortgage which appears is of the date of the 3rd July 1865, and is a mortgage of Korina made by Neoghi to the Land Mortgage Bank of India, to secure a lakh of rupees. In January 1867, Neoghi borrowed from one Lutf Ali Khan a sum of Rs. 10,000, and gave as security a mortgage-bond on certain mouzas, not including either Korina or Nandan. It is only necessary to refer to this mortgage-bond for the purpose of explaining the next mortgage transaction, and also of explaining a reference which is made in the course of the proceedings to the debt due to Lutf Ali Khan. It appears that Lutf Ali Khan obtained a decree upon his bond for Rs. 19,416. He did not, apparently, attach the properties included in his mortgage-bond, but he attached, and was about to sell, Nandan. In order to prevent the sale of Nandan, on the 8th of January 1870, Neoghi mortgaged to the appellant, with several other mouzas not material to be mentioned, the two mouzas, Korina and Nandan, to secure Rs. 38,000. The mortgage of Korina was a second mortgage, it being subject to the prior mortgage to the bank, that of Nandan was apparently a first mortgage. The next transaction is a mortgage by Neoghi of Nandan and other mouzas to the respondents for Rs. 5,500. The bank brought a suit on their mortgage, and on the 17th April 1871, they obtained a decree for the sale of Korina and other mouzas to realize the debt due to them. On the 29th July 1872, Korina was attached by the bank, and also by another decree-holder, creditor, one Chuttun Singh. On the 16th December 1872, Mouza Korina was sold under Chuttun Singh's decree, but subject, to the bank's mortgage, to the respondents for Rs. 115. Shortly after the sale, the respondents paid into Court Rs. 58,719 to satisfy the mortgage and decree of the bank against Korina, and in the following October (1873) were put into possession of that mouza. They, therefore, were the purchasers of Neoghi's interest in Korina, which had been sold by Chuttun Singh, and paid off the prior mortgage to the bank, and the amount so paid is found by the Courts below to have exceeded the value of Korina.

[651] Concurrently with these proceedings affecting Korina, others were going on with regard to Nandan. The respondents, on the 29th of February 1872, obtained a decree in a suit which they had brought on their mortgage of Nandan, and attached it and other mouzas. On the 5th August 1872, the appellant intervened in the execution-proceedings in this suit. He gave notice of his mortgage, and required that it should be notified at the time of the sale; and it was so notified. The sale was made subject to that notification, and of course subject to the mortgage to the appellant, upon which he at that time claimed that a sum of Rs. 1,51,239 was due. It is plain what the effect of such a notification upon the sale must have been, and the biddings were only for the equity of redemption, which was of small value. The sale took place in August 1872, and the purchaser was one Dindyal, the appellant's brother, the price being Rs. 11,710. A certificate of sale and possession were obtained on the 11th September 1873. It has been found by both Courts that Dindyal purchased benami for the appellant. The appellant, therefore, having given notice of his mortgage, purchased the equity of redemption subject to his own debt, and thus became both owner of the equity of redemption and mortgagee. In that state of things it became material to enquire what was the value of Nandan. It has been found by the Courts that its value, beyond the purchase-money, exceeded the amount due upon the appellant's mortgage, and was sufficient to cover not only that amount,

but the Rs. 19,416 due to Lutf Ali Khan, if that sum was really due to him. Under these circumstances, it must be taken that the mortgage-debt was satisfied by the purchase of Nandan and the value of that estate. The appellant, having thus obtained the full amount of his debt, could no longer avail himself of any other part of his security. The mortgage was only a security for the debt, and when it was satisfied, there was an end of any right to resort to the further securities he held. What gives occasion to the present action are the circumstances which will now be stated.

On the 1st of July 1872, the appellant sued Neoghi on his mortgage for principal and interest. The claim he then made [682] was the same he had notified in the suit brought by the respondents as mortgagees of Nandan, to which reference has been already made, namely, Rs. 1,51,239. It appears that sum included penal interest, and the Courts reduced it to a sum of Rs. 78,393. In June 1873 he obtained a decree, and on the 7th January 1874 an order to attach Korina. At the time he obtained that order he had become the purchaser of Nandan under the circumstances which have been stated; and his obtaining it after his mortgage-debt had been thus virtually satisfied was clearly inequitable. Korina being attached, the respondents intervened, as the purchasers of that mouza, and as representing the first mortgagees of it, the bank, and filed objections to the attachment and sale. The respondents in this way made the strongest protest that they could against the sale, but their objections did not prevail. The Judge of Patna disallowed them, and the High Court, upon appeal affirmed the decision of the Judge, stating that the petitioner must be left to his remedy, if any, in a regular suit. The result was, that the sale of Korina was ordered to take place; and to prevent that sale, and to protect the property which they had purchased, the respondents paid into Court the sum of Rs. 78,393 to satisfy the appellant's decree. They at once gave notice in writing that they should seek a refunding of that money in due course of law, and the present suit was brought for that purpose.

It is only necessary to refer shortly to the judgments. Both the Courts have concurred in holding that the plaintiff is entitled to recover. Certain facts are found clearly and succinctly by the Judge of the District Court. His findings are these: "I find, therefore, that the following facts are established: (i) that Mouzas Korina and Nandan are both made subject to a lien of Rs. 78,393 by the mortgage of January 1870"—that is, the appellant's mortgage; "(ii) that plaintiffs have, as owners of Mouza Korina, paid off a lien of a date prior to 1870 on Mouza Korina,"—that is, the bank's mortgage,—“exceeding in amount the estimated value of Mouza Korina as estimated by defendant himself; (iii) that the whole amount of the lien of Rs. 78,393, therefore, falls upon Mouza [683] Nandan, if its value is equal to the amount of the lien, (iv) that the value of Mouza Nandan is equal to the amount of such lien, even if Rs. 18,393 paid by the defendant be deducted”—that is, the amount said to have been paid to Lutf Ali; "that plaintiffs, having paid this lien, are entitled to recover the amount so paid from the auction-purchaser of Mouza Nandan; that defendant No. 1 is the auction-purchaser of Mouza Nandan. It has been shown that at the time that this payment of Rs. 78,393 was made by the respondents to the appellant, the debt had been satisfied by his purchase of Nandan under the circumstances above stated. He has, therefore, received it twice over, and it is obvious that, in such a case, it is inequitable that he should hold the money paid to him, under compulsion, by the respondents. It is to be observed that the appellant had only a second mortgage upon Korina, but in the view their Lordships have taken of the case, it is unnecessary to go into the question of marshalling the securities.

The arguments at the bar were not directed to show that there is any equity upon which the appellant could retain this money ; but the objections taken to the action were that the payment was voluntary, and that the remedy, if any, was in the execution-proceedings. Their Lordships think that there is no pretence for saying that the payment was voluntary. It was made to prevent the sale which would otherwise inevitably have taken place of the mouza which the respondents had purchased, and was made therefore under compulsion of law,—that is, under force of these execution-proceedings. In this country, if the goods of a third person are seized by the Sheriff and are about to be sold as the goods of the defendant, and the true owner pays money to protect his goods and prevent the sale, he may bring an action to recover back the money he has so paid ; it is the compulsion under which they are about to be sold that makes the payment involuntary. See *Valpy and others, assignees of Bate, v. Manley* (1 Common Bench Rep., 594).

It was also objected that the remedy is not the proper one, and that some further proceedings should have been taken in the execution suit ; but none were pointed out by Mr. Ara-[654]thoon which would afford a suitable remedy, or which would preclude such an action as the present.

Their Lordships think the decree of the Judge of Patna is incorrect in declaring that the plaintiffs are entitled to realize the decretal money by auction-sale of Mouza-Nandan ; and that it ought to be amended by striking out that declaration. In the view they take of the case, the decree should be a simple money-decree. On the whole case, they agree with the Courts below, though not altogether on the same grounds, that the plaintiffs are entitled to succeed in the action ; and they will humbly advise Her Majesty, subject to the amendment above indicated, to affirm the decrees appealed from. The appellant must pay the costs of the appeal.

*Appeal dismissed with costs.*

Solicitor for the Appellant : Mr. T. L. Wilson.

Solicitors for the Respondents : Messrs. Barrow & Rogers.

#### NOTES.

#### [MONEY PAID UNDER COMPULSION—RECOVERABLE—

The principle laid down by their Lordships in this case was applied to cases where the purchaser from the judgment-debtor paid money to the decree-holder attaching property after purchase in order to release the property from attachment. (1883) 5 All 400, (1888) 15 Cal. 657, where it was held that the person paying can maintain a suit for refund against the decree-holder. Though the plaintiff might have taken proper proceedings to release the property from attachment, payment is not voluntary : 5 All. 400. The proper remedy in such cases is to claim refund in separate suit and not in execution-proceedings : (1896) 22 Bom. 473. But if the money is paid by a stranger under s. 310 of C P. C. (1882) after sale, suit does not lie to recover the amount from the decree, and this ruling does not apply : (1907) 12 C. W. N. 151. The purchaser paying can claim the amount from the judgment-debtor under s. 69 of the Indian Contract Act. (1894) 22 Cal. 28 (1909) 19 M. L. J. ; 750, where the purchaser of the property from the defendant was held entitled to claim of the defendant the amount paid to the decree-holder in order to avert the sale of the property purchased.]

**The 4th July, 1881.**

**PRESENT :**

**MR. JUSTICE PRINSEP AND MR. JUSTICE FIELD.**

**Degamber Mozumdar and another.....Defendants**

*versus*

**Kallynath Roy.....Plaintiff.\***

*Principal and Agent—Form of Suit for Account—Procedure on taking Accounts—Misjoinder—Limitation—Notice of Objections to Decree by Respondent—Accounts of Joint Property—Civil Procedure Code (Act X of 1877), ss. 250, 395, and 396; sched. v, Form 157—Limitation Act (XV of 1877,) s. 5.*

In a suit for an account by a principal against his agent, the plaintiff should ask in his plaint that a proper account may be taken. If the defendant is found liable to render such account for a certain period, the Court should make [655] an interlocutory decree declaring that he is so liable, and direct him to file an account in Court within a fixed period. This decree may be enforced under s. 260 of the Civil Procedure Code. After an account has been filed, the plaintiff should be allowed reasonable time to examine it. If the objections are numerous, the procedure prescribed by ss. 394† and 395‡ and Form 157§ of sched. iv to the Code should be followed. When the accounts have been taken, the Court must determine the

\* Appeal from Appellate Decrees, Nos. 447 and 448 of 1880, against the decree of R. F. Rampini, Esq., Officiating Judge of Dacca, dated the 10th of December 1879, modifying the decree of Baboo Gungachurn Sircar, Subordinate Judge of that district, dated the 20th of November 1878.

Commission to examine  
or adjust accounts.

† [Sec. 394 :—In any suit in which an examination or adjustment of account is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment.

Court to give commis-  
sioner necessary instruc-  
tions.

‡ [Sec. 395 :—The Court shall furnish the commissioner with such part of the proceedings and such detailed instructions as appear necessary, and the instructions shall distinctly specify whether the commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination.

Proceedings of Commis-  
sioner receivable in evi-  
dence.

The proceedings of the commissioner shall be received in evidence in the suit, unless the Court has reason to be dissatisfied with them, in which case the Court shall direct such further inquiry as is requisite.

Power to make further  
inquiry.

§ [Form 157 :—COMMISSION FOR A LOCAL INVESTIGATION, OR TO EXAMINE ACCOUNTS.]

Sections 392 and 395 of the Code of Civil Procedure. In the Court of At

Civil Suit No.

of 18

A. B.

of  
against

C. D. of

To

Whereas it is deemed requisite, for the purposes of this suit, that a commission for should be issued; you are hereby appointed Commissioner for the purpose of

[Process to compel the attendance before you of any witnesses, or for the production of

amount due, and the final decree should be for the payment of this amount, and also, if necessary, for the delivery of any papers, vouchers or other documents which have come into the hands of the agent in the course of his employment.

In a suit for an account against *A* and *B* as agents, the plaintiff asked for an account as against *A* from 1265 (1858) to 1283 (1876), and as against *B* from 1281 (1874) to 1283 (1876).

*Held*, that there had been no misjoinder.

The seven days within which a notice of objections to a decree by a respondent under s. 561\* of the Code must be given, is not a period to which the provisions of paragraph 2 of s. 5† of the Limitation Act can be extended, and the Court has no discretion to extend the period.

Forms of keeping accounts of joint property in the Mofussil considered.

IN these two suits the plaintiffs, who were co-sharers in certain properties, sued the defendants, Degamber Mozumdar and Mohima Chandra Sen, as agents, and they also joined as defendants their other co-sharers, alleging against them fraud and collusion with the abovenamed defendants. As against Degamber Mozumdar and Mohima Chandra Sen the suits were for monies received by them as agents and for an account, as against Degamber Mozumdar from 1265 (1858) to Pous 1283 (December 1876), and as against Mohima Chandra Sen from Kartick 1281 (October 1874) to Pous 1283 (Dec. 1876). The employment of the defendant Degamber Mozumdar commenced in 1265 (1858), and that of the defendant Mohima Chandra Sen in 1281 (1874). The Subordinate Judge gave the plaintiff a decree for accounts for 1282 (1875) and up to Pous 1283 (December 1876). The District Judge modified this decree and directed that the defendant Degamber Mozumdar should render the accounts directed from 1280 (1873) up to Pous 1283 (December 1876), and that the defendant Mohima Chandra Sen should furnish accounts from Kartic 1280 (Oct. 1873) to Pous 1283 (December 1876.)

Against this decree these defendants appealed, contending among other things that there had been a misjoinder, inasmuch [656] as the accounts asked

any documents which you may desire to examine or inspect, will be issued by this Court on your application.]

A sum of Rs. , being your fee in the above, is herewith forwarded.

Given under my hand and the seal of the Court, this day of 18 .

L. S.

Judge.

\*[Sec. 561 :—Any respondent, though he may not have appealed against any part of the

decree, may upon the hearing not only support the decree on any of the grounds decided against him in the Court below, but take any objection to the decree which he could have taken by way of appeal, provided, he has given to the appellant or his pleader seven days' notice of such objection.

Form of notice, and provisions applicable thereto.

Such objection shall be in the form of a memorandum, and the provisions of section 541, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

†[Sec. 5, para. 2 :—Any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the

appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period.]

for from Degamber extended over a period of more than ten years, while the account asked for from Mohima only extended over a period of two years out of that period. The plaintiff filed a cross-appeal within seven days of the time fixed for hearing the appeal, and put in a petition asking that the cross-appeal might be admitted though filed after time.

*Baboo Rash Behary Ghose and Baboo Jadub Chunder Seal*, for the Appellants.

*Mr. Bell, Baboo Kasi Kant Sen, and Baboo Jagesh Chunder Roy* for the Respondent.

The **Judgment** of the Court (PRINSEP and FIELD, JJ.) was delivered by **Field, J.**—These two appeals will be governed by the same judgment.

In No. 447, Kallynath Roy is the plaintiff, and in No. 448, Futtick Chunder Roy is the plaintiff. These two plaintiffs are co-sharers in certain properties: and they have brought these suits against Degamber Mozumdar and Mohima Chandra Sen, who, they allege, were gomashas, or agents, employed on their behalf in making zamindari collections in the manner customary in the mofussil. The object of these suits is to obtain accounts from these agents; but according to an erroneous practice too common in the mofussil, the plaintiffs have asked a certain amount as damages if those accounts are not rendered.

In a number of cases which have recently been before this Court, the practice which ought to be followed in this class of cases has been explained. The plaintiff should ask in his plaint that a proper account may be taken. If the defendant is found liable to render such account for a certain period, the Court should make an interlocutory decree, declaring that he is so liable, and directing him to file an account in Court within a fixed period.

If the defendant refuses or omits to obey the order contained in this decree, such decree may be enforced under s. 260 of the [687] Code of Civil Procedure by imprisonment or by attachment of property, or by both. If he obey and file the account, then, as soon as it has been filed, the plaintiff should be allowed a reasonable time to examine this account, and (if so advised) to file objections to its correctness or the correctness of particular items therein. If the items of objection are few in number, they can probably be disposed of in open Court. If, however, the objections are numerous, and, in order to dispose of them, it is necessary to enter upon complicated enquiries, the proper course to pursue is, under the provisions of the Code of Civil Procedure, to appoint an officer to take and adjust the accounts and make his report to the Court. See ss. 394 and 395 of the Code of Civil Procedure, and Form No. 157 appended to the Code. This course may properly be pursued in the first instance, if the account required is not of such a nature as to render it probable that there will be no difficulty in dealing with the disputed items in Court. As soon as the account has been properly taken, the Court must determine the amount due to the plaintiff thereupon; and the final decree should be for the payment of this amount; and also (if necessary) for the delivery of any papers, vouchers or other documents which have come into the hands of the agents in the course of his employment. In the present case, and upon the remand which we are about to direct the course above indicated should be followed.

The plaintiffs ask that Degamber Mozumdar be directed to furnish an account from 1265 to Pous 1283, and that Mohima Chandra Sen be directed to furnish an account from Kartick 1281 to Pous 1283.

Now, the first ground of objection raised before us on this appeal is, that there is a misjoinder, inasmuch as an account is asked from Degamber Mozumdar for a period of nearly twenty years, and from Mohima Chandra Sen for a period of two years only out of that period; and it is urged that this double claim against persons not liable to account for the same period ought not to have been made in the same plaint.

It appears to us, on consideration, that this is an argument which ought not to prevail. Degamber Mozumdar is bound to render an account for a period of nearly twenty years, during [658] which he has been employed continuously in the same manner and upon the same duties, and the account which he is liable to render is a connected and continuous account. We do not think that merely because Mohima Chandra Sen is (as has been found by the lower Courts) jointly liable to account for the last two years of this period, separate suits ought to have been instituted against these two agents.

The next point urged is, that defendant No. 2 has been erroneously declared liable to account from Kartick 1280. It is admitted on the other side that this is a mistake on the part of the District Judge, and that, so far as Mohima Chandra Sen is concerned, his liability to account must date from Kartick 1281.

It will be convenient here to deal with the objection which has been taken by way of cross-appeal. That objection is, that Degamber Mozumdar ought to have been made liable to account for the year 1265. Now, the Subordinate Judge was of opinion that Degamber Mozumdar was not liable to render accounts for any period antecedent to the time when, according to his finding, the co-sharers began to have separate collections. He says in his judgment:—"It appears from the evidence of the witnesses examined on both sides, that collections were all along made jointly on the part of all the maliks until they quarrelled with each other, an event which, according to the defendants' witness No. 1, who is a respectable person, took place about three or four years ago. Now, for the time during which collections were made jointly for all the maliks, the agents might be called upon to render a joint account for all the sharers, but I do not think that any of the co-sharers can demand a separate account for the said period in respect of his share only, when there is no special agreement to that effect." Now, here the Subordinate Judge is clearly wrong. Degamber Mozumdar was employed as an agent on behalf of a number of co-sharers, and he was bound to render an account to each one of these co-sharers. In the case of joint collections, the account which he ought to have rendered to each co-sharer would properly take the form of a copy of the account kept on behalf of the joint co-sharers. That each co-sharer is entitled to a copy of this joint account, there can be no doubt.

[659] The case then went before the District Judge, and the District Judge so far differed from the Subordinate Judge, that he was of opinion that the separate collection of the rent commenced in 1280, and he modified the decree of the Subordinate Judge by declaring Degamber Mozumdar liable to account from 1280 instead of 1282, during which latter year the Subordinate Judge was of opinion that the separate collections commenced, and from which year, therefore, he was of opinion that the plaintiffs were entitled to have an account from the defendants.

Now, so far as regards the period antecedent to 1280, we think that we cannot, on the present occasion, interfere with the judgments of the lower Courts. A cross-objection to the decree of the District Judge, in so far as



regards the period between 1265 and 1280, was filed; but as this cross-objection was not put in seven days before the date fixed for the hearing of the appeal, it could not, according to a number of decisions of this Court, be admitted. A petition was further presented to a Division Bench asking that, under the circumstances, if the cross-objection could not be allowed as being out of time, it might be treated as a substantive separate appeal, and admitted, though long after time. Having regard to the number of cases decided upon the amended s. 561 of the Code, we think that we cannot allow this petition. The seven days within which a notice must be given according to the provisions of the amended Code, is not, we think, a period to which the provisions of paragraph 2 of s. 5 of the Limitation Act can be extended as the period of limitation; for this application is not prescribed by the Limitation Act, but by the Act which amended the Code. The words "period of limitation prescribed therefore" in this paragraph must clearly be read with s. 4 of the Limitation Act. It was decided before the last vacation by a Division Bench of this Court, after argument and careful consideration, that the provisions of the amended Code do not allow any discretion to extend the period of seven days. The petition, asking that the cross-objection be accepted as a separate appeal, was not filed until the 14th January 1881; and under these circumstances we are unable to say that sufficient cause has been made out to our satisfaction for not presenting this substantive separate appeal [660] at an earlier date. We must, therefore, reject this petition, and confine our consideration of the case to the period commencing with the Bengali year 1280 and ending with Pous 1283. Now, there can be no doubt that Degamber Mozumdar is bound to render an account for the whole of this period, and Mohima Chandra Sen is bound to render an account for the period between Kartick 1281 and Pous 1283. Then, with regard to what both the lower Courts have said about separate collections, it is not clear to us what the nature of those separate collections was. It has not been suggested to us that there is any evidence upon the record to show that all the ryots agreed to pay their rent to the co-sharers separately,—i. e., in separate shares. If this had been so, there would, as a matter of course, have been separate accounts, in each of which would have been entered the payments made by each ryot in respect of the separate share. There are several forms of keeping the accounts of joint property usual in the mofussil. Shareholders may agree to have a separate account of the collections kept without requiring the ryots to assent to pay their shares of the rent separately. In a case of this kind every rupee of the rent that is paid into the zemindar's sherishtas is divided, and the share to which each shareholder is entitled separately is entered in his separate account. There is also a third practice in addition to the two above noticed. All the accounts are kept as a single account of receipts, all rents paid being entered in this account; and a division subsequently made of the total sum of the collections after allowing for collection expenses. The lower Courts have not at all indicated which of these courses they find to have been pursued in the present case, or from what date a change was made in the mode of keeping the accounts, or what the nature of that change was. We think that these cases must be remanded, in order that the District Judge may come to a distinct finding as to the date from which the so-called separate collections were made, and as to what arrangements were made or instructions given as to the form in which the separate accounts were to be kept. We may point out that so long as the gomashtha remained a joint servant of all the co-sharers, he was bound, as we have already said, to [661] give to each co-sharer a copy of the joint accounts; but when this arrangement was altered, the account to which the plaintiffs are entitled would depend upon the nature of the altered instructions given to the defendants as to the keeping of separate



accounts. The District Judge must come to a distinct finding as to the form of separate account which, after the change from joint to separate collections, the defendants were bound to keep by express direction or by custom or by implied understanding. The result will be, that, as to the period commencing with the Bengali year 1280 and terminating with the date upon which the new form of accounts came into effect, a joint account will be taken, and a copy of that account given to each of the plaintiffs. Allowance will be made for the sums already paid over to the plaintiff; and the District Judge will find the amount which remains due to each of the plaintiffs upon this joint account. Then as to the period commencing with the date on which the new form of accounts came into effect, and terminating with Pous 1283, a separate account must be taken in respect of each of the plaintiffs, allowance being made for any sums paid over to them and for the reasonable expenses of collections, and the District Judge will here also find what amount, if any, is due to each of the plaintiffs. With these instructions the two appeals will be sent back to the District Judge. We direct that the costs of this hearing do abide the ultimate result.

When the above judgment was delivered, Mr. *Bell* for the respondents represented that his clients are willing to accept copies of the accounts which the defendants say they have already delivered to Monmohum Roy, and if the defendants file in Court true copies of the accounts within a reasonable time to be fixed by the District Judge, the procedure above laid down can be applied to those copies.

*Cases remanded.*

#### NOTES.

[S. 5 of the Limitation Act not applicable to memo of objections filed under s. 561 of C. P. C. (1877).]

Followed in (1885) 9 Cal 631.]

### [662] APPELLATE CRIMINAL.

*The 29th July, 1881.*

PRESENT :

MR. JUSTICE MORRIS AND MR. JUSTICE TOTTENHAM.

In the Matter of the Petition of Khamir.

The Empress

*versus*

Khamir.\*

*Penal Code (Act XLV of 1860), ss. 114, 372, 479, 498—Discharge by Magistrate—Order of commitment by Sessions Judge—Omission to call on accused to show cause against such commitment—Criminal Procedure Code (Act X of 1872), ss. 296, 283.*

A Sessions Court has no power, under s. 296 of the Criminal Procedure Code, to direct the commitment of a person discharged by a Deputy Magistrate, without first giving such person an opportunity of showing cause against such commitment.

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\* Criminal Appeal, No. 349 of 1881, against the order of T. M. Kirkwood, Esq., Sessions Judge of Mymensing, dated the 19th May 1881.

But under s. 296, as amended by Act XI of 1874, the Court has power to direct the subordinate Court to enquire into any offences for which it considers a commitment should be ordered.

When, however, a trial under such a commitment made by order of a Sessions Judge has been duly held, and no actual failure of justice has been caused by the error of the Sessions Judge, s. 283 of the Criminal Procedure Code would be a bar to the reversal of his judgment.

THE accused in this case was charged before a Deputy Magistrate of the second class, under s. 498 of the Penal Code, with enticing or taking away, or detaining with criminal intent, a married woman. He was, however, discharged by the Magistrate under s. 215\* of the Criminal Procedure Code.

The complainant then moved the Sessions Judge to take action under s. 296 of the Criminal Procedure Code, and after calling for the record, the Sessions Judge was of opinion that the facts alleged against the accused really amounted to abetment of rape and adultery; and he, therefore, directed the Magistrate to commit the accused under ss. 114 and 376 and 114 and 497, and to send him up for trial before the Sessions Court, remarking that, even if the case came under s. 498, the Deputy Magistrate had no jurisdiction to try it, he being only vested [683] with second class powers. The commitment was made, and the trial held before the Sessions Judge.

The assessors were of opinion that the accused should be convicted under ss. 114 and 497 of the Penal Code; but the Sessions Judge, differing from both the assessors, found that the accused had committed an offence under ss. 114 and 376 of the Penal Code, and sentenced him to four years' rigorous imprisonment.

The prisoner appealed to the High Court.

Bahoo Grish Chunder Chowdhry for the appellant contended, that the Sessions Judge had no power to order the commitment under ss. 376 and 497, as the Magistrate was competent to try the case under s. 498, and had discharged the accused, and further, that the order for his commitment was made without calling upon the accused to show cause against the order—*Re Bundhoo* (22 W. R., Cr., 67), *Nowab Singh v. Kokil Singh* (24 W. R., Cr., 70). The commitment ought therefore, to be set aside.

The Judgment of the Court (MORRIS and TOTTENHAM, JJ.) was delivered by

**MORRIS, J.**—In this appeal it is contended, *first*, that the order under which appellant was committed to take his trial in the Court of Sessions, is on two distinct grounds illegal and *ultra vires*; and *next*, that, on the merits, the prisoner ought not to have been convicted.

\*[Sec. 215.—When the evidence of the complainant and of the witnesses for the prosecution, and such examination of the accused person as the

Discharge of accused. Magistrate considers necessary, have been taken, the Magistrate, if he finds that no offence has been proved against the accused person, shall discharge him.

*Explanation I.*—The absence of the complainant, except where the offence may be lawfully compounded, shall not be deemed sufficient ground for a discharge, if there appears other evidence sufficient to substantiate the offence.

*Explanation II.*—A discharge is not equivalent to an acquittal, and does not bar the revival of a prosecution for the same offence.

*Explanation III.*—An order of discharge cannot be passed until the evidence of the witnesses named for the prosecution has been taken.]

The case had been instituted against the prisoner under s. 498 of the Penal Code. The Deputy Magistrate, after hearing the evidence for the prosecution, discharged the accused under s. 215, Criminal Procedure Code.

That complainant then moved the Sessions Judge to take action under s. 296, Criminal Procedure Code.

That officer was of opinion that the facts alleged against the accused really amounted to abetment of rape or of adultery; and those offences being triable only in the Sessions Court, he directed the Deputy Magistrate to commit the accused accordingly.

[684] He remarked that, even if the case properly came under s. 498, the Deputy Magistrate had no power to try it, inasmuch as he was vested with only second class powers. This dictum is opposed to the provision made in sched. iv of the Criminal Procedure Code in regard to s. 498 of the Penal Code.

It is quite clear, however, that the case before the Deputy Magistrate was one under s. 498; and that he being duly empowered by law to try such a case, discharged the accused under s. 215. The Sessions Judge had, therefore, no power to order a commitment under ss. 376 and 497. He had, under the proviso added to s. 296, Criminal Procedure Code, by Act XI of 1874, power to direct the subordinate Court to enquire into these offences, but no more. In ordering the commitment the Judge unquestionably transgressed the law.

It further appears upon an affidavit made on behalf of the appellant, that the order for his commitment was made by the Judge without giving him any opportunity of showing cause against it, which procedure is not in accordance with what the High Court has laid down on this subject: see *Re Bundhoo* (22 W. R., Cr., 67), *Nowab Singh v. Kokil Singh* (24 W. R., Cr., 70). It has been submitted that the trial and conviction ought to be set aside for the two reasons above set forth. These are, no doubt, serious irregularities, and more especially the first, which is a direct transgression of the law, and if they had been brought to the notice of this Court before the trial had taken place, the commitment would properly have been quashed, but as the trial has been held, and as we do not consider that any actual failure of justice has been caused by the errors, we are disposed to hold that s. 283, Criminal Procedure Code, is a bar to the reversal of the judgment on these grounds.

(His Lordship then proceeded to consider the merits of the case, and set aside the conviction.)

*Conviction set aside.*

#### NOTES.

[Ref. Rat. Un. Cr. 588, 898.]

## [555] ORIGINAL CIVIL.

The 20th July, 1881.

PRESENT :

MR. JUSTICE WILSON.

Chunder Coomar Mookerji and others

versus

Koylash Chunder Sett and others.

*Easement—Right of way—Unity of possession—Severance—Nuisance arising from acts of several persons.*

The words 'appurtenant' or 'belonging' will ordinarily carry only actual existing easements, and therefore will carry no right of way over the land of the grantor, though, under certain circumstances, even these words will have a wider construction—*Whalley v. Thompson* (1 B. and P., 371), *Pheysey v. Vicary* (16 M. and W., 484), *Barlow v. Rhodes* (1 C. and M., 439), *Morris v. Edgington* (3 Taunt., 24).

Where further words are used, such as 'therewith held or used,' such words will carry a way formerly enjoyed as an easement, but as to which the right has been suspended by unity of possession. But such words will not carry a way made by the owner of both properties during the unity of possession for his own greater convenience in the use of the two properties jointly—*James v. Plant* (4 A. and E., 749), *Thomson v. Waterlow* (L. R., 6 Eq., 36), *Langley v. Hammond* (L. R., 3 Exch., 161).

But where, during the unity of possession, a way which has never existed as an easement, is in fact used for the convenience of one of the tenements afterwards severed, the authorities show that the words in question are large enough to carry it—*Kooystera v. Lucas* (5 B. and Ald. 890), *Watts v. Kelson* (L. R., 6 Ch., 166), *Kay v. Oxley* (L. R., 10 Q. B., 360) followed.

One who has a right of passage over any place, must not, any more than the owner of the soil might, use it in an excessive or improper manner so as to obstruct the exercise by others of their rights.

The acts of several persons may together constitute a nuisance, though the damage occasioned by the acts of any one, if taken alone, would not be appreciable—*Thorpe v. Brumfit* (L. R., 8 Ch., 650).

THIS was a suit for an injunction to restrain the defendants from trespassing on, or in any way using, a certain lane to [555] which the plaintiffs laid claim under an express grant from the original owner of the property.

The plaintiffs stated that they were the owners of certain premises known as Nos. 119 and 120, Bulloram Dey's Street, in Calcutta, and also of a certain lane which led from Bulloram Dey's Street to the main entrance of their houses; that the defendants, who were the owners of the premises Nos. 124, 125, 126, and 127 in Bulloram Dey's Street, but who, as they said, had on rights or user by prescription in the said lane, had, prior to the 7th June 1880, claimed to be entitled to use this lane for their own purposes and for the purposes of drainage from their premises, and that they had opened certain doors in their premises abutting on the lane, and claimed to be entitled to enter, and had entered, through such doors into and upon the land of the plaintiffs, and had used the lane for the purpose of removing their night soil to the injury and annoyance of the plaintiffs. They further charged them with breaking down a certain wall built by the plaintiffs, and they, therefore

brought this suit against the defendants to restrain them from further trespassing on or using the lane in question.

The defendants contended that the block of buildings formerly belonged to one Bydonath Dutt, who, in 1864, sold to Gooroo Churn Sen, and that the Dutt had, previously, more than twenty years ago, let out the land to tenants as ryotti lands, and had opened the said lane and dedicated it to the public as a passage from Bulloram Dey's Street to the various portions of the land so let out by him; that they all claimed through Gooroo Churn Sen, and that, since the time they had erected houses on the land so acquired from Gooroo Churn Sen, they had respectively used the lane as a means of passage from the backdoor of their premises, and that, had they no other title, the user of the lane for a period of twelve years before suit gave them an indefeasible title to the user thereof.

The effect of the evidence on both sides, was, that both the plaintiffs and defendants had equally a right to use this lane, and that the plaintiffs were not the owners of the soil of the lane. The wording of the different deeds of sale on which the parties particularly relied as giving a title to the lane in [667] question, are fully discussed in the judgment. A question whether or not there had been a misjoinder of defendants was entered into at the hearing.

Mr. Bonnerjee (with him Mr. Allen) for the Plaintiffs.

Mr. Jackson (with him Mr. Mitra) for the Defendants.

**Wilson, J**—The plaintiffs in this suit are the owners and occupiers of a house and premises Nos. 119 and 120, Bulloram Dey's Street. The defendants, the Setts, are owners of No. 124; the defendants Tara Soondery, of No. 125; the next group of defendants, of No. 126, which is a temple, of which they are trustees; and the defendant Shama Churn Dey, of No. 127.

The plaintiffs' premises have no frontage on the street, but are reached by a lane running first north from the street, and then west along the south of the plaintiffs' premises. The defendants' houses all have a frontage to the street, but also abut on the lane.

The plaintiffs' complaints are three—

*1st.*—That the defendants use the lane for the passage of mehters and the cleaning of their privies.

*2nd.*—That they, or some of them, have used the western portion for drainage of their houses.

*3rd.*—That they combined together to pull down a wall erected by the plaintiffs to prevent their access to the lane. That the defendants did combine to do this is admitted.

The plaintiffs allege themselves to be owners of the soil of the lane, and claim to treat the defendants as trespassers. They put their case in the alternative as one of obstruction of their right of way over the lane.

The rights of the parties have been contested with much pertinacity both here and elsewhere, and this is natural, for the value of their respective houses must be materially affected by the result of this case.

The case is, to my mind, one by no means free from difficulty.

The site of all the houses in question, together with a good deal of land besides, was conveyed by Bydonath Dutt and others to Gooroo Churn Sen many years previously to October 1864. [668] It has, however, been shown, I think very clearly, that Gooroo Churn was a mere benamidar for his father Gunga

Gobind Sen, with whose money the land was bought. And on the 4th of October 1864, Gooroo Churn conveyed whatever remained unsold of the property to his father.

The land so sold had a comparatively narrow frontage to Bulloram Dey's Street on the south; on the north it was bounded by what was then an open public drain, having generally some depth of water in it; on the east it was bounded by the land of other persons; on the west by the land of other persons, and by the drain already mentioned. It was thus completely landlocked except on the south. This is now changed, because the drain has been covered over and made into a lane.

Prior to the sale to Gunga Gobind Sen in the name of Gooroo Churn, the land was partly waste and partly tenanted. There was no defined lane where the present lane is. The tenants made their way amongst the huts as best they could.

The Sens bought with a view of re-selling in plots for building, and for that purpose they laid out the lane in question. The exact order of events is not very clear upon the oral evidence. Gooroo Churn's deposition in a former suit was put in by consent. He contradicted himself a good deal as to whether the lane was made before or after the earlier sales of land. His brother Doorga Churn Sen was examined. He says, the lane was reserved before the conveyance to Gungamoney, which was very nearly the first in date. I think it clearly appears on the evidence, that, from the time the lane was made, all the tenants, upon all the lands ultimately plotted out and sold, used it as they pleased. Indeed, as it completely cut the property in two by a line running east and west, this must have been so.

On turning to the documents the order of dates becomes, I think, fairly clear.

On the 26th of November 1862, there is a conveyance to Issur Chunder Dey and Shama Churn Dey of a portion of No. 127. In that conveyance the lane is not mentioned. But six days afterwards, on the 2nd of December, two sales take [669] place. One is to Kunnuckmoney Dossee, of No. 117 (the position of which is shown on Mr. Bayne's plan), "together with your pathway to and from the said land." Therefore, at that time the eastern arm of the lane was in existence. On the same day there is a sale of No. 126, and the northern boundary described as "the ryotti road."

On the 6th of December, four days later, there is a sale to Gungamoney of a part of No. 124. The northern boundary is "a narrow passage of six feet in breadth"; and the eastern, "a gully six feet in breadth." And on the same day No. 125 is sold, the northern boundary being described in the same words.

The fair conclusion from the evidence seems to me to be, that the lane was in existence, and was in use by the tenants upon all the various portions of the property, when the series of sales in question commenced.

So far I have examined certain of the deeds in evidence, all prior to the first conveyance to the plaintiffs, only with a view to ascertain at what time the lane began to be used. It is necessary, however, to consider those and other deeds more carefully in order to ascertain what rights over the lane they conveyed to the various parties concerned.

The plaintiffs' title commences with a conveyance to them from Gooroo Churn Sen of No. 120, dated the 17th of March 1863. It describes the plot sold as bounded "on the south by the land of the said Gooroo Churn Sen, out of which he has allowed a passage six feet broad, running almost straight west to east, and terminating in another passage leading to Bulloram Dey's street,

and which two passages the said Gooroo Churn Sen hath granted and allowed, and doth hereby grant and allow, as the passage for the said Chunder Coomar Mookerji, Gungadhur Mookerji, Gopal Chunder Mookerji, and Ram Kally Mookerji, their heirs, representatives, and assigns, and all other the purchasers of the northern portion of the said piece of land, No. 68-7. Another deed, dated the 27th of July 1863, executed in consequence of a change in the direction of the lane, declares, that "no one shall be able to throw sweepings or filth on the said road, or make it unclean." By a deed of the 5th of June 1872, Gooroo Churn Sen purportd to convey to [670] the plaintiffs the soil of the lane in question. And by a deed of the 9th of June 1873, No. 19 was conveyed to the plaintiffs.

The effect of the deeds prior to that of the 5th June 1872 has already been decided by an Appellate Bench of this Court, and that decision I am bound to follow. It was to the effect that the plaintiffs took no title to the soil of the lane, but only a right of way. That right would, of course, be subject to any right previously granted to other persons. And it would not interfere with the right of the owner of the soil to grant subsequently any rights over it to other persons, provided they did not conflict with the right granted to the plaintiffs.

Nor can the deed of the 5th of June 1872 alter the case. Gooroo Churn had, from the first, been a mere benamidar for his father. He had, in 1864, conveyed everything to his father. The plaintiffs, therefore, cannot, as against the defendants, gain anything under that deed.

The rights of the various defendants must be examined separately.

The title to No. 124 begins with the conveyance of the 6th of December 1862, which describes the property as bounded on the north and east by the passage and the gully. It is at least doubtful whether that description would of itself carry a right of way over the passage. See *Harding v. Wilson* (2 B. and C., 96); but see also *Roberts v. Karri* (Taunt., 495) and *Espley v. Wilkes* (L. R., 7 Exch., 298).

The deed goes on to grant, amongst other things, all "ways, paths, passages to the said hereditaments and premises . . . belonging . . . or reputed so to be . . . or with the same . . . now or at any time or times heretofore held or used"; and the question arises whether these latter words carried the right to use this passage.

About the law applicable to this question, there is, I think, no doubt. The words 'appurtenant' or 'belonging' will ordinarily carry only actually existing easements, and therefore will carry no right over the land of the grantor—*Whalley v. Thompson* (1 B. and P., 371), *Barlow v. Rhodes* (1 C. and M., 439), *Pheysey v. Vicary* (16 M. and W., 484)—though [671] it would seem that, under certain circumstances, even these words might have a wider construction: *Morris v. Edgington* (3 Taunt., 24).

Where further words are used, such as those in this deed, 'therewith held or used,' the case is different. Those words will carry a way formerly enjoyed as an easement, but as to which the right has been suspended by unity of possession: *James v. Plant* (4 A. and E., 749). On the other hand, such words will not carry a way made by the owner of both properties during the unity of possession for his own greater convenience in the use of the two properties jointly: *Thomson v. Waterlow* (L. R., 6 Eq., 36) and *Langley v. Hammond* (L. R., 3 Exch., 161). Where again, during the unity of possession, a way, which has never existed as an easement, is in fact used for the convenience of one of the tenements afterwards severed, the authorities show that the

words in question are large enough to carry it: *Kooystra v. Lucas* (5 B. and Ald., 830), *Watts v. Kelson* (L. R., 6 Ch., 166), and *Kay v. Oxley* (L. R., 10 Q. B., 360).

I think the facts of this case bring it within the last of these three classes of cases. The lane in question was certainly not made by the vendor Gunga Gobind Sen for the more convenient use of the property as a whole while in his own hands. It was made with a view to the sale of the land in plots, for the benefit, as I think on the evidence, of all those who might purchase; and it was used, I think, by the tenants upon all the plots prior to the sale of No. 124. In my opinion, therefore, the original deed of conveyance gave the purchaser of that plot a right of way over the lane.

The subsequent conveyance of a further portion of No. 124 does not, I think affect this question.

The title to No. 125 is also based upon a conveyance of the same date, the 6th of December 1862, which contains exactly similar general words. That deed, therefore, also gave, in my judgment, a right of way over the lane. The subsequent conveyance of a further portion does not affect the matter.

The title to No. 126 rests upon a conveyance of the 2nd [672] December 1862. That is a Bengali conveyance, and describes the plot sold as bounded on the north by the ryotti road; but it contains no words appropriate to pass a right of way.

And the subsequent conveyance of a further area does not, I think, carry matters further.

The title to No. 127 rests upon a conveyance of the 26th of November 1862, which contains general words as to ways similar to those in the deed I have already considered.

Another document has to be considered in connection with Nos. 125, 126 and 127. That is a deed, dated the 23rd of July 1864, between Gooroo Churn and the owners of the lands in question. It is subsequent to the first conveyance to the plaintiffs, and cannot, therefore, convey any right inconsistent with those given to the plaintiffs, but it might well give any right not inconsistent. The object of the deed was to give a means of draining the premises in question by means of a drain which is shown in the map running towards the north along with the west boundary of the plaintiffs' land.

The deed, as translated in the first place by one of the Court translators, runs thus: "In the year 1269, I sold to you several parcels of land for your dwelling-houses. For the purpose of passing in and out therefrom, I gave you a lane, and as disputes and quarrels have arisen amongst you in respect of keeping a watercourse or drain by the side thereof, in order to settle such disputes, I fix the price of a strip of land"; and then it goes on to describe and convey the strip of land running north.

The deed so translated expressly declares that the lane had been granted to the persons in question, and such a declaration would, I think, be a perfectly good grant to any of them who had not a right of way already.

A question was, however, raised as to the correctness of the translation, and I referred the matter to Mr. Owen, the Chief Interpreter. He reports that the words of the deed are capable of two meanings. They may express a passage 'into' your lands, or a passage 'within' your lands, in the latter case only describing the locality of the lane; there being this ambiguity, the context and the circumstances existing at the [673] time must be looked at. The object of the deed was, as appears from its terms, to settle a controversy and to give



a mode of drainage to the north. The controversy was as to the keeping of a drain at the side of the lane. The drain was part of the lane as appears from the evidence of Mr. Bayne and other witnesses. The controversy was, therefore, about the use of this lane by the owners of the houses in question, and the grant was of a drain running north which could only be reached from those houses by using the lane. Under these circumstances, I think 'I have provided' must mean, 'I have provided for you'; and, therefore, that a right of way passed to any of the parties to that deed who had not one before.

The result is, that, in my opinion, the owners of Nos. 124, 125, 126 and 127 have equally, with the plaintiffs, a right to use this lane.

I have now to consider whether the plaintiffs have shown any right to relief in respect of any of their grounds of complaint.

With respect to the wall which the defendants pulled down, I have stated my reasons for holding that the plaintiffs are not the owners of the soil of the lane, and that the defendants have a right of way over it. The defendants had, therefore, a right to pull down the wall erected to exclude them from the lane.

As to the drain, it may probably be that, as against the plaintiffs, whose grant was of the use of a way six feet wide, none of the defendants had any right to use any part of the lane as a drain. But I think it clear that the drain has been in use for many years, and that the owners of Nos. 125, 126, and 127 were allowed, without objection, to arrange the drainage of their houses with reference to it. Mr. Bayne shows it to be an old brick-drain, and I have no doubt it must be as old as the drain running north with which it connects. It has not been shown that the plaintiffs have suffered, or are very likely to suffer, any inconvenience from it, the more so as it is in a part of the lane some distance beyond the door of their houses. Under these circumstances, I think it is too late for them to come now and ask for an injunction.

The remaining ground of complaint is as to the use of the lane for the passage of mehters and the cleansing of privies; [674] and as to this the rights of the parties are not quite so easy to determine.

I have said that, in my opinion, all the parties concerned have a right of passage over the lane. One, however, who has a right of passage must not, any more than the owner of the soil might, use it in an excessive or improper manner so as to obstruct the exercise by others of their rights. And I think it was rightly argued that the number of persons using the lane in a particular manner may be taken into account; because that which might be no nuisance if done by one, may become a serious nuisance if done by many—*Thorpe v. Brumfitt* (L. R., 8 Ch., 650).

Attention was called to the fact that, in the former suit, already referred to by the now plaintiffs, against the owner of No. 114, the latter was restrained from cleaning his privies by the lane as being an obstruction of the plaintiffs' right of way. But that does not conclude this case. In that case it was decided, on the evidence given, that the plaintiffs' use of the lane had been materially obstructed. This case must be decided on its own evidence.

In the second place, that was a suit against a mere wrong-doer, who had no right to go upon the lane at all.

In the third place, at the time of the transaction then under consideration, the Municipality had not taken charge of the cleaning of privies; it was provided for by the occupiers of houses themselves, so that the then defendant was responsible not only for the fact of cleaning the privies through the lane,

but also for the mode in which it was done ; whereas the present defendants, though they are, no doubt, liable for using the lane for that purpose, if it be wrong of them to do so, are not, in my opinion, responsible for any negligence or impropriety in the mode in which Municipal mehters carry on their duties.

It appears to me, that a right to use a passage, enjoyed as incident to a house, must in general include a right to use it for all ordinary household purposes, for the passage of mehters among the rest. The circumstances existing at and before the date of the plaintiffs' conveyance strengthen this view. The whole of the land brought by Gunga Gobind Sen was being [575] sold off in plots for building, and all the plots, except the four having a frontage to the street, were completely landlocked but for this lane. It must have been evident, therefore, at the time the plaintiffs bought, that the lane must be used by mehters, and the practice has been in accordance with this. It is clear that the occupiers of the plots to the east, Nos. 115, 116, 117, and I think 118, sent their night soil to the street by the lane until other means of egress were provided by the owner of No. 117 purchasing other land to the east, and the turning of the open drain into a lane. The occupiers of No. 119 did the same until the plaintiffs purchased and added it to their house. The occupiers of Nos. 121, 122, and 123, sold after the plaintiffs purchased, did the same. The plaintiff, who was examined, admitted that he has done so too, at least at times. I am satisfied-too, that the soil from the several defendants' privies has always been removed by the lane. No doubt, there is much conflict of testimony about this. Most of the plaintiffs' witnesses declare that the defendants' privies were, till June of last year, always cleaned through the houses to the street. But one of the plaintiffs' witnesses, Hari Madhub Lahiri, who lived in No. 127, from about 1876 to 1878, admitted the contrary. And Mr. Bayne's evidence as to the construction and arrangement of the houses and privies makes the plaintiffs' story incredible. Indeed, in the case of No. 126, the temple, it is all but physically impossible.

These considerations are, I think, sufficient for determining how far the plaintiffs are entitled to redress in this matter of the privies and the mehters.

When the evidence for the plaintiffs is closely examined, their complaints seem to me to resolve themselves into three,—

First, it is complained that the lane is used for the passage of mehters with night-soil from the defendants' premises to the street. For the reasons I have stated, I think the defendants have a right to this extent to use the lane. And I do not see any evidence that this alone really obstructs the plaintiffs' right of way.

The second complaint is, that the mehters are in the habit of placing tubs of night-soil in the lane, and letting them stand [576] there. And this, it is said, and I have no doubt said with truth, is a serious annoyance to the plaintiffs' customers coming to and from their premises in the early morning. It is further said, and I doubt not with truth, that the same practice hinders the plaintiffs in moving casks and cases of goods along the lane from their godown to the street. This practice is shown, I think, on the evidence to be wholly improper; and I should be quite disposed to restrain it by injunction in this suit if I could ; but (subject to what I have to say about certain of the premises in question) I think it has also been shown to be wholly unnecessary. I do not see, therefore, how the defendants can be made answerable for what is apparently the negligence or misconduct of the Municipal

mehters. The plaintiffs must address themselves to the officers of the Municipality, and if this unnecessary nuisance should continue, the plaintiffs would not be without remedy.

The third complaint is, that certain of the defendants actually clean their privies direct on to the lane. This is not the case with No. 124. In that house the only entrances to the privy are upon the premises themselves. The privies therefore are, and must be, cleaned upon the premises. And if anything is done beyond simply carrying the nightsoil from the backdoor to the street, the fault lies with the mehters, and the case is the same with No. 126.

But with Nos. 125 and 127 it is otherwise. Those premises are so constructed that the mehter's doors are in the lane, and the privies are cleaned direct into the lane. I am satisfied on the evidence that this is a cause of serious annoyance, and I think it is entirely in excess of any right of the defendants occupying those premises. Mr. Bayne said, no doubt, that everything beyond the mere carrying away of the nightsoil might be done on the premises. But these cases must be looked at, not with reference to abstract possibility, but practically. And I think, it quite clear that so long as the present state of things continues, these defendants will be improperly using the lane and causing a nuisance to their neighbours. They may make whatever doors they may find necessary, but they must clean their privies on their own premises. An injunction will issue [677] restraining the defendants Tarasoodery, the owner of No. 125, and Shama Churn Dey, the owner of No. 127, from using their present mehter's doors for cleaning their privies into the lane, or in any way cleaning their privies directly into the lane, or otherwise using the lane in connection with the cleaning of their privies, except merely for the carriage of the nightsoil from their premises to the street.

The plaintiffs will recover their costs on scale No. 2 from the defendants Tarasoodery and Shama Churn Dey. As against the other defendants, the suit will be dismissed, and if any extra costs have been incurred by reason of those defendants having been joined, the plaintiffs must pay them.

Attorneys for the Plaintiffs : *Wilson and Chatterjee.*

Attorneys for the Defendants : *Harris & Co.*

#### NOTES.

[Affirmed in (1882) 8 Cal. 677 on all points except on the point of injunction where it was reversed, and the suit was dismissed in toto.]

[7 Cal. 677]

## APPELLATE CIVIL.

*The 23rd June, 1881.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, AND MR. JUSTICE McDONELL.

Ramanath Dass and another... Plaintiffs

versus

Boloram Phookun and others ..... Defendants.\*

[=9 C. L. R. 233]

*Mortgagor and Mortgagee—Mortgage-Bond—Money-Decree—Mortgage-Decree—Lien—Sale in Execution—Purchaser.*

Where a mortgagee obtains a decree against his mortgagor for sale of the mortgaged property to satisfy his debt, he cannot sell that property reserving his own rights over it, because it is for the very purpose of satisfying those rights that the sale is made. And if, instead of obtaining a decree for the sale of the mortgaged property, the mortgagee obtains only a simple money-decree and sells the mortgaged property under it, he is precisely in the same position as far as his own interest is concerned. In either case, the purchaser at the execution-sale takes the property sold freed from the mortgagee's lien.

[678] But where the mortgagee puts up the mortgaged property for sale at a time when the mortgagor has no longer any interest in the property, then nothing passes by the sale, and the execution-purchaser does not get any benefit from the fact that, previously to the sale, the mortgagee had a lien on the property.

*Syud Emam Montazooddeen Mahomed v. Raj Coomar Dass* (14 B. L. R. 408 ; S. O. 23 W. R. 187), *Gopee Bundhoo Shantra Mohapattur v. Kalee Pudo Banerjee* (23 W. R. 338), *Ramkant Roy v. Rajkishore Deb* (24 W. R. 94), *Khub Chand v. Kallian Das* (I. L. R. 1 All. 240), and *Dossmoney Dossee v. Jonmenjoy Mullick* (I. L. R. 3 Cal., 363 ; S. C. 1 C. L. R. 446) discussed and explained (*see post*, p. 714).

IN January 1871, one Jogessur Gossami borrowed Rs. 600 from a lady named Basunti Priya, for the repayment of which he gave her a bond, pledging a tenure, which he held from Government, containing some 866 bighas of land.

Jogessur's rent having fallen into arrear, the Government sold a portion of his tenure, amounting to 261 bighas, which was purchased by one Boloram Phookan, the defendant.

Basunti's mortgage being a specially registered one, she, subsequently to the defendant's purchase, sued Jogessur upon his mortgage-bond, and obtained a money-decree under s. 50 of Act XX of 1866.

In execution of that decree Jogessur's entire tenure was put up for sale, including the portion which had been purchased by the defendant; and the plaintiff Ramanath purchased that portion for Rs. 241.

After the purchase, the plaintiff got his name registered in the Collector's books as the Government tenant of the lot which he had purchased, and obtained possession of it.

Thereupon the defendant, who had previously objected to the attachment of his 261 bighas in execution of Basunti Priya's decree (but which objection

\* Appeal from Appellate Decree, No. 1764 of 1879, against the decree of W. E. Ward, Esq., Judge of the Assam Valley District, dated the 5th May 1879, reversing the decree of Baboo Shib Prosad Chuckerbutty, Extra Assistant Commissioner of Gowhaty, dated the 23rd November 1878.

was overruled), brought a suit against Basunti under the impression that she, and not the plaintiff Ramanath, was the real auction-purchaser of the lot ; and in that suit he prayed to have the sale cancelled, to have his own name registered in the Collector's book as tenant, and to have possession given to him.

[679] In this suit Basunti never denied that she was the real auction-purchaser, and the result was, that the defendant obtained a decree.

In execution of this decree Ramanath was dispossessed. He then applied to the Civil Court, under s. 230 of Act VIII of 1859, to be restored to possession ; but the Assistant Commissioner who tried the case dismissed his suit, upon the ground that he had purchased nothing at the sale. This decision was upheld on appeal by the Deputy Commissioner ; and on special appeal to this Court the same result followed. It was observed, however, by the learned Judges of the Division Bench, that although they were unable to agree with the lower Courts that Ramanath had purchased nothing, they were not prepared to say what he had purchased. They suggested that he might have acquired the mortgagee's lien, but even if he had, they considered that it would not have entitled him to recover possession in that suit. This present suit was then brought by the plaintiff Ramanath against Boloram to recover the Rs. 241, which he paid at the sale, professedly for Jogessur's right, title, and interest in the 261 bighas.

The Munsif gave the plaintiff a decree for Rs. 241, upon the ground that Boloram was liable for the mortgage-debt in proportion to the value of his share in the mortgaged property. He appeared to consider that the High Court had already decided in the former case that the plaintiff Ramanath had acquired by his purchase the mortgagee's lien, and he abstained from deciding, what was in fact the main question in the suit, whether the plaintiff had in fact purchased the mortgagee's rights at the execution-sale.

It would appear that the Munsif fixed Rs. 241 as the sum to which the plaintiff was entitled, as being presumably the amount of the mortgagee's lien upon the 261 bighas.

The defendant Boloram appealed, and the district Judge reversed the Munsif's decree. The plaintiff appealed to the High Court.

Baboo *Mohini Mohun Roy* and Baboo *Boikant Nath Dass* for the Appellants.

[680] Baboo *Bungsheedhur Sen* for the Respondent.  
The following **Judgments** were delivered :—

**Garth, C. J.**—In this case I think I cannot do better than adopt the statement of facts made by the Court below. (His Lordship then stated the facts as above, and continued) :—

The Judge in the Court below has, in my opinion, dealt with the question with great care and judgment. He considers, and I think rightly, that, notwithstanding the observations made in the special appeal by the learned Judges of this Court, he was bound to determine the question, whether the plaintiff had purchased the mortgagee's rights at the execution-sale. He thought, in the first place, that those observations were not necessary for the determination of the special appeal ; and in the next place, that the learned Judges had in fact declined to give any definite opinion as to what interest, if any, the present plaintiff had purchased. In this view I quite agree.

Having then very fully discussed the leading authorities upon the question, and especially the Full Bench judgment in the case of *Syud Emam Momtazooddeen Mahomed v. Raj Coomar Dass* (14 B. L. R., 408 ; s.c., 28

W R., 187), the District Judge arrived at the conclusion, that Ramanath did not purchase the mortgagee's rights at the sale, and consequently that his suit should be dismissed.

On appeal to this Court, the point has been argued very ably by Baboo Mohini Mohun Roy, the learned pleader for the appellants, who has called our attention to several cases which have followed the full Bench decision.

Having taken time to consider our Judgment, and having more fully examined these authorities, I find nothing in any of them which, in our opinion supports the appellants' contention.

The Full Bench Ruling, as I understand it, amounts to no more than this, that where a mortgagee obtains a decree against his mortgagor for sale of the mortgaged property to satisfy his debt, he cannot sell that property reserving his own rights over it, because it is for the very purpose of satisfying those rights that the sale is made: and it would be contrary to all justice, and to the avowed object of the sale, to allow the mortgagee to sell the property for the purpose of satisfying his debt, and yet to reserve his mortgage rights as against the purchaser.

Then the Full Bench further decided, that if, instead of obtaining a decree for the sale of the mortgaged property, the mortgagee obtains only a simple money-decree, and sells the mortgaged property under it, he is precisely in the same position, so far as his own interest is concerned, as if he had obtained a decree for sale. In either case, when he sells the property, he sells it with his own lien; or perhaps the more accurate and less misleading expression would be, that he sells it freed from his lien.

But how can this ruling of the Full Bench assist the appellants' argument in this case? It seems to us to be quite beside it. Indeed, the reasoning of the Full Bench seems rather opposed to the appellant's contention.

When the mortgagee puts up for sale the mortgagor's property, and sells it, his lien passes with the property, because, having regard to the nature and object of the sale, the lien is inseparable from the property.

But when the mortgagee professedly puts up the mortgagor's property for sale, but in fact sells nothing, because the mortgagor has no property to sell, why should the mortgagee's lien pass to the purchaser? The reason why it passes in the other case is entirely absent in this; and I know of no provision of the law which enables a judgment-creditor, under colour of selling his judgment-debtor's property, to sell his own.

Besides which, it appears to me, that if the appellants' contention were correct, it would defeat the very object of the Full Bench, which was to prevent the mortgagee from selling the mortgaged property reserving to himself his own lien.

Suppose a case of this kind. *A* mortgages a property to *B*, and then sells his own interest to *C*. *B* sues *A* for the mortgage debt, obtains a money-decree, and puts up *A*'s right, title, and interest in the property for sale.

At the same time *B* also sues *C*, praying that the mortgaged property in *C*'s hands may be sold to satisfy the mortgage-debt; and he obtains a decree to that effect.

The sale under the decree against *A* takes place first, and *D* [682] becomes the purchaser. The property is then sold under the decree against *C*, and *E* becomes the purchaser.

Under which sale does the mortgagee's lien pass ?

If the contention of the appellants' pleader is correct, it passes by the first sale, and yet the consequence of this would be, that *E*, under the second sale, would have bought the mortgagor's property, subject to the mortgagee's lien, which would then be vested in *D*. In other words, the mortgagee would thus have been enabled to do that which the Full Bench considered to be contrary to justice—namely, to sell the mortgagor's interest for payment of his mortgage-debt without giving the purchaser the benefit of his own lien.

I only think it necessary to notice a few of the authorities to which our attention was called by the appellants' pleader, because, in our view of the case, they do not support his argument.

One was the case of *Gopee Bundhoo Shantra Mohapattur v. Kalee Pudo Bannerjee* (23 W. R., 338). In that case the plaintiff and defendant both took mortgages of the same property from the same person. The plaintiff had two mortgages, both of which were prior to that of the defendant. He sued upon the last of his mortgages, obtained a decree, and in execution of that decree bought the property himself. After this the defendant brought a suit upon his mortgage, obtained a decree, put up the property for sale, became himself the purchaser, and obtained possession. The plaintiff then brought a suit to recover possession from the defendant upon the strength of his own prior purchase and he obtained a decree for possession in all the Courts. In the High Court the learned Judges thought it right to make a declaration that, upon the defendant's paying to the plaintiff the sum due to the latter upon the first of the plaintiff's mortgages, the defendant should become the holder of the first charge upon the property, but this, as I take it, was not, because the defendant had bought anything under the sale in execution of his decree, but because, being the mortgagee, he had a right (independent of his decree) to redeem the first mortgage.

We were then referred to the case of *Ram Kant Roy v. Raj Kishore Deb* (24 W. R., 94). In that case the plaintiff's vendor had purchased certain property from *A*, and the plaintiff in *A*'s right sued *R. K.* for possession. *R. K.*'s defence was, that *A* had mortgaged the property under certain bonds, that a decree had been obtained by the mortgagee upon those bonds; and that, in execution of that decree, *R. K.* had purchased the property in question, and obtained possession. The plaintiff then brought a suit to recover this property from *R. K.*, upon the ground that he had purchased it before the attachments under which *R. K.* had purchased, and the lower Appellate Court found in favor of the plaintiff, upon the ground that if *R. K.* had any rights under the mortgage-bonds; he should have enforced them against the plaintiff in another suit; but the learned Judges of this Court considered, that as they had all the parties before them, they might adjust their rights in the one suit without compelling *R. K.* to bring another suit to establish his lien. We do not understand that the point which we have to determine here was ever argued or present to the minds of the learned Judges in that case.

Another decision to which we were referred is that of *Doss Money Dossee v. Jonmenjoy Mullick* (I. L. R., 3 Cal., 363; s. c., 1 C. L. R., 446). The judgment in that case has now been virtually overruled by a Full Bench—*Jonmenjoy Mullick v. Dossmoney Dossee* (Post, p. 714); but even if that case were good law, it would not have assisted the appellants' argument, because I think that the High Court meant to decide, not that the lien passed to the plaintiff under the sale, but, on the contrary, that either by obtaining the decree itself, or by the sale under it, the plaintiff had lost his lien.

The last authority cited, to which I think it right to refer, is the Full Bench judgment of the Allahabad High Court—*Khub Chand Kalian Das* (I. L. R., 1 All., 240). The Court there differed in some respects from the Full Bench of Calcutta, and there is much in that judgment, more particularly in the observations of Mr. Justice TURNER, which deserves our best consideration; but I find nothing in that judgment which, in my opinion, supports the appellants' contention here.

[684] We have had some doubt whether, having regard to the difficulty of the subject, and the apparently contradictory nature of some of the decisions upon it, we ought to refer this case to a Full Bench; but, on the whole, we do not find that any of the authorities are so opposed to our present view as to render that course necessary. We, therefore, dismiss the appeal with costs.

**McDonell, J.**—I concur in dismissing the appeal. I would merely add, that it seems to me, that all that the plaintiff purchased under his sale, which was held under the old law, was the right, title, and interest of the mortgagor; and as, at the time of the sale to plaintiff, the mortgagor had no right, title, or interest remaining, the plaintiff purchased nothing, and is not entitled to the relief he claims in the present suit.

*Appeal dismissed.*

#### NOTES.

#### [PURCHASER FROM MORTGAGOR NOT PARTY TO SUIT ON MORTGAGE—

"If the mortgagor had no interest at the time of sale under mortgage nothing passes in execution."

Cited in (1888) 10 All. 520, where it was held that mortgage decree and sale in pursuance of it did not bind the purchaser from the mortgagor who was not a party to the mortgage suit. Referred to in (1906) 32 Cal. 891, where it was held with reference to rival purchaser in execution of different mortgage decrees that the title to possession depends upon date of mortgage though RAMPANI, J., dissented from the view and held that it depends upon the date of sale.]

[7 Cal. 684]

*The 25th July, 1881.*

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE FIELD.

Brojendro Coomar Roy.....Plaintiff

*versus*

Krishna Coomar Ghose and others.....Defendants.\*

*Appeal—Decree—Civil Procedure Code (Act X of 1877), s. 540—Survey—Measurement—Beng. Act VIII of 1869, ss. 25, 37, 38.*

An order made under s. 37, Bengal Rent Act (Beng. Act VIII of 1869), is a decree within the meaning of the definition contained in the Civil Procedure Code (Act X of 1877), and an appeal lies therefrom under the provisions of s. 540.

A proprietor of an estate or tenure has a right to make a general survey and measurement of the lands comprised in his estate, under the provisions of s. 37 of the Rent Act, without proving that he is in receipt of the rents, there being nothing in law which prevents him from

\* Appeal from Original Decree, No. 270 of 1880, against the decree of Baboo Gungachurn Sircar, Subordinate Judge of Dacca, dated the 31st July 1880.



making such a survey or measurement, as is contemplated by ss. 26 and 37, merely because his estate happens to be sublet to a number of tenure-holders.

The only excepted case is where there is a special agreement to the contrary.

IN this case the plaintiff sought, under the provisions of s. 37 of Beng. Act VIII of 1869, to establish his right to measure certain [685] lands comprised in Mouza Akhari and several other mouzas. He alleged that he had purchased the zamindari, at a revenue-sale, on the 4th October 1877, for Rs. 10,000, and duly obtained the sale-certificate and delivery of possession under the provisions of s. 29, Act XI of 1859; that he, subsequently, sent an amin to measure all the lands of the zamindari set out in the plaint, but that the defendants resisted such measurement being made, and therefore he was obliged to make the present application to the Court.

A number of the defendants appeared and filed written statements resisting the application on various grounds, and denying that the plaintiff had any cause of action against them; and the following issues were settled amongst others:—

1. Is the suit untenable by reason of its having been brought against all the defendants jointly?
2. Is the suit bad on the ground of nonjoinder?
3. Is the plaint, or rather the application, defective in consequence of the plaintiff's omission to state therein the quantity of land held by each of the defendants, the kismut in which it is situated, and the value thereof?
4. Was the plaintiff formerly a 4-anna shareholder in the zamindari, of which he applies to make measurement on the strength of his having purchased it at a revenue-sale? And should this application be disallowed in consequence thereof?
5. Should the suit be rejected because the plaintiff served no notice upon the defendants?
6. Is the plaintiff entitled to measure the lands of those defendants who say that they held those lands in virtue of their mokurari tenures?
7. Has the plaintiff no right to measure the lands because he has been out of possession from before?

The lower Court found the first five issues in favour of the plaintiff, holding, that although the plaintiff admitted that, previous to the purchase, he owned a 4-anna share in the zamindari, he was not on that account disentitled to the relief he sought.

With regard to the sixth and seventh issues the Judge found that the plaintiff intended to make a minute measure- [686] ment of the lands; that most of the lands were covered by howladari and other intermediate tenures; and that most of the ryots held under such intermediate holders, and paid their rents to them and not to the plaintiff; and that it was admitted on both sides that the plaintiff was never in possession of the estate by receiving rent from the ryots or from the intermediate tenants. "On these grounds, therefore, he held, that the plaintiff was not entitled to the relief he sought, and dismissed the suit accordingly.

Against that order the plaintiff accordingly now appealed to the High Court.

Baboo *Srinath Dass* for the Appellant.

Baboo *Rash Behary Ghose*, Baboo *Mohiny Mohun Roy*, and Baboo *Lall Mohun Das* for the Respondent.

The Judgment of the Court (PRINSEP and FIELD, JJ.) was delivered by **Prinsep, J.**—We think that the judgment of the Subordinate Judge in this case is clearly erroneous. The plaintiff is the purchaser of an estate at a sale for arrears of Government revenue, and he has brought this present suit, under s. 37 of the Bengal Rent Act (Beng. Act VIII of 1869), in order to make a measurement of the estate so purchased.

A preliminary objection was taken which we may well dispose of in the first instance. It is contended that no appeal lies in a case of this sort. We think however, that the order, made by the District Judge under the provisions of section 37 of the Rent Act is a decree within the meaning of the definition contained in the existing Code of Civil Procedure. 'Decree' means "the formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court, when such adjudication, so far as regards the Court expressing it, decides the suit." This is the portion of the definition essential to the present case. Now the right here claimed is the right to make a measurement of the estate, and it is quite clear that the Subordinate Judge has adjudicated upon the right. But then [687] it is contended that this was an application, and not a suit. We think, however, that this objection is effectually disposed of by the language of the section itself, wherein we find the following words:—"The person claiming the right to measure such land may apply, to establish his right to measure such land, in the Court which would have jurisdiction in case such suit had been brought for the recovery of such land." The Legislature here, although it uses the word 'apply' in the first portion of the passage cited, has deliberately termed this application a suit in the concluding words just quoted. We are then clearly of opinion that, having regard to the provisions of s. 540 of the Code of Civil Procedure, this appeal will lie.

The Subordinate Judge, dealing with the right of the plaintiff to make a measurement, says:—"With regard to the sixth and seventh issues, which ought to be tried together, I have to observe, that, from the plaint it appears, that the plaintiff intended to make a minute measurement of certain land contained in the zemindari purchased by him, but it is shown by the evidence adduced on the part of the defendants, that most of the lands are covered by the howladari and other intermediate tenures, which some of the defendants have in the said estate. Whether these intermediate tenures are valid or not, is a question which need not be enquired into in this suit; but it is clear that the ryots, at least most of the ryots, of the mehal hold their lands under the said intermediate holders and pay rents to them and not to the plaintiff. Besides, it is admitted on both sides, that the plaintiff, either before or after purchase, was never in possession of the estate by receiving rents from the ryots or from the intermediate tenants. Under such circumstances I am of opinion, that the plaintiff is not entitled to measure the lands, especially when he seeks to make a minute measurement of the mehal." Now, in the first place, it is not clear to us that the plaintiff wants to make a minute measurement of the mehal, if by that the Subordinate Judge means such a measurement as is contemplated by s. 38 of the Rent Law. It is not set out in so many words in the plaint under what section the plaintiff has applied to the Court; but if we refer to the matter of the plaint, it is [688] quite clear that this matter brings the case within s. 37, and that there is nothing in the plaint which affords the details contemplated by s. 38. Under these circumstances we assume that this is a case under s. 37, and we shall deal with it accordingly; and we may further say that the vakil for the appellant has assented to this view. Now s. 25 of the Rent Act is as

follows :—" Every proprietor of an estate or tenure, or other person in receipt of the rents of an estate or tenure, has the right of making a general survey and measurement of the lands comprised in such estate or tenure or any part thereof, unless restrained from doing so by express engagement with the occupants of the lands." Whether the words "in receipt of the rents of an estate or tenure" are here to be construed as qualifying as well "proprietor of an estate or tenure" as "other person," is a question as to which there has been some difference of opinion. In the case of *Wise v. Ram Chunder Bysack* (7 W. R., 415), decided upon the corresponding section in Beng. Act V of 1862, NORMAN and SETON-KARR, JJ., thought that they did. In the later case of *Ranee Krishto Motee Debia v. Ram Nidhee Sircar* (9 W. R., 331), the Court took a contrary view; and SETON-KARR, J., appears to have changed his opinion, and is at pains to show that the decision in the prior case proceeded on the ground that the plaintiff was seeking to establish a title which was disputed. If the words be taken as qualifying "other person" only, it may be said, that the expression "other person in receipt of the rents of an estate or tenure" implies that the person previously mentioned, i.e., the proprietor of an estate or tenure, is a "person in receipt of the rents, etc." This construction would show it to be the intention of the Legislature, that only a proprietor who is in actual possession by receipt of rent—a *de facto* and not merely a *de jure* proprietor—can measure; and this is in accordance with other cases; see *Pureejan Khatoon v. Bykunt Chunder Chuckerbutty* (7 W. R., 96), *Kalee Doss Nundee v. Ramgutte Dutt Sein* (6 W. R., Act X Rul., 10), *Durga Charan Mazumdar v. Mahomed Abbass Bhuiya* (6 B. L. R., 361). If, instead of 'other,' the word 'any' [689] had been used, there might have been more room for doubt. It is to be observed that the words "entitled to receive the rents of an estate or tenure" are to be found in s. 38, with which, as already pointed out, the present suit is not concerned; but do not occur in s. 37, which is as follows :—"If any person intending to measure any land which he has a right to measure, is opposed in making such measurement by the occupant of the land, etc." Now, in order to ascertain what persons have a right to measure, we naturally refer to s. 25 already quoted. If that section is to be construed as giving the right to measure to persons in receipt of the rents and to those only, it is difficult to account for the use of the words "entitled to receive the rents" in s. 38, while they are omitted from s. 37. It could scarcely have been intended to use the term 'entitled' of a *de jure* title merely which was not also a *de facto* title. Such a construction would give a dangerous extension to s. 38. "Entitled to receive the rents" probably means no more than "in receipt of the rents," and the natural construction to be put upon the omission of these words from s. 37 is, that the class of persons referred to in this section, and who have a right to measure under s. 25, is not necessarily the same class as is mentioned in s. 38; in other words, that the proprietor of an estate or tenure has a right to measure under s. 37 without proving that he is in receipt of the rents. The case of *Raj Chunder Roy v. Kishen Chunder* (4 W. R., Act X Rul., 16) agrees with this view. There can be no doubt that the plaintiff in the present case is the proprietor of the estate, and in this view it is clear that, as a proprietor, he has the right to make a general survey and measurement of the land comprised in his estate. The defendants, in their written statement, do not deny the plaintiff's title; they say that they are not unwilling to pay him rent; and although he has not, since his purchase, actually received any rent from them, in all probability owing to this dispute about measurement, he is, nevertheless, the person admitted to be entitled to the receipt of the rents. There is nothing in the law which precludes the proprietor of an estate from making a general

survey and measurement such as is contemplated by [690] ss. 25 and 37, merely because his estate happens to be sublet to a number of tenure-holders. The only excepted case is where there is a special agreement, and no such special agreement is pleaded in the present case. Under these circumstances, we think the judgment of the Subordinate Judge must be set aside, and this case must be remanded in order that he may proceed to do that which the law empowers him to do. The costs will be assessed on the same scale on which the lower Court has assessed them, and will abide the result.

*Appeal allowed, and case remanded.*

[7 Cal. 690]

*The 11th June, 1881.*

PRESENT :

MR JUSTICE MITTER and MR. JUSTICE MACLEAN.

Khoshelal Mahton and another.....Defendants

*versus*

Gunesh Dutt, *alias* Nanhoo Singh, and another.....Plaintiffs.\*

*Limitation—Time for presenting Plaintiff—Beng. Act VIII of 1869, s. 31—Limitation Act (XV of 1877) s. 5.*

The provisions of s. 5 of the Limitation Act (XV of 1877) apply equally to suits, under the Bengal Rent Act (Beng. Act VIII of 1869).

In a suit for rent, where it appeared that a deposit had been made in Court under the provisions of the Bengal Rent Act (Beng. Act VIII of 1869), and that the six months allowed by s. 31 of that Act for the purpose of instituting a suit had expired on a day when the Court was closed for an authorized holiday, but that the plaint had been filed on the first day the Court re-opened,—

*Held*, that the provisions of s. 5† of the Limitation Act (XV of 1877) applied to such cases and that, consequently the suit was not barred.

*Golap Chand Nawluchha v. Krishto Chunder Dass Biwas* (I. L. R. 5 Cal., 314), and *Hossin Ally v. Danzelle* (I. L. R. 5 Cal., 906) followed.

*Purran Chunder Ghose v. Mutty Lal Ghose Jahnna* (I. L. R. 4 Cal., 50) dissented from.

THIS suit, which was instituted on the 3rd December 1879, was brought to recover arrears of rent for the years 1284 to [691] 1286 (corresponding with the years 1876 to 1879) in respect of Mouzas Bargawan, Bozerg, Khord, etc., Pargana Behar, Zilla Patna. The plaintiffs alleged that they held and owned a share in the lands under and by virtue of a purchase, and that collections and realizations from the said share had continued to be made from before, and management

\* Appeal from Appellate Order, No. 297 of 1880, against the order of H. Beveridge, Esq., Judge of Patna, dated the 24th June 1880, reversing the order of Baboo Sheo Surn Lal, Munsif of Behar, dated the 13th February 1880.

†[Sec. 5.—If the period of limitation prescribed for any suit, appeal or application expires

on a day when the Court is closed, the suit, appeal or application may be instituted, presented or made on the day that the Court re-opens :

Any appeal or application for a review of judgment may be admitted after the period

of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period.]

and settlement thereof since, the cultivation season of 1286 F. S. (1877-1878) separately from the other shareholder; that, previous to that date, settlements at different rates had been entered into between their vendor and his co-shareholder and the cultivators, but that, in 1285 (1877-1878), the tenants, of whom the principal defendant was one, agreed, by a fresh settlement, for the plaintiffs' exclusive share, to pay an additional eight annas per bigha; that, after such settlement, the defendant and the other tenants had, at the instigation of their co-shareholder, ignored such settlement, and deposited rent in the Civil Court, misstating the arrears and the rents actually due, and that they first came to know of such deposit on the 25th Jeyt 1286 (3rd June 1879). The second defendant, being the son of the principal defendant and living jointly and in commensality with him, had been joined as a party but he filed a written statement denying all interest in the land in question. Khoshelal Mahton, the principal defendant, denied any such fresh settlement. He alleged and pleaded payment in full up to the year 1286 (1877-1878), and with respect to the rent due for that year, stated that it had been deposited in Court under the provisions of the Rent Act.

The Munsif dismissed the suit, on the ground that it was barred under s. 31 of Beng. Act VIII of 1869, and that the Limitation Act (XV of 1877) did not apply to such suits; and although he found that the rent in respect of 1286 had been deposited on the 3rd Magh 1286 (11th January 1879) before it was due, he held that that did not alter the case.

The Judge of the lower Appellate Court, while agreeing with the original Court on the point of limitation, had that question arisen, held, that no such point arose, and that the deposit by the defendant was not a deposit under the law, and that therefore s. 31 of the Rent Act did not apply. He considered that, [692] as the rent was not due till the 1st Assar 1286 (5th June 1879), and as it was deposited on the 3rd Magh 1286 (11th January 1879), it was not a deposit in compliance with the law, as the plaintiffs were not bound to accept the rent before it was actually due, and that, as the provisions of s. 31 of Beng. Act VIII, 1869 were not applicable, the plaintiffs were not barred by limitation from recovering the rent for the previous years, although they sued more than six months after the date of the deposit.

He, accordingly, reversed the decree of the lower Court, and remanded the case under the provisions of s. 562 of the Civil Procedure Code for trial on its merits.

The defendants now specially appealed to the High Court against that decision.

Mr. *H. C. Mendes* for the Appellants.

Baboo *Mohesh Chunder Chowdhry* for the Respondents.

The Judgment of the Court (MITTER and MACLEAN, JJ) was delivered by

**Mitter, J.**—The plaintiffs instituted this suit on the 3rd December 1879 to recover arrears of rent for the years 1284, 1285, and 1286 F. S. (corresponding with the years 1876 to 1879). The defendants alleged, that the rents for the years 1284 and 1285 (1876-1878) had been paid in full, and that of the year 1286 (1878-79) having been deposited under the provisions of the Rent Act, the notice of such deposit was given to the plaintiffs on the 31st May 1879. They pleaded that the suit, not having been instituted within six months from the 31st May 1879, was barred under the provisions of s. 31 of the Rent Act.

The Munsif held, that the suit was barred, while the Judge on appeal came to the contrary conclusion. The latter officer based his decision on the

ground that the deposit of the rent of the year 1286 (1878-79) was not legal under the Act, because it had not then become due.

It is contended before us that the Judge is wrong in assuming without evidence that the rent was not due. Although we are of opinion that the Judge ought not to have made any assumption of fact without taking evidence, still we think upon [693] another ground that his conclusion is right. The last day of the six months from the 31st May 1879 fell upon an authorized holiday, and the suit was instituted on the first day the Court re-opened.

Under these circumstances, we think that the suit should be deemed to have been instituted within the time limited by the law. The days during which a Court remains closed should be considered as non-existent. It is but reasonable to hold this, otherwise great injustice might be done. Take for instance a case like this. A plaintiff comes to file his plaint on the last day allowed by law, and finds that the Court has been closed unexpectedly. It would be manifestly unjust to throw out his plaint, if filed on the next day the Court re-opened, as barred by limitation.

This Court has acted upon this principle in the cases of *Hossein Ally v. Donzelle* (I. L. Rep., 5 Cal., 906) and *Dabee Rawoot v. Heeramun Mukatoon* (8 W. R., 223). We are aware of contrary ruling in *Purran Chunder Ghose v. Mutty Lall Ghose Jahira* (I. L. R., 4 Calc., 50). This last-mentioned case was decided when Act IX of 1871 was the general Limitation Act. That law is no longer in force, and it has been decided under the present Limitation Act (XV of 1877), that the provisions of s. 5, which embody the principle laid down above, would apply to suits under the Rent Act; see *Golap Chandra Nowluckha v. Krishto Chunder Dass Biswas* (I. L. R., 5 Cal., 314).

We are, therefore, of opinion that this appeal must fail. We accordingly dismiss it with costs.

*Appeal dismissed.*

#### NOTES.

[Applicability of the provisions of Limitation Act to cases outside it.

Followed in (1891) 18 Cal. 631 where the principle under sec. 5 of the Limitation Act was applied to an application under s. 230 C. P. C. (1882) as the applicant could not file the application on the last day as the Court was closed. When parties are prevented from doing a thing on a particular day by the act of the Court they must be permitted to do that on the next day. But secs. 6 and 7 of the Limitation Act is not applicable to suits under Bengal Tenancy Act. (1889) 17 Cal. 263 where this case was explained on the ground mentioned above.]

[694] The 18th July, 1881.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Madary.....one of the Plaintiffs

versus

Goburdhun Hulwai.....Defendant.\*

*Liberty to erect places of worship—Irregularity in place of trial—District Judge holding his Cutcherry in a Munsif's Court.*

In India, the members of a sect are at liberty to erect a place of worship on their own property, although it is more or less contiguous to a place already occupied by a place of worship appertaining to another sect. The people of any sect are at liberty to erect on their own property places of worship, either public or private, and to perform worship, provided that, in the performance of their worship, they do not cause material annoyance to their neighbours.

*Seshayyengar v. Seshayyengar* (I. L. R., 2 Mad., 143) followed.

Where a District Judge took advantage of his presence in the locality, and heard and decided a suit in the Munsif's Court, which had originally been instituted in that Court, but subsequently transferred to the Judge's Court for trial, and it appeared that the course taken was with the consent, implied, if not express, of both parties, who were represented at the hearing,—

*Held*, that the District Judge was justified in taking the course he had done

THIS suit was originally instituted on the 28th March 1876 by three plaintiffs, the plaint being filed in the Court of the Munsif at Aurangabad. The object of the suit was to have a shivali and thakurbari erected by the defendant demolished, on the ground that it had been erected close to a mosque, and was therefore prejudicial to the plaintiffs' religion. The plaintiffs stated that the cause of action accrued on the 15th Mohorrum 1293 Hijri (corresponding with 12th February 1876), the date on which the foundations of the shivali and thakurbari were commenced, and they prayed that it might be demolished, and the defendant prohibited from doing any new act contrary to the old usual practice, and thereby causing harm to their religious rites.

The defendant stated in his written statement, that the plaintiffs were only ryots, and therefore not entitled to bring the [695] suit; that, on the 17th Sawan 1278 F. (corresponding with the 19th July 1871), he had taken the lands in question from the proprietors of the mouza, and erected the shivali and thakurbari, as well as sunk a well and planted trees, and that no one had till now raised any objection thereto; and that, in addition, the mosque was never used, and consequently there could be no objection to his acts, on the ground of their interfering with the plaintiffs' religious rites

On the 1st May 1876, the following issues were settled by the Munsif :—

1st.—Is the cause of action alleged by the plaintiffs dated correctly?

2nd.—Are the shivali and thakurbari erected by the defendant, likely to cause any interruption to the plaintiffs' offering prayers in the mosque? If so, should the walls of the shivali and thakurbari be demolished?

On the 27th June 1876, the Munsif held a local investigation, and found that the shivali and thakurbari were about forty yards distant from the mosque.

On the 17th July 1876, the defendant applied for the transfer of the case from the Court of the Munsif, on the ground that he being a Mahomedan

\* Appeal from Original Decree, No. 34 of 1880, against the decree of G. Porter, Esq., Judge of Gya, dated the 27th December 1879.

would not adjudicate fairly on a matter relating to his own religion ; and on the 18th August 1876, the case was accordingly transferred to the Judge's file.

Subsequently, in December 1879, the District Judge took advantage of his being at Aurangabad, and directed the parties to be present in the Munsif's Court, and proceeded to dispose of the case.

It appeared that, while the suit was thus pending, two out of the three plaintiffs had died, as well as the defendant, who was now represented by his widow.

The District Judge took the deposition of the surviving plaintiff, and then finding that the facts of the case were undisputed held, that the litigation had originated out of a quarrel between the plaintiffs and the defendant, whose house was situated next to the mosque, and that the mere erection and construction of a shivali and thakurbari at a distance of forty yards from the mosque was not opposed to the Mahomedan [696] religion, and could not, in any way, disturb or interrupt the plaintiffs' prayers. He accordingly dismissed the suit.

The plaintiff now appealed to the High Court against that decree, on the grounds that the Judge had no right to hold his cutcherry in the Munsif's Court, but should have tried it in his own Court, and that he was wrong in dismissing the suit without summoning and hearing the plaintiffs' witnesses, and that the proper issues had not been raised and tried in the case.

Mr. *Sandel* for the Appellant.

No one appeared for the Respondent.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by

**Mitter, J.**—The first objection taken before us is, that the District Judge was not authorized by law to hold his cutcherry in the Munsif's Court but we do not think that there is any force in this objection. We find that this course was taken with the consent, if not express, yet implied, of both parties. The Judge says, he took the opportunity of his visit to Aurangabad to direct the parties to be present, in order that the cases might be decided, and then we find that the plaintiffs were represented by their pleaders, and probably this course was to the advantage of the plaintiffs, as they had probably already engaged their vakils in the Munsif's Court, where this suit was originally instituted.

The next objection taken to the Judge's judgment is, that he is not right in holding that the plaint discloses no cause of action. We think that the view which the Judge has taken of the plaint is correct. Taking all the allegations stated in the plaint as established by evidence, we are of opinion that the plaintiffs were not entitled to any of the reliefs expressly mentioned in the plaint, or to any cognate relief which the plaintiffs might have asked the Court to grant upon the plaint. Our view is supported by a recent Madras case of *Seshayyengar v. Seshayyengar* (I. L. R., 2 Mad., 143). The ruling in that case is to the following [697] effect: "In India, the members of a sect are at liberty to erect a place of worship on their own property, although it is more or less contiguous to a place already occupied by a place of worship appertaining to another sect. The people of any sect are at liberty to erect, on their own property, places of worship, either public or private, and to perform worship, provided that, in the performance of their worship, they do not cause material annoyance to their neighbours."

We, therefore, dismiss this appeal without costs, as no one appears for the respondent.

*Appeal dismissed.*



[7 Cal. 697]

The 1st July, 1881.

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE AND MR. JUSTICE FIELD.

Nobin Chunder Dutt and others.....Defendants

versus

Modun Mohun Pal.....Plaintiff.\*

*Sale in execution—Arrears of rent—Under-tenure—Service Tenures—Permanent tenures—Tenure-at-will—Long possession—Presumption.*

The plaintiff purchased a maurasi taluq at a sale in execution of a decree obtained against the taluqdar for arrears of rent of the taluq, and then sued to recover possession of certain lands held by the defendants within the taluq. The defence was, that the lands in question were held by the defendants under a patta which had been granted to their ancestor, in 1733, by the then taluqdars in respect of certain services to be performed by the grantees and their descendants. The Court of first instance found that the patta was genuine, and dismissed the plaintiff's suit. On appeal the Subordinate Judge found that the patta was a forgery and that although the lands had been granted to the defendants' ancestor in respect of services, yet the plaintiff was entitled to khas possession, as he did not require the services to be performed. He, therefore, decreed the plaintiff's claim.

*Held*, that the decree was right, for having found that the patta on which the defendants chiefly relied was a forgery; the Subordinate Judge was not bound, as a matter of law, to presume that the tenure was a permanent one merely from the fact of long possession of the lands. \*

THIS was a suit brought by the purchaser of a maurasi taluq, which had been sold in execution of a decree for its arrears [698] of rent against the defendants, tenants within the taluq, for khas possession of the lands held by them. The material portion of the plaint was as follows:—"The particulars are, that when the three Mauzas—Nabla, Ulai, and Udoypur—were held by the deceased Brojokishore Roy, the deceased Gunga-gobind Roy, the deceased Surba Chunder Roy, and others, in maurasi right under the proprietors, the said maurasi taluq was sold in execution of a decree for its arrears of rent due to the proprietor, and purchased by me jointly with my co-sharers; that, under a private partition subsequently made by arbitration, the said purchased maurasi taluq was obtained by me alone, and accordingly I now own and hold the same; that the defendants are holding the disputed lands in Mauzas Nabla, Ulai, and Udoypur, appertaining to the said maurasi tenure, on the allegation that they obtained the same as service-lands from the former maurasidars, but the said maurasi mahal having been sold in execution of a decree for arrears of rent as alleged above, such service-tenure, even if it actually existed, became void under the law, and since the auction-sale, the defendants having left the service, *i.e.*, on their not doing any service under the purchasers of the maurasi tenure, their alleged right of service-tenure has further become extinct; that the defendants are holding the lands without any right and without obtaining any settlement, although they have not any right to hold it; that although I duly served a notice on the defendants in Pous last to take out a settlement of the said land from

\* Appeal from Appellate Decree, No 418 of 1880, against the decree of Baboo Kishen Chunder Chatterjee, Officiating Subordinate Judge of Nuddea, dated the 27th of December 1879, reversing the decree of Baboo Anund Mohun Surbadhuary, Munsif of Ranaghat, dated the 23rd of March 1878.

me or to give up possession, up to the month of Cheyt 1284 (March—April 1877), they did not take out any settlement, nor give up possession of the land."

The defendants filed a written statement, the material portions of which were as follow :—

"5. The defendants' ancestor, Ramdeb Dutt, was, while living, a trust-worthy agent entrusted with the collection of rent of the debutter lands of Ram Bhuddur Roy, the ancestor of the former proprietors of the plaintiff's alleged maurasi ijara tenure, and in lieu of his salary granted him a permanent maurasi patta dated the 15th Magh 1139 (corresponding with 27th January 1733), in respect of fifty bighas of homestead [699] garden at a fixed rental of Rs. 12, stipulating to hold the same from generation to generation. The said patta contains a further stipulation to the effect that, if the post be resigned, or the service be dispensed with, a yearly rental of Rs. 12 should be paid. The land in claim is covered by the said patta. As the said land has all along been held by us by *bona fide* payment of the aforesaid rent under the said patta from generation to generation, since before the time of the Permanent Settlement, we cannot be ejected from the said land.

"9. The allegations, that the disputed lands were held by us as obtained from the plaintiff's predecessor, maurasidar, in lieu of certain service, and that it was left after the plaintiff's purchase of the mokurari ijara right, are all false.

"10 Our predecessor, the deceased Ramdeb Dutt, used to collect the rent of the debutter lands of the deceased Ram Bhuddur Roy, and applied the same to the worship of the idol; the said service was formerly done by our predecessors, and now it is performed by us: besides which we had nothing to do with the mokurari ijara mehal, and the land in claim was not granted in lieu of any service done in connection with the said mokurari ijara mehal."

The Court of first instance found that the patta of 1733 was genuine, and dismissed the plaintiff's suit. On appeal the Subordinate Judge, after going minutely into the evidence, said :—"Considering the evidence, as well as the surrounding circumstances, I am inclined to hold that the patta set up by the defendants is not genuine, and that the defendants failed to prove they had any ryotti right in the lands. The service in lieu of which the lands were originally granted to the defendants' ancestor not being required by the plaintiff, the latter is entitled to call upon the defendants to surrender their lands." He then reversed the decision of the Court below, and decreed the plaintiff's claim.

The defendants appealed to the High Court.

Baboo Hem Chunder Banerjee, Baboo Sree Nath Banerjee, and Baboo Bipro Dass Mookerjee for the Appellants.

Baboo Rashbehari Ghose for the Respondent.

[700] The following Judgments were delivered :—

Garth, C. J.—I think this appeal must be dismissed. The plaintiff sued to eject the defendants from certain lands, which the defendants and their father and grandfather before them had held for the performance of certain services. There does not appear to be any doubt as to what the services were, although the Subordinate Judge does not describe them; because both parties seem to agree, that they consisted in collecting the rents of certain debutter lands, and paying those rents, or applying them in some way, for the worship of an idol. The defendants' case was, that they had a permanent tenure which had its origin in a grant given to their ancestor in the year 1139, and the first Court having found this grant to be genuine, dismissed the plaintiff's suit.

The Subordinate Judge took a different view. He considered, for the reasons which he gives in his judgment, that the document brought forward by the defendants was not genuine, and he believed it to have been fabricated within the last few years. At the same time he finds that the defendants and their predecessors in title did hold the lands for many years in consideration of their rendering to the plaintiff certain services; but he says—"The services in lieu of which the lands were originally granted to the defendants' ancestor, not being required by the plaintiff, the latter is entitled to call upon the defendants to surrender the lands."

Reading this passage in conjunction with what the Subordinate Judge says in other parts of his judgment, I think he means to say, that as the grant put forward by the defendants in support of their case is untrue and fabricated, he is not bound to make any presumption of a permanent grant in favour of men who have brought forward such an instrument, and therefore, notwithstanding the long possession, he considered the holding to be at will, and as the services were no longer required, the plaintiff was at liberty to put an end to the defendants' tenancy.

Now the question for us is, having regard to the fact that the defendants, their father, and grandfather, and perhaps a generation before them, had performed the services in consideration [701] of holding the lands, whether the Subordinate Judge was bound, as a matter of law, to presume that the defendants had a permanent tenure. I think he was not bound to make such a presumption. It may be, that he was at liberty to presume, if he had thought proper to do so, a permanent grant; and that, in that case, we could not have disturbed his finding. But having declined to make such a presumption, I think we have no right to say that he was in error. I certainly for one, am not disposed to assist men who have by means of a fabricated deed attempted to deceive the Court. I should add, that if I thought there was any real doubt as to the nature of the services, or as to the nature of the evidence upon which the defendants' case is based, I should have had no objection, if my learned brother thought it necessary, to remand the case for further enquiry. But it seems to me, that there is really no such doubt. The parties are agreed as to the nature of the services, and the nature of the case set up by the defendants is plain enough. I consider, therefore, that a remand is unnecessary, and that the appeal should be dismissed with costs.

**Field, J.**—I also think that no ground has been made out which would justify us in interfering in this case upon second appeal. The plaintiff is an auction-purchaser, and he sued to resume a certain tenure which he alleged to have been held by the defendants in lieu of wages.

The defendants, in support of their case, in the 9th paragraph of their written statement, denied that the plaintiff's account of the nature of the service-tenure was correct, and, in the 10th paragraph of their written statement, they set out, what, according to their contention, was the nature of the service upon which the tenure has been held, and further, they set up an old patta bearing a date antecedent to the Permanent Settlement.

The Subordinate Judge has found against the genuineness of this patta, and that is a finding of fact with which we cannot interfere upon second appeal.

But although the Subordinate Judge found against the genuineness of the patta, he seems to have been of opinion that the tenure was a service-tenure. He does not say in so many words whether he found the nature of the services [702] to be such as was alleged by the plaintiff, or such as was alleged by the defendants. What he says in his judgment is this—"The services in

lien of which the lands were originally granted to the defendants' ancestors, not being required by the plaintiff, the latter is entitled to call upon the defendants to surrender their lands." As I understand the Subordinate Judge, what he means is this, that, notwithstanding the failure of the defendants to prove the patta set up by them, there was other evidence on the record—taking together the allegations of the plaintiff and those of the defendants, and such evidence as had been produced on either side—which left no doubt on his mind that this tenure was really some kind of a service-tenure; but that the defendants had not succeeded in proving the particular case set up by them, had not in fact succeeded in proving that the tenure was of such a nature that they were entitled to hold the land after they had ceased to perform the services. And if this was the intention of the Subordinate Judge, I think that we have not been shown that his view is incorrect.

I may observe that the patta upon which the defendants themselves rely, contains within it sufficient to show, that they had no idea of setting up a tenure of such a nature that it depended upon any old village custom, or any other basis than that of a grant by the zamindar, and this being so, if the services were such as alleged by the zamindar, I think we cannot say, as a matter of law, that the zamindar was not entitled to resume the land granted by himself when he ceased to require the performance of those services. In this view I also think that the appeal must be dismissed with costs.

*Appeal dismissed.*

### [703] FULL BENCH.

*The 17th June, 1881.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE PONTIFEX,  
MR. JUSTICE MORRIS, MR. JUSTICE MITTER,  
AND MR. JUSTICE McDONELL.

Syed Sudfar Reza.....Plaintiff

*versus*

Amzad Ali and another.....Defendants.\*

*Registration—Lease—Agreement for lease—Doul Durkhast—Proposal—Acceptance—  
Contract—Fair-rent—Regular appeal—Special appeal—Remand—  
Full Bench reference—Practice.*

Every lease, or agreement for a lease in writing, must be registered before being given in evidence. But a proposal in writing to take a lease of certain lands on certain terms, made by one person to another, need not be registered, unless the proposal in writing has been so accepted that the proposal and acceptance constitute a contract in writing.

The defendant held lands under the plaintiff at a certain rate per bigha. The plaintiff brought a suit for arrears of rent on a new agreement alleged to have been entered into by the plaintiff and the defendant, whereby the latter agreed to pay a higher rate per bigha. The lower Appellate Court found that the new agreement had never, in fact, been entered into,

\* Full Bench Reference in appeal from Appellate Decree, No. 2813 of 1879, made by Mr. Justice CUNNINGHAM and Mr. Justice PRINSEP, dated the 16th May 1881.

and gave a decree for the old rate of rent without going into the question whether it was a fair rent or not.

*Held*, that the decision was correct.

On a reference to a Full Bench from a special appeal, the Full Bench will decide the special appeal; but on a reference from a regular appeal, the Full Bench will only decide the point referred, and send the case back to be dealt with by the bench which made the reference.

THIS case was referred to a Full Bench by CUNNINGHAM and PRINSEP, JJ., on the 16th May 1881, with the following opinion :—

"The plaintiff having obtained an *ex parte* decree, the District Judge, at the hearing of the appeal of the defendants, himself took a preliminary objection ~~not~~ raised either in the first Court or in appeal, and after giving the parties time to consider it, he dismissed the suit, setting aside the judgment of the first Court solely on those grounds.

"The District Judge held, that the plaintiff had based his suit on a doul durkhast, which bears on its face the words 'munzur kur data,' and what purports to be the signature of the plaintiff. If this document be a memorandum of an agree-[708]ment to lease, it requires a stamp under sched. ii, art. 11, Act XVIII of 1869.

"If this document be a complete and binding lease, it ought to have been both stamped and registered. In either case the doul durkhast is inadmissible in evidence.

"As regards the question of stamp, it is settled law that an Appellate Court is not competent to set aside a decree on account of the improper reception of evidence by the first Court of a document which should have been stamped, or indeed to consider the matter, as it is an irregularity not affecting the merits of the case or the jurisdiction of the Court (s. 578, Act X of 1877). So far, accordingly, as this part of the case is concerned, even supposing that the District Judge is correct in holding that the doul durkhast should have been stamped, his judgment as an Appellate Court cannot be upheld. We would, however, refer to the case of *Choonee Mundur v. Chundee Lall Dass* (14 W. R. 178) and of *Bibee Meheroonnissa v. Abdul Gune* (17 W. R., 509), in which it has been held that such documents need not be stamped.

"The lower Appellate Court was, however, competent to raise an objection that the document had not been registered, and it now becomes necessary to consider this point.

"It may be urged that the addition of the words 'munzur kur data,' signifying the acceptance by the zemindar of the proposal made by the ryot to lease his lands for seven years, completes the agreement, and that thereupon the document became 'a lease' within the meaning of s. 17 (d) and s. 2 of the Registration Act, III of 1877, and should have been registered.

"We are inclined to think that this contention is correct. The document is to the following effect :—

1271 Mulki.  
Bibi Zamirun,  
wife of Sheik  
Farhatulla.

Bibi Zamirun.  
Signed and Sealed for her by  
Ruhuman Buksh, her karpurdaz.  
Granted 28th Falgun 1286.

Application for farming lease for seven years in respect of one anna five gandas two cowris two krants in Goshwara Ilaka, Talqus Lagrao, [708] Bahadurpur, Burnoi, and Pysari, the zemindari of Sircar Deori Kishengunj, Pargana Surjapur, Zilla Purnea. The applicant shall pay to the sadr treasury

the sum of Rs. 12,873 of the current coin, the jama for seven years, from 1286 to 1292 Mulki.

	Rs.
From 1286 to 1292 Mulki, being a period of 7 years	12,873
For the year 1286 Mulki	1,839
Rent for one year for 2 annas 12 gandas 1 cowri	
1 krant share	3,650
Deduct for the share of Syed Haider	
Reza Saheb, zemindar	1,825
Balance	1,825
Izafa	14
Net jama	1,839
For the year 1287 Mulki	1,839
For the year 1288 Mulki	1,839
For the year 1289 Mulki	1,839
For the year 1290 Mulki	1,839
For the year 1291 Mulki	1,839
For the year 1292 Mulki	1,839

Dated the 20th Phalgun 1286 Mulki.

(On reverse.)

Impounded and forwarded to the Collector of the District.

F. COWLEY, D. J.

The 15th September 1879.

Witnessed by—

Didar Buksh and Hara Mirdha, inhabitants of Tifalgunj.

Faizu Mirdha, inhabitant of Majhya.

Doma Singh Jamadar, present resident of Kishongunj, Pargna Surjapur.

Sheik Kariya Mirdha, present inhabitant of Kishengunj.

"We are unwilling to give effect to our opinion, because it would seem to be in conflict with that of two Division [706] Benches in the cases of *Choonce Munder v. Chundee Lall Dass* (14 W. R., 178) and *Bibee Meheroounissa v. Abdool Gunee* (17 W. R., 509); and we are informed that zemindars and tenants in this part of the country have adopted the system of doul durkhast, instead of executing and registering regular leases.

"Under these circumstances we are of opinion, that the point should be decided by a Full Bench, and we accordingly submit the following question, viz., whether an application of this description, embodying the tenant's application for a lease on specified terms, and the landlord's acceptance of those terms, attested by his signature and by the signatures of witnesses, is a document which should be registered, or whether it falls within the exception (h) to s. 17\* of the Act?"

\*[Sec. 17:—The documents next hereinafter mentioned shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or Act No. XX of 1866, or Act No. VIII of 1871, or this Act came or comes into force (that is to say)—

Documents of which registration is compulsory. \* \* \*

(h) any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immoveable property, but merely creating a right to obtain another document which will when executed create, declare, assign, limit or extinguish any such right, title or interest.] \* \* \*

Documents merely creating right to obtain other documents. \* \* \*

Mr. M. L. Sandel for the appellant.—This document is neither a lease nor an agreement for a lease, and does not require registration. It is the tenant's letter, which is kept by the landlord, and no assent in writing is given to the lessee. Writing the word 'granted' in the proposal is merely making a memorandum of what has been done by the landlord, and does not amount to an acceptance in writing. *Bibee Meheroonnissa v. Abdul Gunee* (17 W. R., 509) is in point here. In *Doedem Lambourn v. Pedgriph* (4 C. & P., 312), the words "we approve this draft" were written and signed by the parties, and yet no stamp was necessary. [PONTIFEX, J.—An authority on the Stamp law is not an authority on the Registration law. The Stamp Act is a taxing Act, and all taxing Acts must be construed strictly.] See also *Choonce Mundur v. Chundee Lall Dass* (14 W. R., 178), *Goluck Kishore Acharjee Chowdry v. Nund Mohun Dey Sircar* (12 W. R., 394), *Bunwaree Lal v. Sungum Lal* (7 W. R., 280), *Amjed Ali v. Ala Buksh* (9 W. R., 537), *Gungapersad v. Gogun Singh* (1. L. R., 3 Cal., 322; s. c., *nom Kartienath Panday v. Khakun Singh*, 1 C. L. R., 328), and *Narain Cumari v. Ramakrishna Das*, (6 C. L. R., 286). The acceptance must be communicated in writing to the lessee in order to be a contract.

[707] Baboo Lal Mohun Das and Mr. Mendies for the Respondents.

The Decision of the Full Bench was delivered by

Garth, C. J.—If the application of the defendants was accepted by the plaintiff by writing the word 'granted' in the margin, we think that the instrument in question was a lease and therefore required registration. Even if it was an agreement for a lease, it also, in our opinion, required registration; because, coupled with possession by the defendants, its effect clearly was to give the latter an interest in the property for the term mentioned in the doul; and it does not appear that any other document to complete the transaction was contemplated by the parties.

This view seems to us perfectly consistent with the two decisions, which are mentioned in the reference—the cases of *Choonce Mundur v. Chundee Lall Dass* (14 W. R., 178) and *Bibee Meheroonnissa v. Abdool Gunee* (17 W. R., 509), because, in those cases, the application of the tenant was not accepted in writing. It was a mere proposal, which was accepted, if at all, orally, in which case the entire lease or agreement not being in writing, did not require registration.

In disposing of the second appeal, the only doubt which has occurred to us is, whether, as a matter of fact, the word 'granted,' which appears upon the document, was in itself the acceptance of the application, or whether the application had been previously granted orally by the plaintiff or his agent, and the word 'granted' was afterwards written by the plaintiff for his own purposes.

Certain it is, that the document was not returned to the defendants, but was retained in the plaintiff's own keeping.

Had the question of registration been raised in the first Court, some evidence might have been given upon this point; but it was raised on appeal, and then not by the defendants but by the Judge, so that the plaintiff had no opportunity of giving any explanation.

We think, therefore, that the case should go back to the Court below, in order that this point may be enquired into. [708] There is no doubt a certain decree of danger in allowing evidence on such a point to be given after the case has been discussed; but the lower Court will of course be quite alive to that danger, and will deal with any evidence that may be adduced on the part of the plaintiff with due caution.

It has been suggested to us that the defendants had a duplicate proposal in their own hands duly accepted in the same way by the plaintiff. If they had, there will of course be an end of the question.

We think that the costs in this Court and in the Court below should abide the result.

*Case remanded.*

# NOTES.

## [REGISTRATION—PROPOSAL TO TAKE A LEASE NEED NOT BE REGISTERED UNLESS THE PROPOSAL HAS BEEN ACCEPTED IN WRITING—

Followed in (1881) 7 Cal. 717 where it was held that a doul containing a proposal by a tenant to take up certain land did not require registration. So also an amalnama containing a recital that a lease would be granted to the tenant after 9 years on fulfilment of certain conditions was held not to require registration as it is not a lease or an agreement to lease (1906) 33 Cal. 502. A doul not embodying a special agreement but only containing memo of rent payable did not require registration (1911) 11 C. L. J. 22.]

Maharaja Luchmissur Singh.....Plaintiff

*versus*

Mussamat Dakho.....Defendant

and

Maharaja Luchmissur Singh.....Plaintiff

*versus*

Rung Lal.....Defendant.\*

These two cases were referred to a Full Bench by CUNNINGHAM and PRINSEP, JJ., under the same order of reference as was made in the foregoing case of *Syud Suldar Reza v. Amzad Ali*. The dous in those cases did not contain the term for which the lands were said to have been granted, and were not signed by the parties. The defendants had been tenants of the same lands previously to the making of the alleged agreement evidenced by the dous, and at a rate of rent lower than that mentioned therein. The lower Appellate Court found that no new agreement had in fact been entered into, and gave the plaintiff a decree for the old rent only. The plaintiff appealed.

Mr. H. Bell and Baboo Ram Churn Mitter for the Appellant.—These dous are ordinary village papers; it would be impossible to register such document; see Registration Act, [709] s. 21. *Kedarnauth Dutt v. Shamloll Khettry* (11 B. L. R., 405) shows, that no document requires registration unless it forms the whole contract between the parties. This case comes within the principle of *Gunga Persad v. Gogun Sing* (I. L. R., 3 Cal., 322; s. C., *nom* Karticknath Panday v. Khakun Singh, 1 C. L. R., 328). Even if the Judge did not find the new contract was entered into, he should have given a decree for a fair rent, and not for the old rent merely. [Mr. Gregory.—That does not arise in this reference. GARTH, C. J.—When we sit in a Full Bench, on a reference from a special appeal, we decide the special appeal; when we sit on a reference from a regular appeal, we merely decide the point referred and sent the case back.] Counsel also referred to *Currie v. Chatty* (11 W. R., 520).

\* Full Bench Reference in appeal from Appellate Decree, No. 708 of 1880 made by Mr. Justice Cunningham and Mr. Justice Prinsep, dated the 30th May 1881.



Mr. Gregory and Baboo Nil Madhub Sen for the Respondent.

The Judgment of the Full Bench was delivered by

Garth, C. J.—We think that, as the docs in both these cases contained a portion only of the terms upon which the new lease or settlement was to be granted, they were neither leases, nor agreements for leases, within the meaning of the Registration Act, and consequently were admissible in evidence without having been registered.

But as it has been found as a fact by the lower Appellate Court, that the arrangement for the new lease was never, in fact, completed, we think that the District Judge was right in holding that the new rent had not become payable; and that, under such circumstances, the Court was not at liberty to go into the question of what was a fair rent, but was bound to give the plaintiff a decree for the old rent only.

Both appeals must, therefore, be dismissed with costs.

*Appeals dismissed.*

#### NOTES.

[Followed in (1881) 7 Cal. 717. Agreement reducing rent does not require registration or need not be reduced to writing as it is not a lease (1896) 24 Cal. 20.]

### [710] APPELLATE CIVIL.

*The 11th June, 1881.*

PRESENT:

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Chaturi Sing and others.....Defendants

*versus*

Makund Lall and another.....Plaintiffs.\*

*Ejectment of tenant holding over—Notice to quit.*

There is no difference in Law between the position of a ryot holding without a patta and that of one holding over after the expiry of the term covered by a patta, with the consent of his landlord.

Such a tenant cannot be evicted without a reasonable notice to quit being given; and the relationship does not come to an end at the expiration of each year, without some act on the part of the landlord and tenant jointly, or of either of them.

*Ram Khelawun Singh v. Mussanul Soondra* (7 W. R., 152) followed.

THIS was a suit to recover possession of five bighas four cottas of land, which the plaintiffs alleged were held by them under a patta, and from which they had been wrongfully evicted by the defendants. The plaint stated that the land in suit was in the occupation of the plaintiffs from the time of their father, under a patta granted by the former proprietors on the 25th Jeyt 1278 F. (corresponding with 29th May 1871); that, on the 12th July 1878, the defendants, who were the purchasers of a certain share in the estate in which the land was situated, attempted forcibly to oust the plaintiffs from it, and

\* Appeal from Appellate Decree, No. 213 of 1880, against the decree of Baboo Kally Prosonno Mookerjee, Subordinate Judge of Sarun, dated the 31st December 1879, reversing the decree of Baboo Tara Prosonno Banerjee, Munsif of Chapra, dated the 25th June 1879.

thereupon the latter lodged a complaint in the Criminal Court, which, on the 2nd August 1878, referred them to a civil suit; and that, under the colour of that order, the defendants had wrongfully dispossessed the plaintiffs on the same day. The defendants denied the plaintiffs' title to the land in suit, and stated that, neither they, nor their father, had ever been in possession of it, [711] but that the land formed the zerat property of the malicks, and had been for the last two years in the khas possession of them, the defendants, who were the purchasers of eight pie, eighteen krants, nine and-a-half masants share of the estate in which it lay.\*

\* The only issues settled in the suit were, whether the plaintiffs held the land in dispute as tenants, and whether they had been wrongfully evicted from it by the defendants.

It appeared that the patta dated the 25th Jeyt 1878 F. (corresponding with 29th May 1871) was only for one year,—namely, 1279 (1871-72).

The first Court dismissed the suit, holding that the genuineness of the patta had not been satisfactorily established, and as the plaintiffs based their title solely on that patta, the suit could not be maintained, and that they could not fall back on "mere possession", that even if the patta was genuine, the mere fact of the landlord having permitted them to hold over for some years after its term had expired, viz., till 1285 F. (1877-78), did not create in their favour any right of occupancy; and that they were, therefore, only yearly tenants, and had not been illegally ejected, as they had been ejected at the end of the year. The lower Appellate Court, however, reversed this decree, holding that the plaintiffs' suit was not based on the patta, that being only the document under which the plaintiffs' possession commenced; and that, therefore, the plaintiffs' case would not, in any way, be prejudiced by their failing to prove the patta, and, in addition, the Subordinate Judge considered that the evidence was legally sufficient to prove its genuineness, and that he saw no reason to disbelieve it, that in any event there was ample evidence that the plaintiffs had been in occupation for some years on payment of rent to the malicks, and that they were, therefore, to be taken as tenants-at-will and entitled as such to a reasonable notice to quit, expiring with the end of the year, before they could be ejected.

The defendants now specially appealed to the High Court.

Mr. *Sandel* and *Bahoo Pran Nath Pundit* for the Appellants.

*Baboo Rujunee Kant Banerjee* for the Respondents.

[712] The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by

**Mitter, J.**—It is found by the lower Courts, that the plaintiffs held the disputed land in jote, and were ousted by the defendants in April 1285 (1878) without any notice. It is also found, that they had not, before ouster, acquired a right of occupancy. The defendants are owners of a fractional share of the estate in which the lands lie, but they claim an exclusive right to them as their zerat. The suit was dismissed by the first Court, while the lower Appellate Court, reversing that judgment, has awarded a decree, on the ground that the plaintiffs could not be legally evicted without a reasonable notice.

It has been contended before us, that a ryot not having a right of occupancy may be evicted at the end of the year without a notice. No doubt, a ryot holding under a patta having a fixed term may be evicted without notice at the end of the fixed term. But that is not the case here. The plaintiffs allege that their father obtained a patta for one year, viz., 1279 (1871-72), and

they were allowed to hold over till Assin 1285 (October 1877), when they were dispossessed. This patta was rejected as not established, by the Munsif, but the Appellate Court has expressed no final opinion regarding it, although it is inclined to believe its genuineness.

But, in the opinion of the Appellate Court, this point was immaterial. The lower Appellate Court is right in that view; because, so far as the point raised in the case is concerned, there is no difference in the law between the position of a ryot holding without a patta, or that of one holding over after the expiry of the term of a patta.

The lower Appellate Court mainly relies upon the Full Bench decision in *Rajendronath Mookerjee v. Rascehur Ruhoman Khundkar* (25 W. R., 329). But what is decided in it is, that a suit for possession cannot be treated as a notice in the case of a ryot entitled to a notice to quit. But however, in *Ram Khelawin Singh v. Mussamat Soondra* (7 W. R., 152), the point was decided in accordance with the view taken by the lower Appellate Court. [713] We also think that the view of the law taken by the lower Appellate Court is deducible from the provisions of s. 20 of Beng. Act VIII of 1869, which lays down that ryots like the plaintiffs cannot relinquish without a notice to the landlord. In our opinion it follows from this, that a landlord cannot evict such a tenant without a notice, because, in order to justify an eviction without a notice, it must be held that the tenancy, unless renewed, comes to an end at the end of the year. But if that were so the ryot could throw up the land without a notice.

The relation of landlord and tenant cannot be said to have ceased so far as the landlord's right to evict is concerned, but not with reference to the ryots' right to relinquish. But it seems to us, that the relationship does not come to an end at the expiration of each year, without some act on the part of the landlord and tenant jointly, or of either.

If the law were otherwise, the ryots would have been placed in a very disadvantageous position. It is generally the case that ryots of this class derive their livelihood from cultivation only.

If they were liable to be evicted without notice at the end of the year, they would find in many cases, great difficulty in obtaining a suitable quantity of land for cultivation from other zamindars.

On the whole we think that the lower Appellate Court has laid down the law correctly. The appeal is dismissed with costs.

*Appeal dismissed.*

#### NOTES.

##### [LANDLORD AND TENANT—HOLDING OVER—NOTICE TO QUIT—

Followed in (1885) 20 Bom. 759, where it was held that even in the case of tenancy constituted by holding over reasonable notice to quit was necessary to determine the tenancy. See also (1887) 14 Cal. 323, where it was held that notice to quit was necessary to enable the reversioners to eject the tenants let in by the widow.]

## [714] FULL BENCH.

*The 9th June, 1881.*

PRESENT :

SIR RICHARD GARTH, KT., CHIEF JUSTICE, MR. JUSTICE PONTIFEX, MR.  
JUSTICE MORRIS, MR. JUSTICE MITTER, AND MR. JUSTICE McDONELL.

Jonmenjoy Mullick.. .....Plaintiff

*versus*

Dossmoney Dossee.....Defendant.\*

*Mortgage-Bond—Money-Decree—Mortgage-Decree—Sale in Execution—Mortgagee's Lien.*

A mortgagee who elects to take a money-decree, and becomes himself the purchaser of the property mortgaged at a sale in execution of that decree, may bring a suit to enforce his lien against a person who purchased the right, title, and interest of the same debtor in the same property, at a prior sale in execution of a prior money-decree.

*Dossmoney Dossee v. Jonmenjoy Mullick* (I. L. R., 3 Cal., 363, s.c., 1 C. L. R., 446) overruled

THIS case was referred to a Full Bench by CUNNINGHAM and PRINSEP, JJ., on the 2nd June 1881, with the following opinions :—

This matter, in a different form, has already been before a Division Bench of this Court (JACKSON and KENNEDY, JJ). The judgment delivered has been reported in I. L. R., 3 Cal., 363, where the facts are fully set out.

The parties in that and the present case are the same. In that case the plaintiff, the mortgagee, having purchased in execution of his own decree obtained under s. 58 of the Registration Act of 1866, sued the purchaser of the right, title, and interest of the mortgagor, to enforce the lien created by the mortgage-bond against the lands purchased. That suit was dismissed for reasons stated in the judgment.

The plaintiff has now sued for possession of the property itself.

Having regard to the uncertainty felt by us, and by other Judges of this Court, regarding the effect of the judgment of [715] the Full Bench in *Syed Emam Momtazodeen Mahomed v. Raj Coomnar Dass* (14 B. L. R., 408, s.c., 23 W. R., 187), to the judgment delivered by a Division Bench of this Court in a previous suit between the parties now before us (I. L. R., 3 Cal., 363; s.c., 1 C. L. R., 446), and to the importance of having the law clearly and authoritatively determined, we refer this case to the Full Bench for determination of the following questions :—

1st.—Can the purchaser under the decree obtained on the specially-registered bond sue the first purchaser for restoration of the mortgaged property?

2nd.—If he can sue for restoration of the mortgaged property, is he bound to give the first purchaser the opportunity of re-deeming the property?

3rd.—In such a case are the rights of a purchaser from the mortgagor previous to the passing of a money-decree in favour of the mortgagee, different from those of a purchaser subsequent thereto but without notice of any proceedings taken?

\* Full Bench Reference in Appeal from Original Decree, No. 9 of 1880, made by Mr. Justice Cunningham and Mr. Justice Prinsep, dated the 2nd June 1881.

4th.—If he has previously sued the first purchaser for a declaration that he held the property subject to the mortgage, and that suit has been dismissed, would a second suit brought for possession be barred by ss. 2 and 7 of Act VIII of 1859 ?

Baboo *Rashbehary Ghose* for the appellant.—The Full Bench case of *Syud Emam Montazooddeen Mahomed v. Raj Coomar Dass* (14 B. L. R., 408, s. C. 23 W. R., 187) is conclusive of this case. There it is laid down that a suit for a money-decree is the same as a suit for a mortgage-decree ; and that being so, the doctrine of *lis pendens* applies. [MITTER, J.—The doctrine of *lis pendens* must be limited to cases in which the property is the subject-matter of the suit. PONTIFEX, J.—One effect of applying for a money-decree is to turn the debt into a judgment-debt, and interest is given only on the judgment-debt at the Court rate, 6 per cent.; but the lien remains the same.

Baboo *Srinath Dass* for the Respondent.

The decision of the Full Bench was delivered by

Garth, C. J.—We think that the first question should be answered in the affirmative.

[716] The plaintiff has clearly no right to sue for the restoration of the mortgaged property. His proper course, in our opinion, was that which he adopted in the first instance,—namely, to sue to have his lien upon the property declared.

The High Court's judgment in *Dossmoney Dossee v. Jonmenjoy Mullick* (I. L. R., 3 Cal., 363; s. C., 1 C. L. R., 446), appears to us to be erroneous. The learned Judges in that case seem to think that because the plaintiff had obtained a decree for his mortgage-money, he had thereby lost his lien ; but this is not so. There is ample authority in this Court to show that such a proposition is unfounded. A man who has an equitable lien for a simple contract-debt does not lose his lien by turning his debt into a judgment-debt. Under certain circumstances he may be restrained from pursuing both his remedies simultaneously ; but having enforced one remedy without fully realizing his debt, he may afterwards proceed to enforce the other : see *Barker v. Smart* (3 Beaven, 64).

It has been suggested to us that the judgment and decree were not properly signed ; but whether they were or not, we are unable in this suit to give the plaintiff any relief. Of course, it is quite open to him to make an application in the former suit to the proper Division Bench, either for a rehearing or a review, as he may be advised.

The second question referred to us, we do not think it necessary to answer.

#### NOTES

#### [EFFECT OF MORTGAGEE TAKING MONEY DECREE—REGISTRATION ACT. OF 1866, SEC. 53—

Mortgagee taking money decree does not extinguish the lien, but, if the decree is executed and sale takes place, lien is extinguished (1884) 10 Cal 567. See also (1887) 14 Cal. 464. Even after obtaining decree he can enforce the lien in execution, but against purchaser of mortgaged property he can only enforce the lien by separate suit ; but if the decree is barred suit is also barred : (1884) 10 Cal. 567. If the mortgagee in a suit when the mortgage takes only a money decree, he cannot bring a separate suit for sale of mortgaged property, as the suit would be barred by *res judicata* : res judicate (1906) 33 Cal. 847

II Cited in (1881) 7 Cal. 677 for showing that 3 Cal. 363 is invited by this decision.]

## [717] APPELLATE CIVIL.

The 20th June, 1881.

PRESENT:

SIR RICHARD GARTH, KT., CHIEF JUSTICE AND MR. JUSTICE McDONELL.

Lall Jha.....Plaintiff

versus

Negroo .....Defendant.\*

*Landlord and Tenant—Lease—Agreement to Lease—Doul Darkhast—Proposal—Acceptance—Contract in writing—Registration Act (III of 1877), s. 3.*

Where a *doul darkhast* amounts to nothing more than a proposal by a tenant to pay a certain rent for certain land, it does not amount to a lease or to an agreement for a lease, and does not, therefore, require registration. But if the proposal has been so accepted, that the proposal and acceptance constitute a contract in writing, then such contract must be registered.

*Syed Sufdar Reza v. Amazad Ali* (Ante p. 703) and *Muharaja Luchmissur Singh v. Mussamut Dakho* (Ante p. 708) followed.

*Choonee Mundur v. Chundee Lall Dass* (14 W. R., 178) and *Bibee Meheroohnissa v. Abdul Gunee* (17 W. R., 509) distinguished.

THIS was a suit for arrears of rent. The plaintiff alleged that the defendant had obtained a *malguzari* tenure of the lands for which the rent was claimed, under a *doul darkhast* dated the 2nd of April 1876, at a yearly rent of Rs. 46; and that he had made default in payment. The defendant denied that he held the lands at the rate alleged by the plaintiff, and also pleaded payment. The Court of first instance gave the plaintiff a decree, but this decree was reversed on appeal to the District Court of Purneah. The material portion of the Judge's judgment was as follows.—

"The suit proceeded on a *doul darkhast* dated the 2nd of April 1876. Now the *doul* purports to be signed by three witnesses, and it contains the words: '*islhye darkhast hamara munibtdar San 1284, sal laghayat San 1286, sal mulkike, sir-i-sal sezamin zimma kiya. Jama salana mubligh 46 rupaiya, [718] zarb halbu mujib tafsil bad kharij paya. Patwari satha sal diya karengee.*' It clearly is a *kabuliat* for a term of three years, and it ought to have been registered under s. 17 (4) Act VIII of 1871. I find it is not uncommon to put forward as mere applications for settlement, documents, which are really contracts, or portions of final agreements (in regard to leases) reduced into writing, the object being to evade the registration laws. I hold that the present *doul darkhast* is really a counterpart of a lease and an undertaking to occupy, and falls within the definition of a lease in s. 3,† Act VIII of 1871. As this document contains the terms of the alleged contract between the plaintiff and the defendant, the document itself is the only evidence of those terms (s. 91, Evidence Act) which

\* Appeal from Appellate Decree, No 719 of 1880, against the decree of F. Cowley, Esq., Officiating Judge of Purneah, dated the 1st December 1879, modifying the decree of Baboo Lal Behary Dey, Munsif of Kishengunge, dated the 31st July 1879.

†[Sec. 3:—In this Act, unless there be something repugnant to the subject or context—

Lease. "Lease" includes a counterpart, a *kabuliat*, an undertaking to cultivate or occupy, and an agreement to lease.]

can be accepted: and as the document cannot be put in for want of registration, the plaintiff's case as to the enhanced—for it is admitted to be an enhanced—jama must fail." The plaintiff appealed to the High Court.

Baboo *Rajendro Nath Bose* for the Appellant.

Mr. *Sandel* for the Respondent.

The **Judgement** of the Court (GARTH, C. J., and McDONELL, J.) was delivered by

**Garth, C. J.**—So far as we can see, the District Judge appears to have rejected the *doul darkhast*, which was offered in evidence in this case, upon insufficient grounds. In the case of *Maharaja Luchmussur Singh v. Mussamut Dakho* (*Ante*, p. 708), we decided in a Full Bench of this Court that a *doul darkhast*, if it amounted to nothing more than a proposal by a tenant to pay a certain rent for certain land, does not amount to a lease or an agreement for a lease. If it is accepted in writing by the landlord, it is a different thing. In another case—*Syed Sufdar Reza v. Amzad Ali* (*Ante*, p. 703)—which we also decided in a Full Bench, the document was not only a proposal for a lease, but had the word 'granted' signed by the landlord himself upon it. In that case we considered, that if that word was written upon the [719] document in token of the acceptance by the landlord of the tenant's proposal, it would require registration, because it would then amount to a complete offer by the tenant and an acceptance by the landlord of the terms of the proposed lease.

On the other hand, it was decided by this Court, in *Choonce Munder v. Chundee Lall Dass* (14 W. R., 178) and in *Bibee Meheroonnissa v. Abdool Guzee* (17 W. R., 508) that a *doul darkhast* being a mere proposal for a lease, unaccepted by the landlord, was not a lease within the meaning of the Registration Act. That is a very plain distinction, and we think, having regard to the rule laid down by the Full Bench, that the document here was admissible in evidence, and was improperly rejected.

The case must go back to the lower Court for retrial. If it should turn out that the landlord has agreed to the proposal of the tenant in writing, the document will of course require registration. The costs of this Court and of the Court below will abide the result.

*Case remanded.*

[7 Cal. 719]

*The 6th May and 20th July, 1881.*

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Birajan Kooer.....Defendant

versus

Ram Churn Lall Mahata and another.....Plaintiffs.\*

*Receiver, Appointment of—Reference to District Court—Appealable Order—Civil Procedure Code (Act X of 1877), ss. 503, 504, and 505.†*

No Appeal lies from an order passed under s. 505† of the Civil Procedure Code by a Court subordinate to a District Court, submitting the name of a person sought to be appointed a receiver, together with the grounds for the nomination, such being only a preliminary order or expression of opinion, and not an order under s. 503.‡

Nor does an appeal lie from the order of the District Court confirming such nomination, but the District Court ought, when the question is raised, to decide on the necessity for the appointment of a receiver, the words "or [720] pass such other order as it thinks fit" in s. 505 being sufficient to include that question, and not merely to decide the fitness or otherwise of the person nominated to the office of receiver.

\* Appeal from order, No. 286 of 1880, against the order of H. W. Gordon, Esq., Officiating Judge of Tirhoot, dated the 4th September 1880, affirming the order of Baboo Amrita Lal Pal, First Subordinate Judge of that district, dated the 21st August 1880.

†[Sec. 505 :—The powers conferred by this chapter shall be exercised only by High Courts and District Courts. Provided that whenever the Judge of a Court subordinate to a District Court considers it expedient that a receiver should be appointed in any suit before him he shall nominate such person as he considers fit for such appointment and submit such person's name, with the grounds for the nomination, to the District Court, and the District Court shall authorize such Judge to appoint the person so nominated or pass such other order as it thinks fit.]

‡[Sec. 503 :—Whenever it appears to the Court to be necessary for the realization, preservation or better custody or management of any property, moveable or immovable, the subject of a suit, or under attachment, the Court may by order

- (a) appoint a receiver of such property, and if need be,
- (b) remove the person in whose possession or custody the property may be from the possession or custody thereof ;
- (c) commit the same to the custody or management of such receiver and
- (d) grant to such receiver such fee or commission on the rents and profits of the property by way of remuneration, and all such powers as to bringing and defending suits, and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of instruments in writing, as the owner himself has, or such of those powers as the Court thinks fit.

- (e) Every receiver so appointed shall

Receiver's liabilities. give such security (if any) as the Court thinks fit duly to account for what he shall receive in respect of the property.

- (f) pass his accounts at such periods and in such form as the Court directs,
- (g) pay the balance due from him thereon as the Court directs, and
- (h) be responsible for any loss occasioned to his property by his wilful default or gross negligence.

Nothing in this section authorizes the Court to remove from the possession or custody of property under attachment any person whom the parties to the suit, or some or one of them, have or has not a present right so to remove ]



THIS appeal arose out of a reference by the Subordinate Judge of Tirhoot, under s. 505 of the Civil Procedure Code, to the District Judge. The plaintiffs applied under s. 492\* for the issue of an interim injunction restraining the defendant from realizing the profits of the immoveable properties, or the debts due to the estate and to a certain firm which formed portion of the estate, or from otherwise dealing with the property, the subject-matter of the suit then pending. The Subordinate Judge, in dealing with the application, considered that the facts did not justify him in granting the injunction sought for, but he thought that sufficient cause had been shown for the appointment of a receiver; and accordingly, having nominated a person to fill that post, referred the matter to the District Judge.

The latter officer declined to go into the question as to whether the Subordinate Judge was justified in coming to the conclusion he had done, and as no objection was taken to the fitness or otherwise of the person so nominated, he authorized the Subordinate Judge to make the appointment. He also expressed an opinion that an appeal lay against the Subordinate Judge's order under s. 503, and that it was for the Appellate Court to consider whether the appointment of a receiver was expedient or otherwise.

The defendant appealed to the High Court.

The case first came on to be argued on the 6th May, 1881, when

Baboo Chunder Madhub Ghose and Baboo Kurunu Sindhoo Mookerjee appeared for the Appellant.

Baboo Mohesh Chunder Chowdhry and Mr. C. Gregory for the Respondents.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by

**Mitter, J.**—The respondents in this case are plaintiffs in a suit for recovery of the property of two brothers, their [721] nephews, now dead, which is in the possession of the appellant, the widow of one of them.

The respondents prayed for an injunction under s. 492 of the Code to restrain the defendant from wasting or alienating the property which consists of moveables and immoveables, including a money-lending business of some extent. The Subordinate Judge, however, on the evidence submitted to him, thought that there were no grounds for issuing such an injunction as was asked for; but then he proceeded to find that it was necessary for the realization, preservation, and better management of the property in dispute, that a receiver should be appointed, and accordingly submitted the name of a suitable person to the District Judge, who sanctioned the appointment. The appellant objected to the appointment of any receiver, and the Judge considered that he had no authority to enter into that question, his functions under s. 505 being, in his opinion, confined to considering the fitness or unfitness of the person nominated by the Subordinate Judge for the post.

Cases in which temporary \* [Sec 492—If in any suit it be proved by affidavit or injunction may be granted, otherwise

- (a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or
- (b) that the defendant threatens, or is about to remove or dispose of his property with intent to defraud his creditors,

the Court may by order grant a temporary injunction to restrain such act, or give such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, or refuse such injunction or other order.]

\* This appeal is preferred against the orders of the Subordinate Judge, dated 21st August 1880, and of the District Judge, dated 4th September 1880. Neither of these orders is, in my opinion, appealable. The former because it is not an order under s. 503, but only a preliminary order or expression of opinion of the Subordinate Judge that he will appoint a receiver. He could not make an order appointing one until he had received the District Judge's authority under s. 505, and it is the order not passed, appointing the receiver and providing for the other matters referred to in s. 503 (a), (b), (c), and (d) that is appealable.

The District Judge's order of 4th September 1880 is not one against which the law allows an appeal.

In my opinion the District Judge ought to have taken the necessity for the appointment of a receiver into his consideration. I do not think that his duty is only to approve or disapprove of the particular person nominated by the Subordinate Judge. He is also required to make "such other order as he thinks fit," and these words, in my opinion, give him full control over the matter of the appointment of a receiver.

[722] But although the order of the Subordinate Judge is not appealable we think we ought to give such directions to the lower Court as the circumstances of the case require for its guidance in defining the powers to be granted to the receiver whom the Subordinate Judge will proceed to appoint.

We think that, as to the share of the property devolving from Chutterbhuj, the plaintiffs' claim is *prima facie* a good one, and that the receiver should have full authority to represent that share until the suit is decided. He should, therefore, be empowered to manage the entire estate jointly with the defendant, all moneys realized by the joint management being divided into two portions, one portion to be paid into Court, the other being at the disposal of the defendant.

As this state of things may prove to be inconvenient, it is very desirable that the hearing of the suit should be expedited by the parties as much as possible, and the Subordinate Judge should give them special facilities for bringing on the hearing at the earliest possible date.

The costs of the proceedings in this Court, including vakeel's fee, should, we think, be costs in the suit.

Subsequently, a rule having been issued at the instance of the plaintiffs (respondents), the matter came on for disposal on the 20th July, 1881.

Mr. W. C. Bonnerjee and Baboo Tarruck Nath Palit for the Petitioners.

Mr. H. Bell and Baboo Chunder Madhub Ghose for the Opposite Party.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by

**Mitter, J.**—In our judgment of the 6th of May 1881, we held that no appeal lay against the order of the Subordinate Judge, dated the 4th September 1880, soliciting the sanction of the District Judge to the appointment of a receiver. We further gave certain directions as to the conditions under which a receiver was to be appointed, etc. These directions were given by us, being under the impression that no receiver had then [723] been appointed. It now turns out that a receiver had been appointed before our order was passed. Therefore these directions must be cancelled, and our order dismissing the appeal, upon the ground that no appeal lies, will alone stand. It is represented to us, that the Subordinate Judge has made no provision regarding any payment of money to the appellant for the purpose of

defending the suit pending in the lower Court; and Mr. Bonnerjee on behalf of the plaintiffs gives his consent that there should be a direction given to the Subordinate Judge to allow to the defendant from time to time such sums of money as would be reasonably necessary for conducting the litigation on her behalf. We, therefore, direct that the lower Court, if any application be made to it on behalf of the defendant to be supplied with reasonable funds for the purpose of defending the suit, should take that application into his consideration, and allow such sums of money from time to time to be paid by the receiver to the defendant as in his discretion would be necessary to defend the suit.

The costs of this application will be costs in the cause. Let the record be forthwith sent back.

*Appeal dismissed.*

**NOTES.**

**[C. P. C., SECS. 503, 505, 588 OF 1882—APPOINTMENT OF RECEIVER—**

This case was followed in (1908) 33 Bom. 104=10 Bom. L. R. 1037, where it was held that the order of the District Judge refusing to appoint a receiver under s. 505 of C. P. C. (1882) on report from the Subordinate Judge was not appealable under s. 588.

But *See* (1904) 31 Cal. 495, where it was held that such order was appealable. If the Subordinate Judge refuses to appoint receiver the order is appealable under Sec. 588 cl. 24. (1899) 24 Bom. 38. So also when he appoints a receiver after being authorised by District Judge (*ibid*) Nomination by Sub-Judge is only conditional appointment and the District Judge has full powers to pass any order and he may refuse to appoint receiver: (1895) 21 Bom. 328. Though the Subordinate Judge appoints a receiver without being authorised previously by the District Judge if he approves subsequently the appointment is good as he has ratified it. (1907) 34 Cal. 305=5 C. L. J. 270. Referred to in (1886) 10 Mad 179 where it was held that an order refusing to appoint receiver is appealable. Under the Civil Procedure Code of 1908 even a Court subordinate to District Court has the power to appoint receivers. *See* O. 40, r. 1. So this case has no practical importance.]

**[7 Cal. 723]**

*The 4th August, 1881.*

PRESENT:

MR. JUSTICE PRINSEP AND MR. JUSTICE FIELD.

Mohendro Coomar Dutt and others... ..Judgment-debtors

*versus*

Heera Mohun Coondoo and others .. .. .Auction-purchasers.\*

Ishaneswary Dasee.....Judgment-debtor

*versus*

Gopal Das Dutt and others.....Decree-holders.\*

*Execution-sale—Material irregularity—Sale of a portion of a tenure—Sale for arrears of rent—Mortgage-decree—Civil Procedure Code (Act X of 1877), s. 311.*

The mere fact that the amount of rent payable in respect of a tenure brought to sale in execution of a decree is not stated in the sale-proclamation, is not a material irregularity within the meaning of s 311 of the Civil [724] Procedure Code (Act X of 1877), though if

\* Appeals from Original Orders, Nos. 103 and 109 of 1881, against the order of Baboo Bhoobun Chunder Mookerjee, Subordinate Judge of the 24-Parganas, dated the 24th February 1881.

the amount of rent payable were stated to be more than it actually was, that might constitute such an irregularity, as tending to lessen the price at which purchasers might be willing to buy.

Where decrees for arrears of rent had been obtained by fractional share-holders in a tenure, and in execution thereof a moiety of the tenure had been sold, it appeared that the other moiety had been sold at the same time in execution of a mortgage-decree against some of the judgment-debtors in the rent-suits, on an objection being taken to the confirmation of such sale on the ground that the whole tenure should have been sold in execution of the rent decrees,—

*Held*, that all that the decree-holders were entitled to have sold, was the right, title, and interest of their judgment-debtors, and that they were in the position of ordinary creditors having no lien on the tenure; and that, consequently, the mortgagor being entitled to enforce his lien against the moiety covered by his mortgage, the sale of the remaining moiety in satisfaction of the rent decree was a good sale, and could not be set aside.

THESE two appeals, which were heard together, were against the orders of the Subordinate Judge of the 24-Parganas confirming two separate sales with respect to one property, which had been held on the same day, *viz.*, 20th September 1880.

In the first case (No. 108), the decree-holders were the mortgagees of an eight-anna share in the property, and they had obtained an order dated the 15th February 1880, directing that the eight annas share in the property, covered by their mortgage and belonging to the judgment-debtors in that case, should be sold in satisfaction of their decree.

In the second case (No. 109), the decree-holders were fractional share-holders of the tenure, and the decrees held by them were for arrears of rent against both the judgment-debtors (appellants) in that case, and the mortgagors of the other eight annas share.

The objections raised in both cases against the sales being confirmed, were substantially the same, the judgment-debtors alleging that there had been material irregularities in publishing and conducting the sales, and that in consequence they had suffered substantial injury, and an additional objection was urged in the second case, that the Court should have sold the entire tenure in execution of the decrees for arrears of rent, and not merely the eight annas share which had been sold.

[725] The nature of the objections appears sufficiently from the judgment of the High Court, both cases being heard at the same time.

Baboo *Gurudas Banerjee* and Baboo *Saroda Churn Mitter* for the Appellants.

Baboo *Chunder Madhub Ghose*, Baboo *Taruck Nath Sen*, Baboo *Tarucknath Dutt*, Baboo *Umbica Churn Bose*, and Baboo *Bhowany Churn Dutt* for the various respondents.

The following **Judgments** of the Court (PRINSEP and FIELD, JJ.) were delivered by **Field, J.** :—

*No. 108*:—This is an appeal against the order of the Subordinate Judge of the 24-Parganas confirming a sale, and it is contended that this sale ought not to have been confirmed—*first*, because there was material irregularity in publishing it; and *secondly*, because substantial injury had been sustained by the appellants in consequence of such material irregularity. The first material irregularity alleged is, that the sale-proclamation was not published in the *mofussil*. We agree with the Subordinate Judge that the weight of evidence is in support of the sale-proclamation having been duly published in the *mofussil*.

The next contention is, that as the amount of annual rent payable upon the tenure was not stated in the notification of sale, 'this is a material irregularity. We certainly are of opinion that the amount of rent payable upon the tenure ought, in the careful transaction of business, to have been set out in the sale-proclamation; but we are not prepared to say that the absence of this information, which is not, in so many words, prescribed by the law, was a material irregularity within the meaning of s. 311. If the annual rent had been stated to be more than it really was, this might have been material as tending to lessen the price at which purchasers would be willing to buy; but no information being given on the point, purchasers cannot be said to have been misinformed.

Then it is contended, that the decree-holders dissuaded purchasers from bidding at the sale. We think that the remarks [726] of the Subordinate Judge upon the evidence bearing upon this point are proper, and we see no reason to differ from the view which he has taken on this question. Under these circumstances, we are of opinion, that no material irregularity has been established; and this being so, this appeal must be dismissed with costs.

No. 109. —With reference to the question of material irregularity, the grounds taken in this appeal are the same as those taken in Appeal No. 108, and will be disposed of by the observations already made in the judgment in that case. There is, however, a further contention in this appeal,—*viz.*, that the tenure ought to have been sold in its entirety, and that the Subordinate Judge was wrong in selling a moiety of the tenure only in execution of the decrees for rent. Now, these rent-decrees were obtained by persons who were sharers only and consequently, under the law at present in force, these decree-holders were not entitled to bring the tenure itself to sale under that special procedure by which a tenure is sold, in execution of a decree for arrears of its own rent, free from all incumbrances. All that these decree-holders, being sharers, were entitled to sell, was the right, title, and interest of the judgment-debtor. Now, let us see what this right, title, and interest amounted to in the present case. There was admittedly a mortgage-decree obtained upon a mortgage-bond, by which one moiety of the tenure had been hypothecated; and this decree entitled the mortgagee to enforce his lien. This being so, it is clear that all that remained to sell in satisfaction of the rent-decrees, and after the mortgage had been satisfied, was eight annas only. Taking another view of the question, it is clear that the holders of the decrees for rent had no lien upon the tenure. Whatever contention may be raised when a tenure is sold under the special procedure in order to satisfy the arrears of its own rent, that the landlord must be presumed to have a lien upon the tenure for such rent, we think no such contention can possibly be raised in a case in which the decree-holder, being a sharer only, is entitled to sell not the tenure itself, but the interests of the judgment-debtor only. This being so, we have here the case of one secured [727] creditor holding a decree, which entitles him to enforce his lien; and another decree-holder not secured and holding a simple money-decree. Under these circumstances, we think it impossible to say that the Subordinate Judge was wrong in allowing the mortgaged eight annas to be first sold in execution of the mortgage-decree, and then selling the remaining moiety in execution of the decrees for rent. This appeal, therefore, must also be dismissed with costs.

*Appeals dismissed.*

[7 Cal. 727]

The 11th June, 1881.

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Wazeer Mahton and another.....Defendants

*versus*

Chuni Singh and another.....Palintiffs.\*

*Res judicata—Finality of arbitrator's award, when judgment is passed thereon—Question dealt with by such award raised in a subsequent suit.*

Where a case was referred to arbitration, and the award was subsequently filed and judgment passed in accordance therewith, and subsequently, in another suit between the same parties, a question dealt with in the award was raised,—

*Held*, that such question was *res judicata* between the parties, the judgment on the award having the same effect as an ordinary judgment of a Court, and being conclusive on the point.

THIS was a suit for arrears of rent for the years 1284 and 1285 (1876—1878). The rent was payable in kind, and the amount of land in respect of which it was alleged to be due was found by the original Court to be 44 bighas and 12 cottas. The plaintiffs alleged that they were entitled to a nine-anna share, and that the defendants were only entitled to a seven-anna share, but the defendants disputed this, and contended that the plaintiffs were only entitled to an eight-anna share of the produce, and that a tender had been made of that amount and refused previous to the suit being brought

[728] The original Court found the shares to be in the proportion of nine to seven, on the ground that this question had been decided in a previous suit between the parties, which had been referred to arbitration. It appeared that the award, which was dated the 12th November 1877, had been confirmed by the Munsif, and subsequently upheld on appeal by the District Judge. The remaining facts in the case having been found against the defendants, the Subordinate Judge gave the plaintiffs a decree for the amount they claimed, and this decree was confirmed on appeal by the lower Appellate Court. The defendants accordingly now appealed to the High Court, on the ground, amongst others, that the decision of the arbitrators, acted on by the Courts below, was not a finding of a Court of competent jurisdiction upon the question at issue in the present suit, and that it was, therefore, not admissible, if at all, as conclusive evidence on the question.

Baboo Mohesh Chunder Chowdhry and Baboo Sresch Chunder Chowdhry for the Appellants.

Baboo Saligram Singh for the Respondents.

The **Judgment** of the Court (MITTER and MACLEAN, JJ.) was delivered by

**Mitter, J.**—This was a suit for arrears of rent for the years 1284 and 1285 (1876—1878), the rent being admittedly payable in kind. The plaintiffs claim to recover in the proportion of nine-sixteenths of the produce, the defendants allege that the proportion is half and half.

It appears that there was a previous suit between the parties in respect of the rent of the years 1281 to 1283 (1874—1876). In that suit, also, they were at issue upon this point, *viz.*, in what proportion the plaintiffs are entitled

\* Appeal from Appellate Decree, No. 721 of 1880, against the decree of H. Beveridge, Esq., Judge of Patna, dated the 19th January 1880, reversing the decree of Babu Poresh Nath Banerjee, Subordinate Judge of that district, dated the 27th May 1879.

to receive the produce. The whole matter in difference in that suit was referred to arbitration, and the arbitrator submitted his award, deciding this question in favour of the plaintiffs. Certain objections were taken against the award, but the Court overruled them and passed judgment in accordance with it. The defendants appealed against [729] that judgment, but failed, on the ground that the judgment being in accordance with the award was final under the law.

The Courts below in this case have treated the former judgment as conclusive evidence on this point, and the question raised before us is, whether it has that effect.

We are of opinion, that the lower Courts are right in treating the former judgment as conclusive upon this particular issue. It has been contended before us, that a judgment can be only treated as *res judicata* when it is the decision of a Court of competent jurisdiction, and that an arbitrator is not a court of competent jurisdiction, his jurisdiction being limited to the decision of the particular matter referred to him.

This argument seems to us not to be sound. It is not simply the award which has been held to be *res judicata* in this case, but the award followed by the judgment of the Court.

Section 325 of Act VIII of 1859, (the reference was under that Act) says, that if the Court shall not see cause to remit the award, &c., &c., the Court shall proceed to pass judgment according to the award, and s. 185 says, that the judgment shall contain the point or points for determination, the decision thereupon, and the reasons for the decision. It is clear, therefore, that a judgment passed in accordance with s. 325 incorporates in itself the decision upon the points at issue as contained in the award. It has the same effect as an ordinary judgment of a Court. This view is supported by an authority cited at p. 17 of "Biglow on the Law of Estoppel." It is to the following effect.—The award of arbitration under a rule of Court, if final and valid, is also conclusive upon the parties. The case first cited—*Lloyd v. Barr* (11 Pen. St. 41)—was an action on a note against a prior by a subsequent indorser, who had paid a judgment given by arbitrators in an action by the holder against all the indorsers; and as no technical issue had been framed, it was contended that the judgment was not an estoppel to the present defendants to deny demand and notice. But the Court ruled otherwise."

It has been also urged that the question of proportion was incidentally tried in the former suit. But we are unable to take [730] this view. It appears to us, that the point arose directly in that case as it also arises directly here.

The decision of the lower Courts is, therefore, correct. The appeal is dismissed with costs.

*Appeal dismissed.*

#### NOTES.

#### [DECREE WHEN AWARD—RES JUDICATA—

Followed in (1896) 21 Bom. 465, where it was held that judgment and decree passed upon award operated as *res judicata*.]

[7 Cal. 730]

*The 28th July, 1881.*

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE FIELD.

Bonomali Mozumdar.....Judgment-debtor

*versus*

Woomesh Chunder Bundopadhya .....Decree-holder.\*

*Sale in execution of Decree—Irregularity—Material Injury—Presumption—Civil Procedure Code (Act X of 1877), s. 311—Witnesses, laches in summoning.*

On an application under s. 311 of the Civil Procedure Code (Act X of 1877) to set aside a sale, it appeared that there had been a material irregularity in publishing the sale ; but no witnesses were called to prove that substantial injury had been caused thereby. It also appeared that seventeen days after the applicant had applied for proclamations to be issued to his witnesses, he deposited the requisite fees ; and that, subsequently, there was a delay of seven days in the office in issuing such proclamations, which were ultimately issued only three days prior to the day fixed for the hearing. On the applicant alleging that, in consequence of such delay, he had not been allowed a fair opportunity to produce his witnesses,—

*Held*, that the Court cannot presume that substantial injury has been caused from the mere fact of there having been a material irregularity in publishing a sale ; but when both a material irregularity and substantial injury have been proved, the Court may reasonably presume that the substantial injury is due to such irregularity.

*Held* also, that the applicant having been guilty of laches himself, could not be allowed to set up the delay in the office, as a ground for the non-production of his witnesses.

*Gopee Nath Dobay v. Roy Luckmeeput Singh* (1 C. L. R., 349) considered.

THIS was an appeal against an order rejecting an application under s. 311 of the Civil Procedure Code (Act X of 1877) to set aside a sale.

[731] The lower Court found that there had been a material irregularity in publishing the sale, and the principal allegation of the appellant was, that he had not been allowed an opportunity of producing his witnesses to show that he had sustained substantial injury by reason of such irregularity. He also alleged, that the sale had never been published at all ; but the lower Court held, that if this was so, it could not be set aside under the provisions of s. 311, that section applying only to cases in which there had been an irregularity in publishing or conducting the sale, and in addition that there was no other section under which a sale could be summarily set aside.

The application having been rejected, the judgment-debtor now appealed.

Baboo Grijic Sunker Mozumdar and Baboo Bycant Nath Das for the Appellant.

Baboo Rashbehary Ghose, Baboo Busunt Coomar Bose, and Baboo Radlom Kinkor Roy for the Respondent.

The **Judgments** of the Court were as follows :—

**Field, J.**—The first point, which it will be convenient to dispose of in this appeal, is the allegation that the appellant was not afforded fair opportunity of producing his witnesses. Now, the facts as to this objection are these. He applied for and obtained an order for the issue of a proclamation on these

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\* Appeal from Original Order, No. 142 of 1881, against the order of Baboo Jugatdurlubh Mozumdar, Officiating Subordinate Judge of Furreedpore, dated the 5th February 1881.



witnesses on the 8th January. He did not put in the requisite court-fees for the issue of these proclamations until the 25th January,—that is, seventeen days afterwards, although he was aware on the 8th January that the 5th February had been fixed for the hearing. Now, it appears to us, having regard to the ordinary despatch with which business is done in the mofussil, that he might have been well aware when he paid in the court-fees on the 25th January, after seventeen days, that it was improbable that these proclamations could have been served in such time as to allow of the witnesses being in attendance on the 5th February. As a matter of fact, the proclamations did not issue till the 2nd February, and although this delay of seven days in the office is a delay which would have [732] given the appellant some ground of complaint if he himself had acted with reasonable expedition, yet, having regard to the fact that he himself delayed seventeen days in the first instance, we think he cannot be allowed to set up the laches of the office, so as to succeed in this appeal.

The next question is concerned with substantial injury. The provisions of s. 311 of the Code are :—"No sale shall be set aside on the ground of irregularity, unless the applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity." An argument has been addressed to us to the effect, that the fact of irregularity being proved, the Court ought to presume substantial injury; and in support of this argument the case of *Gopee Nath Dobay v. Roy Luchmeeput Singh* (1 C. L. R., 349), has been quoted. It appears to us, that the judgment of the learned Judges in that case does not support the contention sought to be based thereupon. As we understand that judgment, it merely comes to this, that if the fact of irregularity is proved, and also the fact of substantial injury, then the Court may reasonably presume that the substantial injury was due to the irregularity, or, as the words of the section show, was caused "by reason of such irregularity." We think that this is a reasonable presumption in most cases, and explained in this way, the judgment is one which has our concurrence. But it certainly does not support the argument of the learned pleader, that from the fact of irregularity a Court ought to presume that there was substantial injury,—a presumption which might be contradicted in many cases by the fact of the property having been sold for its fair value.

It is then contended, that in this case there is not an irregularity, but an entire absence of any notification, and that this being so, the provisions of s. 311 are not applicable. If the provisions of this section do not apply, we are not aware of any section of the Code under which this application could have been made; but it appears to us that the facts in this case, if true, would have amounted to an irregularity within the meaning of that section. The appeal is dismissed with costs.

[733] **Prinsep, J.**—I am of the same opinion. I would only add that I have always considered the judgment in the case of *Gopee Nath Dobay v. Roy Luchmeeput Singh* (1 C. L. R., 349) as bearing the interpretation put upon it by my learned colleague, and in that view, I have followed that judgment in other cases decided by me while sitting in other Division Benches of this Court.

*Appeal dismissed.*

[7 Cal. 733]

The 29th August, 1881.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE FIELD.

Kristomohiny Dossee.....Decree-holder.

Bama Churn Nag Chowdry and others.....Judgment-debtors.\*

*Execution—Mortgage-decree—Stay of sale pending Administration-suit—Appealable Order—Civil Procedure Code (Act X of 1877) s. 244, cl. (c).*

In execution of a decree on a mortgage-bond executed by the father of the judgment-debtors, since deceased, with decree directed that the mortgage lien should be enforced—*first*, by sale of the property specifically mortgaged, and *secondly*, if the debt remained unsatisfied, by the sale of the other property in the possession of the judgment-debtors, the judgment-creditor proceeded to have the mortgaged property sold. After the issue of the sale notification, and three days prior to the date fixed for the sale, one of the judgment-debtors applied to have the sale stayed, on the ground that an administration-suit was pending with respect to the property of his father, the mortgagor, and also asked that a receiver might be appointed and arrangements made for the purpose of paying off the mortgage-debt and saving the property from being sold. On this application the Court passed an order staying the sale.

*Held*, that such order was appealable, being a question arising between the parties to the suit in which the decree was passed and relating to the execution of that decree, and as such coming within the provision of cl. (c). s. 244, Act X of 1877 (Civil Procedure Code).

*Held* also, that the Court was wrong in passing such order, inasmuch as there were no reasonable grounds why a secured creditor should be debarred from enforcing his security pending the administration-suit.

*Gambhirmal and Bana Chand v. Chejmal Jodhmal* (11 Bom. H. C. R., 151) distinguished [734] THIS was an appeal against an order staying the sale of mortgaged property in execution of a decree obtained on the mortgage.

The facts appear sufficiently from the judgment of the High Court.

Baboo Bhowany Churn Dutt and Baboo Bydonath Dutt for the Appellant.

Baboo Gurudas Banerjee and Baboo Baroda Churn Mitter for the Respondents.

The **Judgment** of the Court (PRINSEP and FIELD, JJ.) was delivered by

**Field, J.**—The appellant in this case obtained, on the 25th May 1880, a decree on a mortgage-bond executed in his favour by Ram Goti Nag. The three sons of Ram Goti Nag were judgment-debtors under that decree, which directed that the mortgage lien should be enforced—*first*, by sale of the property specifically mortgaged; and *secondly*, if the mortgage-debt were not thereby satisfied, by the sale of the other property in the possession of the judgment-debtors. The decree-holder proceeded, in February 1881, to execute this decree against the properties specifically mortgaged; and, after the issue of the sale-notification, it appears that a petition was presented to the Court in which the execution-proceedings were pending by one of the sons of Ram Goti Nag. This petition was presented three days before the date on which the sale was to take place. The purport of the petition was this, that the three sons of Ram Goti Nag were disputing as to the respective shares of their father's property, and they had instituted an administration-suit in order to have the

\*Appeal from Original Order, No. 180 of 1881, against the order of Baboo Krishna Mohun Mookerjee, Second Subordinate Judge of the 24-Parganas, dated the 2nd May 1881.

property administered under the directions of the Court, and they asked that the sale of the mortgaged property at the instance of the decree-holder, appellant, should be stayed until the final disposal of the administration-suit. The Subordinate Judge made an order staying the sale; and against that order this appeal has been preferred.

A preliminary objection is first taken that no such appeal will lie. It appears to us, however, that this order, passed [735] under s. 243 of the present Code, comes clearly within cl (c) of s. 244, inasmuch as the question raised thereby is a question arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree. It is contended that this question does not really relate to the execution of the decree, and in support of that argument the case of *Gambhirmal and Bana Chand v. Chejmal Jodhmal* (11 Bom. H. C. R. 151) has been quoted. Now, in the first place, there is a marked distinction between that case and the present case, in this, that Bama Chand, who was the assignee of the decree for costs, was not a party to the second suit there instituted; and WEST, J., observed,—“but a strictly literal interpretation of the words we have quoted would exclude Bama Chand from the operation of the section as not having been a party to the suit.” In the next place, we think that the arrangement of the present Code, and the difference between the language of the present Code as compared with the language used in the old Code, must make a material difference in the interpretation, and we entertain no doubt that the order now appealed against, which stays the execution of the decree for an indefinite time, and prevents a secured creditor from availing himself of the benefit of his security, is, according to all common sense, a question relating to the execution of the decree.

Then, as to the merits of the case, we entertain no doubt that the order appealed against ought not to have been made. The decree-holder is a secured creditor. He has obtained a decree upon a mortgage-bond, and that decree entitles him to realize the amount due to him from the property specifically hypothecated by that mortgage-bond. There is no reasonable ground for saying that, because the sons of Ram Goti Nag are disputing as to their shares in the property of their deceased father, a secured creditor is to be debarred from enforcing his security until that quarrel is determined. Under these circumstances, we think that the order of the Subordinate Judge must be set aside, and this appeal decreed with costs.

*Appeal allowed.*

#### NOTES.

[Sec. 244 of C. P. C. (1882)=sec. 47 of C. P. C. (1908) order staying sale—appealable.

Order staying sale in execution under s. 545 is appealable (1886) 12 Cal. 624, (1884) 7 All.

73. Order under s. 243 staying sale is appealable (1886) 13 Cal. 111.]

[736] *The 15th August, 1881.*

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE FIELD.

Mohima Chunder Dhur.....Defendant

*versus*

Jugul Kishore Bhattacharji.....Plaintiff.\*

*Declaratory decree—Cause of action—Civil suit to contest the genuineness and validity of a registered document—Registration—Onus of proof—Registration Act (III of 1877), ss. 74, 75—Specific Relief Act (I of 1877), s. 39.*

Under the special procedure provided in the Registration Act (III of 1877), the defendant, in whose favour a document was said to have been executed, succeeded in obtaining an order from the District Registrar for the registration of the same, although the plaintiff, who was alleged to have executed it, appeared before the Sub-Registrar, and subsequently before the Registrar, and denied executing it, and alleged it to be a forgery.

In a suit brought under the above circumstances to have the document declared void, and to have it cancelled, the Court placed the onus of proving its genuineness and its execution by the plaintiff on the defendant,—

*Held*, that the proceedings of the Registrar, when he required whether the document had been duly executed or not, were in no sense those of a "competent Court," but only those of an executive officer invested with quasi-judicial functions, and that, consequently, such a suit was maintainable; and that, under the circumstances, the onus of proof was properly placed on the defendant.

*Held* also, that the Specific Relief Act (I of 1877) applied, s. 39 evidently contemplating and providing for such a suit.

*Ram Chunder Paul v. Becharam Dey* (10 W. R., 329) dissented from.

*Prasanna Kumar Sandyal v. Mathurnath Banerjee* (8 B. L. R., Ap., 26) followed.

THIS was a suit to have a registered kobala, dated the 22nd Cheyt 1284 (corresponding with April 3rd, 1878), set aside on the ground that it was a forged document. The plaintiff alleged that the defendant Mohima Chunder Dhur presented the kobala for registration before the Sub-Registrar of Manickgunge on the 6th May 1878, and that thereupon a summons were issued against him, as he appeared on the face of the document to have executed it; that, upon the receipt of such summons, he appeared before [737] the Sub-Registrar and denied having executed it, but that the defendant had then appealed to the Registrar, who heard evidence on both sides and ordered its registration on the 22nd August 1878.

The defendant stated that the plaintiff had executed the document in his favour after having received 152 rupees, the consideration-money; and that, after its execution, the plaintiff had been persuaded by his co-sharers in the property covered by the kobala not to register the same, whereupon he had taken the proper steps to have it registered; and having succeeded in getting registration effected, had taken possession of the property in the usual way by fixing up a bamboo-post.

\* Appeal from Appellate Decree, No. 632 of 1880, against the decree of Baboo Nobin Chunder Ganguly, Second Subordinate Judge of Dacca, dated the 21st January 1880, affirming the decree of Baboo Ohoy Kumar Sen, Additional Munsif of Manickgunge, dated the 21st February 1879.

The original Court, after hearing evidence on both sides, found the kobala to be a forgery and ordered it to be set aside; and the decision was upheld on appeal by the lower Appellate Court.

The defendant now appealed to the High Court, on the ground that the kobala having been duly registered, the present suit would not lie, and that the original Court was in error in placing the onus of proving the genuineness of the document on him.

Mr. L. Ghose and Baboo Bungshedhur Sen for the Appellant.

Baboo Mohiny Mohun Roy and Baboo Gria Sunker Mozoomdar for the Respondent.

The **Judgment** of the Court (PRINSEP and FIELD, JJ.) was delivered by

**Field, J.**—In this case the plaintiff sued to have a kobala or bill of sale set aside and declared spurious. It appears that the defendant presented this bill of sale for registration, and, under the special procedure provided in the Registration Act, he succeeded in obtaining an order of the District Registrar for the registration of the document. The first contention raised before us on appeal is, that this suit is not maintainable; and, in support of this contention, the case of *Ram Chunder Paul v. Becharam Dey* (10 W. R., 323) is quoted. Now, that case we think to have [738] been virtually overruled by the case of *Prasanna Kumar Sandyal v. Mathurnath Banerjee* (8 B. L. R., Ap., 26), which latter case has been since followed in several other cases in this Court. Most decidedly, if we had to form an independent opinion, our view would be the same as that taken by the learned Judges in the latter case, but we think that, whatever may have been the state of the law before the passing of the present Registration Act and the present Specific Relief Act, these two enactments have put the point beyond doubt. The case of *Ram Chunder Paul v. Becharam Dey* (10 W. R., 329) was decided when Act XX of 1866 was in force, and under the provisions of s. 84 of that Act, it was the District Judge who heard the petition made against the order of the registering officer refusing registration. PHEAR, J., who delivered judgment in that case, certainly regarded that as a decision of a "competent Court." The present Registration Act enacts, that where the registering officer refuses to register, the procedure is by way of an appeal to the Registrar, and the Registrar is then to enquire—*first*, whether the document has been executed, and *secondly* whether the requirements of the Registration law have been complied with. It appears to us, that it is impossible to say that the proceedings of the Registrar, when he enquired whether the document had been executed, are in any sense proceedings of a "competent Court." They are the proceedings of an executive officer invested with quasi-judicial functions for the limited purposes of the Registration Act. In this view we think that, even if the case of *Ram Chunder Paul v. Becharam Dey* (10 W. R. 329) had not been overruled and dissented from in several other cases, it would no longer have a binding effect, regard being had to the alteration made in the Registration law. Then, if we turn to s. 39 of the Specific Relief Act, I of 1877, we find that a suit of this nature is there contemplated and provided for. That section enacts, that "any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable, and the Court may, in its discretion so adjudge it and order it to be delivered up and cancelled."

[739] It then proceeds: "If the instrument has been registered under the Indian Registration Act, the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered, and such officer

shall note on the copy of the instrument contained in the books the facts of its cancellation." We think, having reference to these specific enactments of the Legislature, there can be no doubt that a suit of this kind is maintainable.

The second point taken is, that the burden of proof has been wrongly placed upon the defendant. It appears to us that this contention is untenable. The plaintiff himself came forward and denied the execution of the document, and this was sufficient to cast upon the defendant the burden of proving its execution and its genuineness. Under these circumstances, we think that this appeal must be dismissed with costs.

*Appeal dismissed.*

#### NOTES.

[Sec. 311 C. P. C. (1882)=O 21 r 89 (1908)—Materia irregularity.

Referred to in (1894) 5 M. L. J. 70, where it was observed that the Civil Procedure Code did not draw any distinction between illegality and irregularity in conducting sale. But *see* (1889) 11 All. 333, where it was held that sale within thirty days from the date of publication is only a material irregularity and does not amount to illegality rendering the sale void.]

[7 Cal. 739]

*The 5th August, 1881.*

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE FIELD.

Bungsee Singh and others.....Defendants

*versus*

Soodist Lall.....Plaintiff.\*

*Jurisdiction—Property situated in different Districts—Pleading—Multifariousness—Civil Procedure Code (Act X of 1877), ss. 28, 31—Parties—One member of Joint Hindu Family contracting alone—Undisclosed Principal—Splitting cause of action.*

A, B, C, and D were the proprietors of a 2a. 13g. share in mouza E, and also of a 2a. 13g. share in mouza F, both in the district of Bhagalpore. On the 19th September 1872, A mortgaged a 1a. 4p. share of E. to H. On the 20th September 1872, A, B, C, and D, mortgaged their shares in E and F, together with property in the district of Tirhoot, to the plaintiff. On the 24th March 1873, A mortgaged his share in E and F to J. On the 18th November 1874, A and B mortgaged their shares in E to K.

On the 25th March 1874, J obtained a decree on his mortgage, and the interests of A and B were purchased on the 5th January 1875 by L.

[740] On the 17th April 1874, M, to whom the first mortgage has been assigned, obtained a decree and attached the property mortgaged. L objected that he had already purchased the interests of A, and on the objection being allowed, M instituted a suit against L for a declaration of priority, and obtained a decree on the 9th August 1876. In execution of this decree the property first mortgaged was sold on the 4th March 1878, and after satisfying the mortgage a surplus of Rs. 7,664 remained. After the institution of the first suit, and before L's purchase, the plaintiff instituted a suit upon his mortgage in the Tirhoot Court without having obtained leave to include that portion of the mortgaged property situate in the Bhagalpore district. On the 17th July 1874, a decree was made in this suit. On the 17th January 1877, K obtained a decree on his mortgage, and the shares of A and B in E were

\* Appeal from Original Decree, No. 102 of 1880, against the decree of Moulvi Hafiz Abdul Kurim, Subordinate Judge of Bhagalpore, dated the 17th February 1880.

sold, and purchased on the 3rd September 1877 by *N*. The plaintiff had his decree transferred for execution to the Bhagalpore Court, and he attached the surplus sale-proceeds and a 1a. 9g. share in *E*. This attachment was withdrawn on the objection of *L*, who drew out the surplus sale-proceeds. The share purchased by *N* was also released from attachment.

The plaintiff now sued *L*, *N*, and the mortgagors for a declaration that his decree of the 17th July 1874 affected the *E* property, to recover the surplus sale-proceeds from *L*, and in case the decree should not be valid to the extent mentioned, for a decree declaring his prior lien on the property in *E*.

It was contended for the defendants, that the Tirhoot Court had no jurisdiction in respect of the Bhagalpore property; that the suit was bad for multifariousness; that certain persons, co-sharers with the plaintiff, should have been made parties; and that the cause of action had been split.

*Held*, that the Tirhoot Court had no jurisdiction in respect of the Bhagalpore property; that the suit was not bad by reason of multifariousness; and

that it was not necessary to make the plaintiff's co-sharers parties, as he might be regarded as contracting on behalf of himself and the other members of the family as undisclosed principals.

*Sims v. Bond* (5 B. and Ad., 898), *Bottomley v. Nuttall* (5 C. B., N. S., 122), *Agacio v. Forbes* (14 Moore's P. C., 160) and *Jones v. Robinson* (1 Ex., 454) followed.

*Held* also, that the cause of action had not been split.

*Grish Chunder Mookerjee v. Ramessuree Dabee* (22 W. R., 308), and *Rao Kuran Singh v. Nawab Mahomed Fyzali Khan* (14 Moore's I. A., 188) followed.

THE facts of this case sufficiently appear from the judgment.

Baboo Chunder Madhub Ghose and Baboo Sreenath Banerjee for the Appellants.

[741] Baboo Mohes Chunder Chowdhry and Baboo Rajendro Nath Bose for the Respondent.

The Judgment of the Court (PRINSEP and FIELD, JJ.) was delivered by

**Prinsep, J.**—The facts of this case are somewhat complicated; but when these facts are understood, no real difficulty arises in dealing with the case. Four persons, who are in the suit termed the third party defendants, *viz.*, Dukharun Lall Dobay, Baiju Lall Dobay, Gopal Dobay, and Lalji Dobay, were the proprietors of a 2a. 13g. 1c. 1cr. share out of 10 annas out of the entire 16 annas of Mouza Shazadpore Dumduma, *alias* Rohimpore, and also of 2a. 13g. 2c. 1cr. of Mozufferpore Thatha. Both these properties are wholly situate in the district of Bhagalpore. There were four mortgages affecting this property. The first mortgage was by Dukharun alone in favour of Rughoonath Prosad. This mortgage is dated the 19th September 1872, and it was a mortgage of 1a. 4p. share of Shahzadpore Dumduma. The second mortgage is dated the 20th September 1872. It was executed by Dukharun Lall, Baiju Lall, Gopal Dobay and Lalji Dobay in favour of the plaintiff in the present suit, Soodist Lall, and the property covered thereby, consisted of the whole of the two shares above set forth, as also of other property which was situate in the district of Tirhoot, the two properties Shazadpore Dumduma and Muzufferpore Thatha being, as already stated, wholly situate in the district of Bhagalpore. The third mortgage is dated the 24th March, and was created by two deeds dated respectively the 24th March and 23rd April 1873. It was in favour of Rughoonath Sahoy, and the property mortgaged was the whole of the two shares already mentioned. The fourth mortgage is dated the 13th November 1874. It was executed by Dukharun Lall and Baiju Lall in favour of

Deep Narain, and the property mortgaged was the whole of the above share in Mozufferpore, together with some other property. Upon these mortgage-bonds there were four suits. The first suit in point of time was brought by the third mortgagee, Rughoonath Sahoy, who, on the 25th March 1874, obtained a decree, and sought to [742] enforce his lien against the property mortgaged to him. In execution of this decree he brought to sale the interest of Dukharun Lall and Baiju Lall, and these interests were purchased on the 5th January 1875 by Chowdhry Bungsee Singh and others, who are the first party defendants in the present case, and are now the appellants before us. The second suit in point of time was brought by Gobind Lall, the assignee of the first mortgagee Rughoonath Prosad, and he obtained a decree on the 17th April 1874. In execution of this decree, he attached the 1a. 4p. share which was mortgaged by the first mortgage-deed on the 19th September 1872. An objection was thereupon raised by the present appellants, to the effect that they had already purchased the interests of Dukharun Lall, and that objection was successful. Whereupon Gobind Lall instituted a suit against the appellants for the purpose of having the priority of his mortgage declared, and he obtained a decree on the 9th August 1876. In execution of this decree the 1a. 4p. share, which was the subject of the first mortgage-bond, was brought to sale, and was sold on the 4th March 1878 for Rs. 11,400. The first mortgage was satisfied out of these sale-proceeds, and there remained a surplus of Rs. 7,664-6-1. These surplus sale-proceeds may be taken as representing the value of the equity of redemption of the 1a. 4p. share of Shazadpore Dumduma, which was the subject of the first mortgage. The third suit was instituted by the present plaintiff after the institution of the first suit and before the present appellants had become purchasers. It will be remembered that the present plaintiff Soodist Lall was the mortgagee not only of the two shares, but of the other property situate in the district of Tirhoot. The third suit was instituted under the old Code of Civil Procedure, and it was instituted in the district of Tirhoot. In that suit Soodist Lall sought to enforce his mortgage lien not only against the property situate in Jirhoot, but also against the property situated in the district of Bhagalpore. Now, according to the old Code of Civil Procedure, Act VIII of 1859 (s. 12\*), it was necessary to have obtained the sanction of the High Court in order that the property situated in the district of Bhagalpore might be made liable under the [743] decree which would be passed in the suit. No such sanction was obtained, and on the 17th July 1874, a decree was passed in favour of Soodist Lall. The fourth suit was brought by the fourth mortgagee, and he obtained a decree on the 17th January 1877. In execution of this decree, he attached a 2a. 13g. 2c. 1cr. share in Mozufferpore Thatha. It was sold on the 3rd September 1877, and purchased by the second party defendants, Tribani Persad Singh and others. The remaining facts of the case are as follows:—Soodist Lall had his decree transferred for execution with a certificate from the district of Tirhoot to the district of Bhagalpore, and in this latter district he attached in execution the surplus sale-proceeds, Rs. 7,664-6-1, and also the 1a. 9g. 2c. 1cr. share of Mouza Shazadpore Dumduma. The present appellants came forward and made a claim (i) as to the surplus proceeds, and (ii) as to the share of Baiju Lall,—that is, 17g. 3c. 1d. share. In consequence of this claim,

\*[Sec. 12:—In like manner, if the property be situate within the limits of different districts, the suit may be brought in any Court, otherwise

Suits for immoveable property situate in different districts.

competent to try it within the jurisdiction of which any portions of the land or other immoveable property in suit is situate but in such case the Court in which the suit is brought shall apply to the Sudder Court for authority to proceed with the same; if the suit is brought in any Court,—subordinate to a District Court,—the application shall be submitted through the District Court to which such Court is subordinate.]



the attachment was withdrawn both as to the surplus sale-proceeds, and as to the 17g. 3c. 1d. share just mentioned ; and the present appellants, on the 24th August 1878, drew out the surplussale-proceeds already mentioned. Tribani Persad Singh and others, second party defendants, also made a claim in respect of 2a. 13g. 2c. 1d. share which they had purchased ; and on the 21st January 1879, an order was made releasing this share from attachment. The present suit had now been instituted by Soodist Lall, and he asks (i) that the decree of the 17th July 1874 obtained by him in the Tirhoot Court may be declared valid to affect the 17g. 3c. 1d. share of Shazadpore Dumduma, and also the whole share of Mozufferpore ; (ii) that he may recover the surplus sale-proceeds, Rs. 7,664-6-1, together with interest, from Bungsee and others, the present appellants ; and (iii) that, if the decree of the 17th July 1874 be not held valid so as to affect the properties abovementioned, then a decree may now be given to him declaring his prior lien upon the 17g. 3c. 1d. share of Mouza Shazadpore Dumduma, and upon the 2a. 13g. 2c. 1cr. share of Mouza Mozufferpore Thatha. Now, it is to be borne in mind that Bungsee purchased the interests of Dukharun and Baiju Lall at a sale under a decree obtained upon the third mortgage. The plaintiff, who is the [744] second mortgagee, has, therefore, in respect of the surplus sale-proceeds, and also in respect of Baiju's share, a prior lien to that of Bungsee, who claims only in right of the third mortgagee. Then, as to the share in Mozufferpore Thatha, Tribani Persaud and others, second defendants, are purchasers under a decree obtained upon the fourth mortgage, and as regards this share also, the plaintiff, being the second mortgagee, has a prior lien.

• Four points have been argued before us upon this appeal. The first point is, that the Tirhoot Court had no jurisdiction in respect of the property situate in Bhagalpore, and therefore the decree of the 17th July 1874 is not valid so as to affect the Bhagalpore property.

The second point is, that the suit is bad for multifariousness, inasmuch as the first set of defendants and the second set of defendants are interested not jointly, but severally, and in respect of separate portions of the property. The third point is, that the plaintiff is not entitled to sue alone, because there are four other persons,—viz., Mohesh Lall, Chutoorbhoj Lall, Gopal Lall, and Ram Lall (one of whom, viz., Chutoorbhoj, is a minor), who are members of a joint Hindu family,—co-sharers with the plaintiff. It is, therefore, contended, that the plaintiff Soodist Lall is not alone interested in the subject-matters of the suit, and is not competent to sue alone. The fourth point is, that this suit is not maintainable, because it is a suit brought after splitting a cause of action ; in other words, as the plaintiff had already brought a suit in the Tirhoot Court, and did not, in order to make the decree in that suit effectual as against the whole of the mortgaged property, obtained the sanction of the High Court, he is now precluded from bringing this second suit in respect of the Bhagalpore property.

As to the first point it is conceded on behalf of the plaintiff, respondent, that the decree of the Tirhoot Court is not valid to affect the property in the Bhagalpore Court, and it is not necessary for us to say anything further upon this point. The second point is concerned with multifariousness, and in order to understand how far this objection can be sustained in connection with the present case, we must bear distinctly in mind what are the exact facts.

[745] The plaintiff sues in respect of a single transaction affecting several items of property. He sues upon a single contract as between himself and his mortgagor ; and he is compelled to sue by reason of this fact, that subsequent

to the execution of his mortgage, several other persons have become interested in different portions of the property which, as a whole, was the subject of his mortgage-bonds. Now it appears to us, that this is just the case which s. 28 of the present Code of Civil Procedure was intended to meet and provide for. That section enacts, that "all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative, in respect of the same matter." The right to relief, so far as regards the first and second set of defendants, is, undoubtedly, a right to relief as against these sets of defendants severally, but the cause of action arises out of the single subject-matter which formed the subject of the plaintiff's original mortgage. We may also advert to s. 31 of the Code of Civil Procedure, which provides, that "no suit shall be defeated by reason of the misjoinder of parties, and the Court may, in every suit, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it." We are of opinion, that the two sections which have just been quoted, are a sufficient answer to the objection of multifariousness raised upon this appeal.

Then, with reference to the third objection, the mortgage-bond was executed in favour of the plaintiff alone. If this were not the case, there would, undoubtedly, be much in the objection, that the plaintiff, whether regarded as a member of the partnership or as a member of a Hindu family, could not alone maintain this suit. But we think that the fact of the mortgage-bond having been executed in the name of the plaintiff alone entirely alters the case. The plaintiff may be regarded as contracting not only on behalf of himself, but on behalf of undisclosed principals—i. e., the other members of the family. The rule of law on this subject is to be found in the case of *Sims v. Bond* (5 B. and Ad. 393). The learned Chief Justice of England, in delivering the judgment of the Court, then said:—"It is a well-[746]established rule of law, that where a contract, not under seal, is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it; the defendant, in the latter case, being entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the contracting party. This rule is most frequently acted upon in sales by factors, agents, or parties, in which cases, either the nominal or real contractor may sue." The same principle is applicable to the case of partners contracting in their own names, but really on behalf of themselves and their unnamed partners—*Bottomley v. Nuttall* (5 C. B., N. S., 122), for, as Baron PARKE said in *Beckham v. Drake* (9 M. and W., 98), all questions of this sort between partners are mere illustrations of the same questions between principal and agent. In the case of *Agacio v. Forbes* (14 Moore's P. C., 160) it was held by the Privy Council, that one partner, with whom personally a contract was made, was entitled to sue upon this contract in his own name without joining his co-partners as plaintiffs; see also *Jones v. Robinson* (1 Ex., 454).

The same principle of law is embodied in s. 230 of the Indian Contract Act, which enacts, that, "in the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them. Such a contract shall be presumed to exist in the following cases:—(i) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad; (ii) where the agent does not disclose the name of his principal." Now, in the present case the contract was made with Soodist Lall, the plaintiff, alone. It has not been expressly pleaded, and there is no evidence upon the record to show, that Soodist Lall did, at the time of making the contract, disclose that he was contracting not only on behalf of himself, but also on behalf of the other

members of the partnership. Under these circumstances, we think that this ground of appeal must also fail.

Then the fourth ground of appeal is, that the cause of action [747] has been split. Now, the present case is on all fours with the case of *Grish Chunder Mookerjee v. Rameessuree Dabee* (22 W. R., 308), in which the case of *Subba Rau v. Rama Rau* (3 Mad. Rep., 376) is referred to. In the case of *Grish Chander Mookerjee v. Rameessuree Dabee* (22 W. R., 308) it was held, that the cause of action was not split, because the plaintiff did not, in the first case, either relinquish or omit to sue for any portion of his claim; but the necessity for the second suit arose out of the fact, that the decree in the first suit had become infructuous, so far as regarded a certain portion of the property, in consequence of its having been made without jurisdiction. We see no reason to dissent from the principle there laid down, and that principle must govern the present case. Were it otherwise, we think that there is another principle of law laid down by the Privy Council which would be applicable to the present case. We think that the cause of action in this second case is not the same cause of action upon which the plaintiff sued in the first suit. In the first suit the cause of action was the non-payment of the money secured by the mortgagee-bond, and the real contention was as between the mortgagee on the one hand and the mortgagors on the other hand. The second suit is directed to enforce the plaintiff's prior mortgage lien against subsequent mortgagees, and the cause of action is, that the subsequent mortgagees have denied the plaintiff's right to a prior lien. The real contention is, not between the mortgagee and the mortgagors, but between the prior mortgagee and the subsequent mortgagees. We think, therefore, that this case falls within the principle explained in the case of *Rao Kuran Singh v. Nawab Mahomed Fyazali Khan* (14 Moore's I. A., 188). The appellants thus fail upon all the grounds which have been taken and argued before us, and this appeal must be dismissed with costs.

*Appeal dismissed.*

#### NOTES.

#### [I. ONE MEMBER OF JOINT HINDU FAMILY CONTRACTING ALONE—HIS RIGHT TO SUE ALONE—

Approved of in *Adaskalam v. Mari Muthu* (1899) 22 Mad. 326 where it was held that a member of an undivided Hindu family could sue on a bond executed in his favour without joining other members of the family. Contract entered into by the manager of joint family business could be sued on without joining other members of the family, *Gopal Das v. Badrinath* (1904) 27 All. 361=2 All. L. J. 8=(1904) 13 W. 282. The matter is settled by the ruling of Privy Council in (1911) 33 All. 372.

#### II. C.P.C., SEC. 28—MISJOINDER OF DEBTS—

Referred to in (1907) 31 Bom. 516=9 Bom. L. R. 482 as valuable guide in determining when defendants could be joined together. See. O. 1, r. 3 of the present Code which is wider.]

[748] *The 27th July, 1881.*

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE FIELD.

Kristo Ram Roy.....Judgment-debtor

*versus*

Janokee Nath Roy and others.....Decree-holders.\*

*Execution of decree—Sale of under-tenure—Sale of other immoveable property of judgment-debtor—Beng. Act VIII of 1869, ss. 59-61.*

A judgment-creditor, who has obtained a decree for arrears of rent due in respect of an under-tenure transferable by its own title-deeds or by the custom of the country, is not bound to bring that under-tenure to sale in execution before he can proceed against other immoveable property belonging to his judgment-debtor.

The case of *Desaratulla v. Nawab Nazim Nazar Ali Khan* (1 B. L. R., A. C., 217), which was decided upon s. 105 of Act X of 1859<sup>\*</sup> is not applicable to ss. 59-61 of Beng. Act VIII of 1869.

*Doolar Chand Sahoo v. Lall Chabul Chand* (3 C. L. R., 564) followed.

Baboo *Gopinath Mukerjee* for the Appellant.

Baboo *Gurudas Banerjee* and Baboo *Golap Chand Sircar* for the Respondents.

THE facts of this case sufficiently appear from the following **Judgments** of the Court (PRINSEP and FIELD, JJ.) :—

**Field, J.**—The question raised in these appeals is, whether a judgment-creditor, who has obtained a decree for arrears of rent due in respect of an under-tenure transferable by its own title-deeds or by the custom of the country, is bound to bring that under-tenure to sale in execution before he can proceed against the other immoveable property belonging to his judgment-debtor. There can be no doubt that if this question had to be answered under the old law, it must have been answered in the affirmative. Such is the effect of the decision in the case [749] of *Desaratulla v. Nawab Nazim Nazar Ali Khan* (1 B. L. R., A. C. 217). It is contended that this decision is still applicable. Section 61 of Beng. Act VIII of 1869 enacts as follows in its last paragraph :—

“ If, after sale of any such under-tenure in execution of such decree, any portion of the amount decreed remains due, process may be applied for and issue against any other property, moveable or immoveable, belonging to the debtor.” Now, this is the first provision contained in the Act which allows execution to be taken out against immoveable property, and having regard to the point of time at which the judgment-creditor is here allowed to proceed against the debtor's immoveable property, it may well seem that it was not the intention of the Legislature to allow him to proceed against immoveable property, until after the sale of the under-tenure. This was in fact the construction placed upon s. 105 of Act X of 1859 by the decision to which I have just referred. But although, as I have said, the provision above quoted is the first specific provision in Beng. Act VIII of 1869 which allows process of execution to be taken out against immoveable property, there is another section in the Act which appears to have

\* Appeals from Appellate Orders, Nos. 128, 150, 151, and 152 of 1881, against the order of Baboo Radha Krishna Sen, Additional Subordinate Judge of Hooghly, dated the 10th March 1881, affirming the order of Baboo Behari Lal Mullick, Munsif of Haripal, dated the 24th April 1880.

a very important bearing upon the question, that is s. 34, which enacts:—  
 “Save as in this Act is otherwise provided, suits of every description brought for any cause of action arising under this Act, and all proceedings therein, shall be regulated by the Code of Civil Procedure.” The effect of the decision of their Lordships of the Privy Council in the case of *Doolar Chand Sahoo v. Lall Chabul Chand* (3 C. L. R., 564) is, that that section extends to rent-suits the provisions of the Code of Civil Procedure concerning execution and the property which may be taken in execution; and that the result of this extension is, that a judgment-creditor, in a case such as that with which I am now dealing, has the option of proceeding either against the under-tenure or against the other moveable or immoveable property of his judgment-debtor. In that case the question before their Lordships was, whether what had been sold in execution of a rent-decree was the under-tenure itself or merely the right, title, and interest of the judgment-debtor. Their Lordships refer to s. 59 of Beng. Act VIII of 1869, and say:—[750] “The Maharaja, if he had pleased, was authorized to apply for the sale of the tenure.” They then quote the words of that section, and proceed as follows:—“It appears, therefore, that although the Maharaja might, if he had pleased, have applied to sell the tenure in execution of his decree, he had also a power to proceed against other property of the defendant.” From this it appears to have been the opinion of their Lordships of the Privy Council, that the effect of s. 34 was, as I have already said, to give the judgment-creditor the option of proceeding to sell the under-tenure or proceeding against any other property of the judgment-debtor. It is deserving of notice that Sir BARNES PEACOCK, who was the Chief Justice of this Court, and who delivered the judgment in the case of *Desaratulla* (1 B. L. R. A. C. 217), was one of the Lords of the Privy Council who heard the case to which I have just referred; and this fact is strong to show that the old law, as settled by *Desaratulla's* case (1 B. L. R., A. C. 217), was not overlooked in putting a construction upon the new Act of 1869, which incorporated, by reference, the provisions of the Code of Civil Procedure. It, therefore, appears to us that, as the law now stands, we must take it that the decision in the case quoted upon the old s. 105 of Act X of 1859, is not applicable to ss. 59 to 61 of Beng. Act VIII of 1869. The appeals will be dismissed with costs.

**Prinsep, J.**—I am of the same opinion. It appears to me that their Lordships of the Privy Council, in the judgment in *Doolar Chand Sahoo v. Lall Chabul Chand* (3 C. L. R., 564) (the passage I refer to is to be found at page 564) held, that s. 34 of the Rent Act gave the Civil Courts a concurrent jurisdiction under the Code of Civil Procedure, and enabled a decree-holder, in a suit for arrears of rent, to proceed either under the general powers conferred under the Code or under the Rent Law. We must now accept the law as thus laid down. The appeals will be dismissed with costs.

*Appeals dismissed.*

[751] *The 23rd April, 1881.*

PRESENT :

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Gopal and another.....Defendants

*versus*

Macnaghten.....Plaintiff.\*

*Enhancement of Rent—Parties to Suit—Enhancement by single Shareholder.*

Even if a single shareholder can raise the rent of a joint tenant without the consent of his coparcener, he can only do so in a suit to which all the sixteen annas proprietors must be made parties.

IN this suit the plaintiff, as ticcadar of an eight-anna share of Mouza Mohenpoor Ruttonpoor, sought to recover arrears of rent at an enhanced rate on a notice served by him alone. The proprietor of the other eight annas share was not a party to the suit.

The notice specified the different kinds of land in the holding of the defendants, and demanded different rates according to their respective qualities. It informed the defendants that the rent of the whole holding would be raised from the succeeding year.

In the plaint the plaintiff claimed his share only of the enhanced rent. Two grounds of enhancement were stated in the notice as well as in the plaint,—viz., (i), that the plaintiff having constructed embankments in the mouza, the productive power of the land had increased otherwise than through the agency of the tenant, and (ii), that the rates prevailing in the neighbouring mouzas were higher than those current in the village in question.

The Munsif at first dismissed the suit, upon the ground that a fractional shareholder of a property cannot alone enhance the rent of a joint tenant. But the District Judge, on appeal, overruled the decision, and remanded the case to be tried on the merits.

The Munsif, on remand, held, that the grounds of enhancement in the plaint and the notice were not made out. But, [752] after holding a local investigation, he came to the conclusion that the lands of the mouza in question were of the same quality, and that the average rate of rent paid by the bulk of the ryots was 3 rupees 4 annas per bigha; and as the defendants' rent was lower, he awarded a decree at that enhanced rate. The District Judge, on appeal by the defendants, upheld this decision.

The defendants appealed to the High Court.

Mr. H. E. Mendes and Baboo Gopal Palit for the Appellants.

The Advocate-General (the Hon. G. C. Paul) and Baboo Amarendro Nath Chatterjee for the Respondent.

The Judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

Mitter, J. (who, after stating the facts of the case as above, continued):—The first question that has been argued before us is, whether an undivided fractional shareholder of a mouza can enhance the rent of a holding of a joint tenant. But whether he can or not, we are clearly of opinion that

\* Appeal from Appellate Decree, Nos. 2664 to 2763, 2861 to 2870, and 2880 to 2885 of 1879, against the decree of R. J. Richardson, Esq., Judge of Tirhoot, dated the 28th April 1879, affirming the decree of Baboo Ramyeed Lall, Munsif of Tezpoore, dated the 29th May

such a suit as this is not maintainable in the absence of the other shareholder or shareholders. Conceding that a single shareholder can raise the rent of a joint tenant without the consent of his coparceners, it is clear that he can only do so in a suit to which all the sixteen annas proprietors must be made parties, otherwise the rent of the same holding might be raised to two or more different amounts at the instance of the several coparceners.

We are, therefore, of opinion that the decree of the lower Courts is not sustainable, and we dismiss the suit with costs in all the Courts.

This decision will govern Appeals Nos. 2665 to 2763, 2861 to 2870, and 2880 to 2885 of 1879, in which the plaintiff's suit is likewise dismissed with costs.

*Appeal allowed.*

[753] The 21st July, 1881.

PRESENT :

MR. JUSTICE PRINSEP AND MR. JUSTICE FIELD.

Dinonath Ghose.....Plaintiff

*versus*

Auluck Moni Dabee and others.....Defendants.\*

*Registration Act (III of 1877), s. 50—Priority—Registered Conveyance—  
Unregistered Conveyance accompanied by Possession.*

One who holds under an unregistered deed of sale, the registration of which is not compulsory, and is in possession of the property conveyed, has a superior title to one who sets up a registered conveyance of a later date unaccompanied by possession. The second purchaser presumably has notice of the title of the first purchaser from the fact of possession having been given.

Authorities on the question of priority discussed.

THE facts of this case sufficiently appear from the Judgment of FIELD, J.

Baboo Ishur Chunder Chuckerbutty for the Appellant.

Baboo Sreenath Doss and Baboo Guru Churn Banerjee for the Respondents.

The following are the **Judgments** of the Court (PRINSEP and FIELD, JJ.) :—

**Field, J.**—In this case the plaintiff purchased certain immoveable property on the 26th Aughran 1280 (10th December 1873), and his conveyance was registered. He alleged in his plaint that he got possession of the property after the execution of his conveyance. The Munsif was of opinion that he got possession of part only of the property ; but the Subordinate Judge does not support the Munsif's finding, even to this extent. The defendant claims the same property under two unregistered kobalas, dated respectively the 5th and 15th Aughran 1279 (19th and 29th November 1872), and she alleges that she obtained possession of the property upon the execution of these conveyances, and has been in possession ever since. The amount of [754] consideration for each of these instruments is less than Rs. 100. Registration was therefore optional ; and the instruments themselves, though not registered, are admissible in evidence to prove the defendant's title.

\* Appeal from Appellate Decree, No. 555 of 1880, against the decree of Baboo P. M. Mukerjee, Subordinate Judge of Furreedpore, dated the 19th January 1880, reversing the decree of Moulvi Mahbut Ali, Munsif of Goalundo, dated the 3rd August 1878.

The Judge of the lower Appellate Court has found the following facts, *viz.*, that the defendant's two unregistered conveyances have been satisfactorily proved; and that it has also been proved that she obtained possession of the property upon the execution of, and under, these conveyances. He thinks it very probable that the defendant's vendors, after selling the property to her, got up the subsequent registered conveyance (which purports to convey to the father-in-law of one of the vendors) for the object of committing fraud. He does not, however, find fraud as a fact, nor does he find that the purchaser under the subsequent conveyance had notice of the previous unregistered conveyances. The case does not, therefore, come within the principle that, notwithstanding the stringent provisions of the Registration Act, a person who claims under a registered instrument is estopped in equity from saying that this instrument shall prevail against a prior unregistered instrument, if at the time when he took his registered instrument he knew of the existence of the prior unregistered instrument. See the remarks of Lord Selborne in the case of *The Agra Bank, Limited, v. Barry* (L. R., 7 E. & Ir. Ap., 135). This case was decided upon the Statute 6 Anne c. 2, Ir., the fourth section of which provides, "that all registered deeds shall be taken "as good and effectual in law and equity according to the priority of time of registering"; and the fifth section provides, that "every deed not registered shall be deemed and adjudged as fraudulent and void," not only as against a registered deed, but as against all creditors. "Any person," said Lord Chancellor Cairns, in the case just quoted, "reading over that Act of Parliament would perhaps, in the first instance, conclude, as has often been said, that it was an Act absolutely decisive of priority under all circumstances; and enacting that, under every circumstances that could be supposed, the deed first registered was to take precedence of a deed which, although it might be executed before, [755] was not registered till afterwards. But by decisions which have now, as it seems to me, well established the law, and which it would not be, I think, expedient in any way now to call in question, it has been settled that, notwithstanding the apparent stringency of the words contained in this Act of Parliament, still if a person in Ireland registers deed, and if, at the time he registers the deed, he himself, or an agent whose knowledge is the knowledge of his principal, has notice of an earlier deed, which though executed is not registered, the registration which he actually effects will not give him priority over that earlier deed. And I take the explanation of those decisions to be that which was given by Lord King in the case of *Blades v. Blades* upwards of one hundred and fifty-years ago, that, inasmuch as the object of the Statute is to take care, that by the fact of deeds being placed upon a register, those who come to register a subsequent deed shall be informed of the earlier title, the end and object of the Statute is accomplished, if the person coming to register a deed has *abunde*, and not by means of the register, notice of a deed affecting the property executed before his own. In that case the notoriety which it was the object of the Statute to secure, is effected in a different way but effected as absolutely in respect of the person who thus comes to register, as if he had found upon the register notice of the earlier deed." The same principle has been adopted in cases concerned with property in England, see *Le Neve v. Le Neve* (Amb., 436), *Davis v. Strathmore* (16 Ves., 419), *Willis v. Brown* (10 Sim., 127), *Rolland v. Hart* (L. R. 6 Chan., 678), and *Bradley v. Riches* (L. R., 9 Chan. Div., 189), and has also been applied to instruments registered under the Indian Registration Act, see *Sherikh Rahmatulla v. Sherikh Sarutullah Kagchi* (1 B. L. R., F. B., 82), *Waman Ram Chandra v. Dhondiba Krishnaji* (I. L. R., 4 Bom., 127), and *Fuzluddeen Khan v. Fakir Mahomed Khan* (I. L. R., 5 Cal. 342). As I have already observed, the present case does not fall within the principle of these decisions, which are nevertheless valuable



to show, that however strict the language of [758] Registration Acts may be, they will not be construed so as to enable their provisions to subserve fraud.

Upon the findings of fact abovementioned, the Subordinate Judge held, that the defendant had acquired a good and valid title in the property by her unregistered conveyance, which was accompanied by possession, and that the plaintiff's registered conveyance cannot prevail against this title. It is now contended in appeal, that this decision is wrong, and that, under the provisions of s. 50 of the Registration Act (III of 1877), the plaintiff is entitled to succeed upon the strength of his registered conveyance.

Section 50 is as follows—"Every document of the kinds mentioned in cls. (a), (b), (c), and (d) of s. 17, and cls. (a) and (b) of s. 18, shall, if duly registered, take effect, as regards the property comprised therein, against every unregistered document relating to the same property." What is the meaning of the words 'take effect' in this section? Do they mean "have effect to pass the property and give a good title to it," even although the vendor had neither property nor title when he executed the registered conveyance, or that which is more reasonable, take effect in those cases in which effect can be given by reason of the property being still in the hands of the vendor?

If A, pretending to be the owner of property which really belongs to B, and in which A never had any interest, convey that property by a registered document to X, it will scarcely be contended that X, by this registered conveyance, acquires any title to such property. Now, if A sells the same property to C on the 1st January 1880 by an instrument which the law does not require to be registered, and which, therefore, although unregistered, is admissible in evidence to prove the transfer and the title of the transferee, and if this legal conveyance, made in legal form, is further followed immediately by delivery of the possession of the property to C, upon what principle can it be reasonably contended that A has, on the 1st February of the same year, any right which he can convey to X. If A has no interest to convey, the fact of this second conveyance being registered ought not to give X any title to the property in the [757] case last put any more than in the case first put. But it is contended that there are decisions of this Court which leave the question no longer an open one, and that, upon these decisions, X has a good title, a title which will prevail against C. If the question is concluded by decision, there is an end of the matter, but I apprehend that an examination of all the cases will show that the result is in favour of, not X, but C. Before proceeding to examine the cases, it will be well to define exactly the case with which we have to deal—

(a) It is not a case in which it is contended that the subsequent registered purchaser is estopped, because he had notice of the prior unregistered conveyance.

(b) It is a case in which the vendor first sold by an unregistered conveyance and gave the first vendee possession, and had no possession to give to the second vendee.

(c) Registration of the prior conveyance was optional, not compulsory, and therefore the prior vendee can produce and use his unregistered conveyance to prove this title.

(d) It is in fact a case of possession and a prior unregistered conveyance, registration of which was optional, *versus* a subsequent registered conveyance and nothing more.

1. The first case is that of *Girija Singh v. Giridhari Singh* (1 B. L. H., A. C., 14). Here the plaintiff claimed under a registered kobala, dated the 29th October 1866. The defendant claimed under an unregistered kobala of May 1855, alleging that he had been in possession since the execution of this prior unregistered kobala. This possession was found as a fact, and it was held that possession under an unregistered kobala created a title which could not be defeated by a subsequent registered instrument. MACPHERSON, J., remarked, that the transfer of the property to the defendant was complete, and nothing was wanting to perfect it according to the law then in force; and that s. 50 of the then Registration Act could not be construed as vitiating all titles acquired prior to the passing of this Act. Now this is a distinct authority that a registered conveyance and possession taken thereunder are a complete transfer of the vendor's [788] interest so as to leave him nothing which he can subsequently convey. But it is not exactly on all fours with the present case, because the prior unregistered instrument was executed before the new Registration Act came into operation. The Madras High Court have decided to the same effect in *Tirumala v. Lakshmi* (I. L. R., 2 Mad., 147).

2. In the case of *Syud Furzund Ally v. Syud Abdool Ruhim* (4 W. R., 30) it was decided that a kobala registered under the provisions of Act XIX of 1843 has no priority over an unregistered kobala under which enjoyment has actually taken place. Section 2, Act XIX of 1843 enacted as follows:—  
“Every deed of sale or gift of lands, houses, or other real property, a memorial of which has been or shall be duly registered according to law, shall, provided its authenticity is established to the satisfaction of the Court, invalidate any other deed of sale or gift for the same property which has not been registered, and whether such second or other deed shall have been executed prior or subsequent to the registered deed.” Observation may be made upon the distinction between the terms ‘shall invalidate’ used in this section, and the words of the present law ‘shall take effect against.’ In connection with this Act the case of *Maharaja Maheswar Bax Sing Bahadur v. Bhukha Chowdry* (B. L. R., F. B. Rul., 403) may be noticed, in which it was decided, in accordance with the previous decisions of the Sadr Court, that a registered deed of sale had no priority over an unregistered mortgage-deed of an earlier date; and see the remarks upon this case in *Prahlad Misser v. Udit Narayan Singh* (1 B. L. R., A. C., 197).

3. In the case of *Ram Chand Koomar v. Modhoo Soodun Muzoomdar* (7 W. R., Civ. Rul., 119) the plaintiff claimed under a registered deed of sale, dated the 13th Assar 1272, that is, 24th June 1865. The defendant claimed under a subsequent unregistered deed, dated the 3rd Pous 1272, that is, 19th December 1865. Both the instruments were for a sum less than rupees one hundred; no question of possession was here raised, and the sole question was, whether the registered deed was fraudulently registered. This [759] case is not in point, more especially as the registered deed was prior in point of time.

4. In the case of *Gooroo Dass Dan v. Kooshoom Koomaree* (9 W. R., 547) the plaintiff's (appellant's) deed was not registered, but was prior in date to the defendant's registered deed. The value of the property conveyed by each was less than one hundred rupees. The possession of the plaintiff (appellant) under his unregistered deed was not found by the lower Appellate Court: see the judgment of KEMP, J. This case is also not in point, not being a case of possession under a prior unregistered deed *versus* a subsequent registered deed.

5. In *Gobind Chunder Roy v. Poorno Chunder Sein* (10 W. R., 36), the plaintiff purchased on the 4th Pous 1272, but did not register. The defendant claimed

under a prior registered lease from the same person, and dated the 17th Aughran 1272; nothing was said as to the values of the property or as to possession. Effect was given to the prior registered lease. This case also is not in point.

6. In the case of *Soodharam Bhattacharjee v. Odhoy Chunder Bundo-padhya* (10 B. L. R., 380) the plaintiff sued to recover 99 rupees due to him under an unregistered mortgage-bond, dated the 11th Jeyt 1266 (23rd May 1859), by which a tank was pledged as security for the repayment of the loan. Another person intervened in the suit, claiming to be in possession of the tank under a subsequent registered deed of sale, dated the 5th Srabun 1274 (19th July 1867) from the same person. Section 50 of the Registration Act, XX of 1856, was held applicable, and the subsequent registered instrument was held to prevail. Here the possession accompanied the registered instrument; so that this case also is not in point.

7. In the case of *Salim Shaikh v. Baidonath Ghuttuck* (12 W. R., 217; s.c., 3 B. L. R., 312), the plaintiff claimed under a registered patta, dated the 16th of Bysack 1275 (12th April 1867). The defendants claimed under a verbal grant. This case also is not in point, but the observations of MARKBY, J., as to the effect of possession are important.

[760] 8. In the case of *Gouree Kant Roy v. Gurdhur Roy* (12 W. R., 456) the plaintiff's kobala was dated the 6th Pous 1272, and was registered. The defendants claimed under a prior unregistered instrument of the 25th Bhadro 1272; the value of the property does not appear. The question of possession was not decided. The only point which appears to have been taken was, whether the subsequent purchaser had knowledge of the previous sale. Reference was made to the last case, and the Judge below was authorized to re-trv the whole question. This case is also not in point, as it appears to have been decided with reference to the principle of notice to which I have already alluded.

9. In the case of *Nursingh Poorkaet v. Bikrum Majee* (14 W. R., 250) the plaintiff sought to recover possession under a patta granted by a female and registered. The defendant claimed under a prior lease granted by the female's husband. The defendant's lease was one which, under the Registration Act, should have been, but was not, registered. The defendant alleged possession. The last case was referred to, and the case was remanded for re-trial of the question whether the defendant had got a lease from the husband of the widow, and possession under it. In this case the defendant's patta was not an instrument of which the registration was optional, but an instrument which should have been registered, but was not so registered. It would, therefore, have been inadmissible in evidence to prove the defendant's title.

10. In the case of *Narain Doss v. Gungaram Dhara* (20 W. R., 287) the plaintiff claimed under a registered kobala dated Cheit 1277, and the defendant claimed under a prior unregistered kobala dated Srabun 1276, the the registration of which was not compulsory, alleging that he had obtained possession thereunder. GLOVER, J., sitting alone, remanded the case to have this allegation of possession tried, remarking that s. 50 of Act XX of 1856 referred to cases where the purchase had not been completed by possession. In support of this view, he quoted the last case, but this appears to have been done under a misconception of the facts of that case.

[761] 11. In the case of *Sharkh Ryasutalla v. Doorga Churn Pal* (15 B.L. R., 294) the plaintiff sued to enforce his lien under an unregistered mortgage-

bond for Rs. 95, dated the 19th August 1870. One defendant resisted as to part of the land, claiming it under a subsequent registered kobala for Rs. 300, dated the 18th June 1872. The registration of this latter kobala was compulsory, and the only point decided in the case was that s. 50, Act XX of 1866, applied not to the case of a registered instrument of which the registration was compulsory as against an unregistered instrument of which the registration was optional, but only to the case of a registered instrument of which registration was optional as against an unregistered instrument of which registration was also optional. This anomaly in the law was removed in the next Registration Act. This case is also not in point.

12. In the unreported case of *Indro Naram Bal v. Foolmann Bewah* (Sp. Ap., No. 1122 of 1876) the plaintiff claimed under a registered kobala, dated the 23rd Bysakh 1280, which included several plots. The defendant alleged title to two of these plots by a prior unregistered kobala, dated the 11th Jeyt 1276, alleging that possession had been given and held thereunder. This allegation of possession was found to be true by the lower Appellate Court. Registration of both kobalas was optional. MARKBY and PRINSEP, JJ., held, that the plaintiff's registered kobala could not give him a title against the defendant's unregistered kobala and possession thereunder. MARKBY, J., said—"The Act which governs the question as between these parties is Act VIII of 1871. Upon the previous Act XX of 1866, as also upon Act XVI of 1864, and Act XIX of 1843, it had, in my opinion, been held by, at any rate, a preponderance of authority, that the provisions of these Acts, so far as they invalidate title not duly registered, had no application where the party who had purchased had been put into possession." This is a case directly in point. I am bound, however, to say that the learned Judge refers to his judgment in case No. 7 above as containing the authorities, but all the cases there cited, as far as I have been able to test them, were decided upon Act XIX of 1843, and [762] I have been unable to find that in any of these cases both instruments were governed by any of the new Registration Acts.

13. In the case of *Fuzluddeen Khan v. Fakir Mahomed Khan* (I. L. R. 5 Cal., 336), a certain person, whom I shall call A, was a tenant of a jote under another person X. A purchased from X by an unregistered kobala, dated the 2nd Pous 1282 (16th December 1875). B purchased from X by a registered kobala of subsequent date, 12th March 1876. The value of the property was less than one hundred rupees. A kabuliati had been executed by A in favour of X's father, and A had paid rent under this kabuliati to X. As to this kabuliati, PONTIFEX, J., says:—"The defendant (respondent) sets up his possession as sufficient notice to the plaintiff of the defendant's alleged prior purchase. No other equity in his own favour, or fraud on the part of the plaintiff is alleged or proved. In many cases possession not properly accounted for may be a very material fact. But in the present case, the defendant had originally been a tenant of the jotedar, the common vendor of both parties, and his possession was equally consistent with the continuance of such tenancy as with his alleged purchase. Moreover, it has been found as a fact by the Officiating Judge of the Court below, that the defendant left the kabuliati of his tenancy in the hands of the common vendor. He ought, if and when he made his alleged purchase, to have insisted upon the kabuliati being given up to him. By not having done so, he in fact helped the vendor to commit a fraud upon the plaintiff, for the production of this kabuliati to the plaintiff would be sufficient to satisfy him that the defendant's occupation was merely that of a tenant." This was a very important feature in this case, which, but for this essential difference, would be on all fours with the case now before us. That a person who allows the *indicia* of

ownership to remain in the hands of another person will be estopped by such conduct from afterwards saying, as against an innocent purchaser for valuable consideration without notice, that such person could not dispose of the property, is a proposition established by numerous cases: see for example the remarks of their Lordships of the Privy Council in *Ram Coomar [763] Koondoo v. McQueen* (11 B. L. R., 53), and see the case of *Blugwan Doss v. Upooch Singh* (10 W. R., 185). But for this point of difference, in all probability this case would have been referred to a Full Bench, regard being had to case No. 12, which is referred to and dissented from.

14. In the case of *Panha Khumaji v. Fatta Upaji* (12 Bom. H. C. Rep., 179) the plaintiff claimed under an unregistered sale-certificate. The defendant claimed under a subsequent registered sale-certificate, and was in possession. The Registration of both was optional, and it was held that the defendant had a better title. But here again possession accompanied the registered and not the unregistered instrument. So that this case also is not in point.

15. In *Balaram Nem Chand v. Appavulad Dulu, &c.* (9 Bom. H. C. Rep., 121) it was held, upon cl. 1, s. 6 of the Bombay Reg. IX of 1827, that possession and an unregistered deed of sale left nothing in the vendor which he could afterwards sell or mortgage, and that a person claiming under a subsequent registered mortgage-deed could not succeed. This agrees with the state of the old law on this side of India.

16. The case of *Manmalvalad Suratmal and Dasrathvalad Narayan* (9 Bom. H. C. Rep., 147) is directly in point, and was decided on the new Registration Acts. The Bombay High Court here decided that a prior unregistered deed of sale, registration of which was optional, followed by possession, created a good title, which could not be defeated by a subsequent registered sale-certificate.

17. In *Sheo Dyal Aheer v. Gool Mahomed Khan* (2 N. W. P. H. C. Rep., 296) a person claiming under a registered deed of sale executed in 1867 was held not to have a better title than a conditional mortgagee in possession under an unregistered deed of 1853,—i.e., executed before the new Registration Acts.

The result of the examination of these seventeen cases is then as follows:—*Nine, viz.*, Nos. 3, 4, 5, 6, 7, 8, 9, 11, and 14, are not in point, and any argument based on them fails; *four, viz.*, Nos. 1, 2, 15, and 17, are indirectly in support of the unregistered instrument followed by possession, inas-  
[764] much as, on both sides of India, it has been decided that it was not the policy of the old Registration Acts to allow such a title to be defeated by a bare registered instrument. *Three cases, viz.*, Nos. 10, 12, and 16, are directly in support of the unregistered instrument of which registration could have been effected under the new Acts, but was not compulsory, such instrument being followed by possession. One case, No. 13, is indirectly against the unregistered instrument and possession, and in favour of the registered instrument, while in no single instance has it been held, that a person claiming under a later registered conveyance has a better title than a person claiming under a prior unregistered conveyance, the registration of which was optional, and which was followed by undoubted delivery of possession.

There is an argument based upon the existence of the words “*unless where the agreement or declaration has been accompanied or followed by delivery of possession*” in s. 48, which gives registered documents priority over oral agreements; and the non-existence of these words in s. 50. I venture to think that there is a very simple solution of the difficulty raised by this argument. These words did not exist in either section, as these sections stood in the Act

XX of 1866. Notwithstanding their absence, when s. 48\* came to be construed in the case of *Salim Shaikh v. Boidonath Ghuttuck* (12 W. R., 217; s. c., 3 B. L. R., 212), decided in July 1869, it was held that the provisions of this section had no application when possession had been given. The Legislature, when amending the Act in 1871, adopted this construction, and added the above words in s. 48 of Act VIII of 1871. No similar question had been raised up to that time upon s. 50. Case No. 10 was decided in July 1873; case No. 12 in August 1877, and was never reported; and case No. 16 in May 1872. It may be said that the Legislature had Nos. 10 and 16 in the published reports when the Act III of 1877 was passed, and yet the words abovementioned were not inserted in the section of this Act. To this it may be replied that case No. 10 was the decision of a single Judge only, and No. 16 may have escaped observation; that the legislature had in 1871 [765] ratified and approved the construction put upon s. 48, and a similar construction is therefore rightly put upon s. 50.

The object of the new Registration Acts is to prevent fraud. It ought to be construed so as to promote this object. If we decide that a person who has sold land by a legal conveyance and has parted with the possession, can again sell, and by registering the second conveyance can destroy the first title and give a good title to the second purchaser, we enable the law to be used for the promotion, not the prevention, of fraud. Until the purchaser under the unregistered instrument has been twelve years in possession, his vendor may defraud him of that which he has honestly bought and paid for.

In giving effect to the prior unregistered conveyance and possession, there is no real hardship done to the later registered purchaser, who, if he has used ordinary precaution and had not been misled by the conduct of the first purchaser as in case No. 13, would have been able to discover that his vendor had no possession to give him.

Whether a bare conveyance by a person not in possession, and who cannot therefore put his vendee in possession, confers any title in this country, is a question as to which there has been some difference of opinion and some discussion. See the following cases:—*Raja Sahib Perhlad Sem v. Baboo Budhoo Singh* (12 Moore's I. A., 275), *Ranee Bhobo Soondree Dasseah v. Issur Chunder Dutt* (11 B. L. R., 36 s. c. 18; W. R. 140), *Tara Soondaree Chowdhraim v. The Collector of Mymensingh* (13 B. L. R., 501; s. c. 20 W. R., 446), *Ram Khelawan Singh v. Musmmat Audh Koer* (21 W. R., 101), *Kuchu Bayaji v. Kachoba Vithola* (10 Bom. H. C. R. 491), *Gunga Hurry Nundee v. Raghob Ram Nundee* (14 B. L. 309; s. c. 23 W. R., 131), and *Lalubhai Surchand v. Bai Amrit* (I. L. R., 2 Bom. 301). The result of these cases appears to be that delivery of possession of the property sold is essential to complete the title of the vendee; and that a bill of sale by a person out of possession does not take effect as a conveyance *in present*, and is merely evidence of a contract to be performed in future.

[766] The effect of applying this principle is, that the unregistered purchaser obtained a complete title when possession was delivered to him; but the registered purchaser never obtained a complete title, and has in fact no title to enforce. It may well be that, in view of these cases, the Legislature

Registered documents relating to property when to take effect against oral agreements.

\*[Sec. 48:—All documents, not testamentary, duly registered under this Act, and relating to any property whether moveable or immoveable, shall take effect against any oral agreement or declaration relating to such property, unless where the agreement or declaration has been accompanied or followed by delivery of possession.]

thought it unnecessary to and the words already referred to in s. 50 of Act III of 1877.

It may be observed, although it cannot be used as an argument for the decision of this case, that, in the revised draft of *The Transfer of Property Bill*, published in the *Gazette of India* of the 26th March last, 'sale' is defined as "the transfer of ownership, &c.," and such transfer, in the case of tangible immoveable property of a value less than one hundred rupees, may be made either by a registered assurance or by delivery of the property, such delivery being said to take place when the seller places the buyer in possession (s. 54). This is practically the state of the law at the present moment.

The conclusion to which I am led by authority and by my own examination of the subject is, that a bare conveyance, though registered, does not give the person claiming under it a better title than a person in possession under an unregistered conveyance; such possession having been delivered in order to complete the title created by the unregistered conveyance, and such unregistered conveyance being admissible in evidence to prove that title.

I think, therefore, that this appeal must be dismissed with costs.

**Prinsep, J.**—It appears to me that this case is on all fours with *Indro Narain Bal v. Foolmani Bewah* (Sp. Ap., No. 1122 of 1876) decided by Mr. Justice MARKBY and myself on the 20th August 1877, the decision of which has not been reported. Since the decision of that case, I have had another opportunity of considering this point in a case which was heard by me and two other learned Judges of this Court last week, and I am confirmed in the opinion which I then entertained, that one who holds under an unregistered deed of sale the registration of which is not compulsory, and is in possession of the property conveyed, has a superior title to one [767] who sets up a registered conveyance of a later date unaccompanied by possession. The second purchaser presumably has notice of the title of the first purchaser from the fact of possession having been given. I therefore concur in dismissing this appeal with costs.

*Appeal dismissed.*

#### NOTES.

##### [ SEC. 59 OF THE REGISTRATION ACT—

*Notice of prior unregistered instrument affecting subsequent registered instrument.*

The rule laid down in this case that the second purchaser presumably has notice of the title of the first purchaser from the fact of possession having been given was qualified by subsequent decisions, *Nani Bobee v. Hafizullah* (1884) 10 Cal. 1073, where it was held that, though possession was not conclusive evidence of notice of title, was cogent evidence. *Narain Chunder Chuckerbutty v. Dutaram* (1882) 8 Cal. 597 F.B. where the majority took the view that possession alone was not sufficient notice of title, but PRINSEP, J., maintained the view expressed by him in this case. Though the Calcutta High Court once considered doubtful the proposition that notice of prior unregistered deed where it is not required to be registered takes away the priority given to the registered deed under s. 50 of the Registration Act: *Bama Sundari Dasi v. Krishana Chundar Dur* (1884) 10 Cal. 424, it is now well settled that it has got such effect: 8 Cal. 597, *Abool Hussein v. Ragunath Sahu* (1886) 13 Cal. 70. *Shivaram v. Genu* (1882) 6 Bom. 575, *Ranputar v. Daulatran* (1886) 8 All. 540, *Krishnamm v. Surana* (1891) 16 Mad. 148 F.B. where it was held that the Court was not bound to apply s. 50 of the Registration Act to such a case.]



[7 Cal. 767]

The 14th July, 1881.

PRESENT:

MR. JUSTICE MITTER AND MR. JUSTICE MACLEAN.

Dhurrum Singh.....Defendant

versus

Kissen Singh and others.....Plaintiffs.\*

*Religious Endowment—Act XX of 1863, s. 14—Restraining Manager from allowing Property to be removed—Form of Order—Injunction—Civil Procedure Code (Act X of 1877), s. 30.*

In 1849, the Board of Revenue, acting under Reg. XIX of 1810, interfered in the management of the affairs of a temple. In a suit relating to the affairs of the temple instituted in 1878, it did not appear whether any transfer of property had been made under s. 4 of Act XX of 1863, but it did appear that, in 1865, the Judge of Patna had appointed a manager of the temple.

*Held*, that the right of the Government officers to control the affairs of the temple had been sufficiently proved.

Section 14 of Act XX of 1863 is generally applicable to all religious endowments, and while it in one sense restrains the ordinary Courts from dealing with cases against trustees of religious endowments, it gives special facilities for suits in the principal Civil Court of the district by any of the persons interested in these endowments.

*Quære*.—Whether, considering the provisions of s. 30 of the Civil Procedure Code, the retention of s. 14 of Act XX of 1863 is at all necessary?

An order under s. 14 of Act XX of 1863 should be mandatory, and not prohibitory.

Where a sacred book was kept at a temple, and was an object of veneration to the members of the sect entitled to worship there,—

*Held*, that a suit would lie under s. 14 of Act XX of 1863, by some of the persons interested in the temple, to restrain the superintendent from removing the book to another place, and that he should be directed to retain it as a portion of the furniture of the temple.

THE facts of this case sufficiently appear from the judgments.

[768] Baboo Unnoda Prosad Banerjee and Baboo Mohesh Chunder Chowdhry for the Appellant.

Baboo Gurudas Banerjee and Baboo Kallymohun Das for the Respondents.

The Judgments of the Court (MITTER and MACLEAN, JJ.) were as follows:—

**Maclean, J.**—This is a suit instituted under the provisions of Act XX, 1863, entitled “an Act to enable the Government to divest itself of the management of religious endowments.” Leave to institute the suit was given under s. 18 of the Act. The plaintiffs are members of the Nanuk Shai sect of Sikhs resident at Patna, and the defendant is the superintendent or mohunt of the temple of Guru Gobind Singh, called Harmandir, at the same place. The temple is said to be on the site of the Guru’s birthplace, and it contains his cradle ‘Pangura’ and several copies of the Granth, a sacred law of the Sikhs. One of these Granths purports to have been sent by Guru Gobind Singh to the temple more than a century ago, and to contain a gold leaf on which the Guru

\* Appeal from Original Decree, No. 66 of 1880, against the decree of H. Beveridge, Esq. Officiating Judge of Patna, dated the 15th January 1880.



himself inscribed some words. This cradle and book are, therefore, objects of great veneration to the Sikhs, and the temple is visited by the chiefs of the Sikh nation and others.

It appears that the Maharaja of Jhind, a leading Sikh Chief, is said to have expressed a wish that the Granth referred to above should be sent to his capital, that his Ranis might have an opportunity of paying their respects to it. He is said to be willing to make a considerable present to the temple for this privilege, and the present superintendent or mohunt is, or was, anxious, to comply with the Maharaja's wishes. The plaintiffs, professing to represent the general body of persons interested in the temple, object to the removal of the Granth, on the ground that its removal will "leave the temple empty," or "render it desolate." It is not clear, whether they apprehend that the sacred book will be permanently lost to the temple or not, but they urge that its removal will be an innovation contrary to practice, and will impede the Sikhs of Patna from the due performance of their religious duties. They, therefore, pray [769] that the superintendent may be restrained, by order or injunction, from carrying out the proposed removal of the book.

The defendant, the superintendent, urges that the temple is "not governed by Act XX of 1863," nor is he a trustee appointed under the Act. He states that the Granth is not 'established' or 'asthopou,' nor is it, like the cradle, worshipped. That it is not contrary to the religion of the Sikhs to remove the Granth, and that this particular Granth has on previous occasions been removed. He alleges that it will really be for the temporal advantage of the temple to send the book to Jhind, and that the prohibition asked for will involve loss.

It may be remarked that the defendant's (appellant's) pleader informed us, that his client had abandoned his intention of removing the book, though still questioning the applicability of the Act No. XX of 1863 to the temple.

The District Judge, disbelieving the evidence as to the removal of the Granth last year, *i. e.*, 1878, to the Sonapore fair, has directed the issue of an injunction prohibiting the defendant from removing the book. The defendant has appealed to this Court.

The first question is, whether Act XX of 1863 has any application to this temple at Patna. That Act was passed to divest the officers of Government of the control which they were empowered to exercise over religious endowments by Reg. XIX of 1810, and it directed that they should hand over to the trustees of a certain class of endowments all the land and property then (1863) in the possession or under the superintendence of the Board of Revenue or any local agent. The class of endowments referred to were religious endowments to which the Regulation specified was applicable, and the nomination of the trustee, manager, or superintendent whereof was vested in or might be exercised by Government. The evidence of the control of this temple having been exercised by Government is not very strong, but we find that, in 1849, the Board of Revenue forbade any unsolicited interference with the affairs of the temple. There is nothing to show that any transfer of property was made under s. 4 of the Act of 1863, although we find that the Judge of Patna, on the 11th March 1865, acting under [770] Act XX of 1863, appointed Genda Singh, the defendant's immediate predecessor, manager of the temple, which he could only do if the Act applied. On the whole, I am disposed to think that the right of the Government officers to control the affairs of the temple was asserted or admitted in 1849 and 1865 without question.

Even if it can be held that sections of Act XX of 1863 are of doubtful application, I am disposed to think, that s. 14 is generally applicable to all religious endowments, and while it in one sense restrains the ordinary Courts from dealing with cases against trustees of religious endowments, it gave special facilities for suits in the principal Civil Court of the District by any of the persons interested in these endowments. Under the Civil Code then in force, viz., Act VIII of 1859, no such suit could have been brought in the ordinary Courts on behalf of the community, but the present Code provides for such suits in s. 30. It may be doubted whether the retention of s. 14 is at all necessary under the present Code of Civil Procedure.

As to the merits, I think the decree a proper one, save that it should be mandatory rather than prohibitory, for s. 14 requires that the Court should direct the performance of some specific act. It is clear that the Granth to which it refers is one of the main attractions of the temple. Its value as an object of veneration is clearly demonstrated by the mere fact that the Maharaja of Jhind is stated to be anxious to present the ladies of his family to it at his own capital. The objections to its removal could hardly be better illustrated than by the fact proved in this case, that Runjit Singh, the most powerful Chief the Sikhs ever had, yielded to the auguries which are said to have been against its removal, and we find an informal piece of evidence on the record that the question of removing it was seriously debated in the Patiala durbar, and it was decided that it was contrary to the wishes of the States and Sikhs of the Khalsa community that the book should be removed. We cannot say that the evidence of removal of other Granths is conclusive in favour of the removal of this one, or that the Judge has improperly rejected the evidence of one instance of a temporary move of the book to Sonapore fair.

[771] I think, therefore, that the decree of the Judge of Patna should be so far modified as to make it direct that the defendant retain the Granth referred to as a portion of the furniture of the temple. With this alteration in the decree, the appeal should be dismissed with costs.

Mitter, J.—I am also of the opinion that the conclusion to which the lower Court has come is correct.

The provisions of Act XX of 1863 are applicable to this case. The Act in question is applicable to all cases of religious endowments and temples to which Reg. XIX of 1810 was applicable. It is said, that s. 4 of the Act is not applicable, because there was no transfer of property. But if Reg. XIX of 1810 governed this temple, then, by the operation of s. 4 of Act XX of 1863, there was a transfer of the superintendence, which was vested in the Board of Revenue under s. 2, Reg. XIX of 1810. That such superintendence was vested in the Board of Revenue under the Regulation in question is clear from their letter, an extract of which has been filed as an exhibit in this case. This is further corroborated by the fact that the predecessor of the appellant, viz., Genda, was confirmed in his appointment under the provisions of s. 5 of Act XX of 1863. It seems to me, therefore, that Act XX of 1863 is applicable to this temple.

The next question is, whether the present suit could be brought under the provisions of s. 14, Act XX of 1863. The plaintiffs charge the defendant with misfeasance, breach of trust, and neglect of duty in respect of the trusts confided to him. If the charge be established, then the Civil Court, under the section in question, would be competent to direct the specific performance of the following act, viz., to keep the Granth in question within the precincts of the temple, so that the pilgrims who may come to visit it may worship it.

On the merits, I think that the plaintiffs' claim is just. Quite apart from any other consideration, it is evident that it would be a breach of trust on the part of the defendant if by any act of his the pilgrims visiting the temple should be deprived of the opportunity of worshipping the sacred Granth. They, undoubtedly, have the right to worship it any time they may choose to visit the temple. The defendant, who is a trustee [772] on behalf of all these pilgrims, would be clearly guilty of breach of trust in allowing the sacred Granth to be removed from the temple.

The appeal will, therefore, be dismissed, subject to the alteration of the decree as proposed by my learned colleague. The appellant will pay the costs of this suit to the respondents in both the Courts.

*Appeal dismissed.*

# NOTES.

## [ RELIGIOUS ENDOWMENT ACT, S. 14—

Is applicable to all kinds of religious endowments (1896) 19 All. 104, even where the mutwali is not lawfully appointed. Trust for Hindu idol or Temple is regarded as trust for public charitable purpose (1887) 12 Bom., 247; where it was held that s. 539 of C. P. C. (1882) is also applicable. Endowment need not have been under the control of Board of Revenue in order that s. 14 of the Religious Endowment Act may be applied to such institution (1907) 34 Cal., 587. So it is applicable to endowments founded after the passing of the Act. (1890) 18 All., 227. Suit against trustees could be brought for the removal of marks on idols and alteration of *namams* (1906) 30 Mad., 158=17 M. L. J. 1.]

[7 Cal. 772]

*The 10th August, 1881.*

PRESENT:

MR. JUSTICE CUNNINGHAM, MR. JUSTICE PRINSEP,  
AND MR. JUSTICE WILSON.

Anund Moye Dabi..... Plaintiff

*versus*

Grish Chunder Myti and another.....Defendants.

*Limitation Act (XV of 1877), s. 10—Trust—Charge of debts by Testator.*

A charge of debts generally by a testator upon his property, or any part of it, will not affect limitation, because it does not at all vary the legal liabilities of the parties, or make any difference with respect to the effect and operation of the Statute itself. The executors take the estate subject to the claim of the creditors, and are in point of law trustees for the creditors and such a charge adds nothing to their legal liabilities. But the case is different when particular property is given upon trust to pay a particular debt or debts. In such a case the trustee has a new duty, not the ordinary duty of an executor to pay debts generally

\* Appeal from Original Decree, No. 143 of 1880, against the decree of Baboo Jadu Nath Roy, Subordinate Judge of Midnapore, dated the 5th March 1880.

out of property generally, but a duty to apply a particular property to secure a particular debt; and there is a trust within the meaning of s. 10\* of the Limitation Act.

*Scott v. Jones* (4 C. and F., 382), *Williamson v. Naylor* (8 Y. and C., Ex., 208), and *Philips v. Philips* (3 Hare, 281) followed.

THIS was a suit to recover the sum of Rs. 24,300 from the infant defendant Grish Chunder Myti and from certain properties which were bequeathed to him by his maternal uncle, one Shib Pershad Giri, under the following circumstances: Shib Pershad Giri borrowed a sum of Rs. 15,000 from the defendant Goluck Chunder Myti, the father of the infant defendant Grish [773] Chunder Myti. On the 26th Bysack 1275 (May 1869), Shib Pershad Giri executed a will in favour of the infant defendant, to whom it was addressed, directing him to pay of that debt out off the properties for which he had obtained a decree against one Joy Narain Giri. The material parts of the will were as follow:—

“Therefore, you being my nephew (sister's son), and competent to give the pinda (funeral cake) to my *peetreelok* (ancestor), I give you under this will the whole of my moveable and immoveable properties specified in the decree of the original suit No. 17 of the District Court and of the Appeals Nos. 167 and 168 of the High Court, under these conditions,—*viz.*, that you will perform my *onteyshtee kreea* (funeral cremation) and rites and ceremonies in the proper manner at the prescribed expenses, and that you will cause the said *kreea* to be performed. The sum of Rs. 15,000, which I took in oan from your father and carried on the cases aforesaid from the Zilla Court up to the Sadr Court, and in which I have been successful, you will repay that oan with interest from the properties specified in the decrees, and you will set me free from the liability of that debt. Your maternal grandmother, who is my mother, and I, who am your maternal uncle, his wife, (must be my wife,) to these two persons you will give food and raiment, and pay expenses to meet religious rites as will be required, and you will maintain them both accordingly. I have a daughter, who is unmarried. You will find out a worthy lad and give her in marriage. The expenses which will be incurred for that, you will pay. If a son be born of the womb of that daughter of mine,—that is to say, if I have a daughter's son, in that case you will yearly pay him Rs. 200. My opposite party has preferred appeal to the Privy Council against the appeal case abovementioned. You will pay the expense of defending that out of your money, and you will recover the properties specified in the decree and the costs incurred in the lower Court up to the Sadr Court with interest thereof. If it be necessary to furnish security for execution of the decree, when the case is pending in appeal to the Privy Council, in that appeal you will furnish the security and will recover the whole properties with costs as specified in the [774] decree. You being a minor, I have appointed your father, Baboo Goluck Chunder Myti, the trustee. He will carry out the whole work specified in this will. I have given to you the whole of the abovementioned property under the condition stated in this will. From to-day I have relinquished my right to the properties. You from this day will become rightfully entitled to my right of the whole of the properties,—that is to say, to the decree numbered aforesaid, and you will obtain from the Court a certificate under this will, and

\*[Sec. 10:—Notwithstanding anything hereinbefore contained no suit against a *person* in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration) for the purpose of following in his or their hands such property, shall be barred by any length of time.]

you will cause record of your name in the decree aforesaid, and you will be in possession, and you will maintain my patrimonial rites and ceremonies and the (sheba) worship of the debta (idol), and you will be in enjoyment of the properties as aforesaid."

After the successful termination of the suit in the Privy Council, Goluck Chunder Myti, as guardian of the infant defendant, executed the decree against Joy Narain Giri, and obtained possession of all the properties included in it on the 23rd November 1874, and realized the sum of Rs. 10,200 from Joy Narain Giri.

Subsequently, the plaintiff's husband obtained a decree against Goluck Chunder Myti, and caused Goluck Chunder Myti's right to receive his debts due to him out of the estate bequeathed by Shib Pershad Giri to be sold in execution of his decree, and purchased it himself on the 16th September 1875. The present suit was not instituted until more than three years after that date. The defendants pleaded limitation, and in the Court below the suit was dismissed on that ground.

The plaintiff appealed to the High Court.

Mr. *H. Bell*, Baboo *Mohesh Chunder Chowdhry*, Baboo *Taruak Nath Sen*, and Baboo *Jogesh Chunder Dey* for the Appellant.

Baboo *Prannath Pundit* for the Respondents.

The following **Judgments** were delivered :—

**Wilson, J.** (CUNNINGHAM, J., *concurring*).—This is a suit by a purchaser at an execution-sale of the right, title, and interest of one Goluck Chunder Myti under the will of one Shib Pershad Giri.

[775] The only question before us is one of limitation. If the suit is properly a mere suit for a debt, and if, as was argued before us, the will amounted at most to an acknowledgment of the debt so as to give a new period of three years within which to sue, then, it is conceded, the suit is barred.

If, on the other hand, the will validly charged the debt on immoveable property, or created a valid trust for its payment, then, it is conceded, the suit is in time. (His Lordship then read the will as above set out and continued).

It has been decided in England that a charge of debts generally in a will upon the testator's personal estate, or any portion of it, creates no trust so as to exclude the Statute of Limitations : *Scott v. Jones* (4 C. and F., 382).

The reason is, "because it does not at all vary the legal liabilities of the parties, or make any difference with respect to the effect and operation of the Statute itself. The executors take the estate subject to the claim of the creditors ; they are in point of law the trustees for the creditors, the trust is a legal trust, and there is nothing whatever added to their legal liabilities from the mere circumstance of the testator himself declaring in express terms that the estate shall be subject to the payment of his debts."

In this country there is no distinction between one kind of property and another in respect of its liability for debts. Probably, therefore, upon the principle just referred to (which is not based upon any peculiarity in the English law of trusts), a charge of debts generally by a testator on his property or any part of it would not affect limitation.

But the case is, I think, materially different when particular property is given upon trust to pay a particular debt or particular debts. In such a case the trustee has a new duty, not the ordinary duty of an executor to pay debts generally out of property generally, but a duty to apply particular property to secure a particular debt, and such trusts of personality have been upheld in English Courts.\*

In *Willia v. Naylor* (3 Y. and C., Ex., 208), a testator gave one-fifth of his residuary personal estate upon trust to pay certain specified [776] debts, all of which were barred by limitation at the date of the testator's death. The case came first before Lord LYNTHURST, C.B., and afterwards before ALDERSON, B., and it was held, that the effect of the will was to revive the barred debts (the effect of the English Statute having been to bar the remedy, not to extinguish the rights); that the trust was a valid trust; and that the creditors claiming under it were entitled as creditors, not as legatees.

This case, it is true, was decided before *Scott v. Jones* (4 C. and F., 382); but the decision was approved and followed in an exactly similar case by SHADWELL, V. C., five years after *Scott v. Jones* (4 C. and F., 382) had been decided—*Philips v. Philips* (3 Hare, 281).

I think the same rule is applicable in this country, and that a gift of property by will upon trust to pay a particular debt or particular debts creates a good trust.

In the present case the testator gives the property in question to the defendant, and expressly directs him to discharge certain duties, one of which is to pay the debt of Goluck Chunder out of the property. It is true that he confides the active administration in the first instance (probably during the defendant's minority, to the defendant's father; but that does not relieve the defendant from discharging the duties imposed, so far as they are undischarged; and then he says expressly, "I have given to you the whole of the above-mentioned properties under the condition stated in this will."

This seems to me clearly a gift only on condition of discharging the trust, and I, therefore, think there is a trust within the meaning of s. 10 of the Limitation Act, and that the suit is not barred.

**Prinsep, J.**—On reconsideration of this case, and after hearing further argument, I agree in this judgment. The contrary view I formerly entertained was in consequence of understanding the case of *Scott v. Jones* (4 C. and F., 382) differently from the explanation now given. The case will be remanded to the lower Court for trial. Costs to follow the result.

*Case remanded.*

#### NOTES.

[Affirmed in appeal—*Grish Chunder v. Anand Moye Debts* (1887) 15 Cal., 66—by Privy Council, where their Lordships based the decision upon a different ground, *v.e.*, the suit was not barred under art. 132 of the Limitation Act as there was a charge. Referred to in *Hemangiri Das v. Nobin Chand Ghose* (1882) 8 Cal., 788 for the position that s. 10 of the Limitation Act is not applicable to resulting or implied trust ]

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<i>Held</i> , that, it appearing that he had remained for sixteen years in the same house under the same guardians, and there being no allegation of illtreatment, no sufficient grounds were shown for the Court's interference, or the appointment of another guardian of his person. Before any action can be taken under the Act in this respect, there ought to be a strong case made out that the change of custody would be for the lunatic's benefit. <i>Held</i> also, that as his daughter could not inherit his ancestral property, and as it was doubtful if the collaterally inherited property was the		



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*Semble.*—Act XXXV of 1858 applies to the members of a Mitakshara family.

*Quere.*—Assuming the application to be made with a view to a partition of the property, and that the lunatic was declared a lunatic under the Act, whether a partition could be had?

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*Held*, also, that the mortgage decree declaring the lien over all the mortgaged properties covered the surplus sale-proceeds then in the hands of the Collector, because these moneys must, as between the mortgagee and attaching creditors of the mortgagor, be taken to represent the mortgaged properties.

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**Administration Suit—**

*Supplemental Suit—Debts due by Appointed Managing Members under the Will of the Testator—Limitation.* A and B, two of the sons of one N, had been declared, in a suit brought to administer N's estate, to be indebted to the estate; it was also declared in such suit that a certain sum of money should be set apart for the performance of certain religious ceremonies, and paid into Court.

**Administration-Suit—(concluded.)**

*A and B died without having satisfied their debt.*

In a suit supplemental to the former suit, the descendants of the sons of *N*, amongst whom were the descendants of *A* and *B*, claimed to be entitled to their share in the interest on the funds in the hands of the Court, and sought for a division of such accumulation of interest.

*Held*, that, notwithstanding that the debt due from *A* and *B* to the estate was barred, the descendants of *A* and *B* could not be allowed to share in the accumulations of interest in the hands of the Court without first satisfying the debt due by their ancestors to the estate.

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**Adoption—**

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*Fraud—Adoptive son claiming Share in Estates already vested in another before the date of the adoption.*] Shortly before his death in 1862, *A*, by his will, gave his widow power to adopt a son. In consequence of fraud on the part of *B*, the son of a brother of *A*, in suppressing this will and setting up another, the will was not proved until 1874, when the widow exercised the power. *C*, the widow of another brother, had died in 1867, and *B* had succeeded to her estate. The adopted son now sued by his mother to recover a half share in *C*'s estate, alleging that his adoptive mother, in consequence of the fraudulent act of *B* in suppressing the will under which the power of adoption was given, and by setting up a false one, was unable to exercise the power of adoption before the death of *C*, and that thus he had been deprived of the opportunity of succeeding to *C*'s estate.

*Held*, that although *B* had committed fraud in suppressing the will and setting up a false one, and had so placed obstacles in the way of the adoptive mother of the plaintiff taking a son in adoption earlier, yet that, as the plaintiff was not in existence at the time the fraud was committed, such fraud was too remote so far as it affected him, and that the Court, as a Court of Equity, could not disturb the estate which had already vested in *B*.

**Adoption—(concluded.)**

The right to succession is a right which vests immediately on the death of the owner of the property, and cannot, under any circumstances, remain in abeyance in expectation of the birth of a preferable heir not conceived at the time of the owner's death.

NILCOMUL LAHURI v. JOTENDRO MOHUN LAHURI ..	VII ...	178
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**Alienation—**

*Impartible Raj—Chota Nagpore—Limitation Acts (IX of 1871), sched. ii. cl. 127; and (XV of 1877), s. 2, and sched. ii. cl. 127.]* The fact that the Raj of Chota Nagpore is an impartible one, does not prevent the Maharaja for the time being from alienating a portion of it in perpetuity.

Under Act IX of 1871, sched. ii, cl. 127, the limitation for a suit by a person excluded from joint family property, to enforce a right to share therein, was twelve years from the time when the plaintiff claimed and was refused his share. Under Act XV of 1877, sched. ii, cl. 127, the limitation for such a suit is twelve years from the time the exclusion becomes known to the plaintiff.

*Held*, that the period of limitation prescribed by the latter Act is shorter than the period prescribed by the former Act, within the meaning of s. 2, Act XV of 1877.

NARAIN KHOOTIA v. LOKENATH KHOOTIA ... ..	VII ...	461
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**Alternative Sentence—**

OF IMPRISONMENT. See BENG. EXCISE ACT, ss. 9, 58, 74 ...	VI ...	575
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## Amendment—

### OF RECORD ON APPEAL.—

A second plaintiff was added in the Court below, but no amendment was made in the record, and the suit was dismissed with costs. An appeal being brought, the original plaintiff failed to pay the costs, was made insolvent, and the Official Assignee declined to proceed with the appeal. It was objected that the appeal ought to be dismissed, there being no appellant on the record; but the Court allowed the appeal to proceed, and the amendment ordered by the Court below to be effected.

KEDARNAUTH DOSS v. PROTAB CHUNDER DOSS ... VI .. 626

## Ancestral Estate—

MORTGAGE OF, BY FATHER. See HINDU LAW,  
MITAKSHARA" ... .. VII ... 52

## Ancient Lights—

*Enlargement of Window—Obstruction—Notice—Delay—Mandatory Injunction.* Where a person, who has a right to light from a certain window, opens a new window, or enlarges the old one, the owner of an adjoining house has a right to obstruct the new or enlarged opening, if he can do so without obstructing the old, but if he cannot obstruct the new without obstructing the old, he must submit to the burden.

A plaintiff entitled as of right to light and air through a certain window, subsequently enlarged it, and on the light thereto being interfered with by the defendant, gave him notice to remove the obstruction two days after it had been completed.

*Held*, that he had been guilty of no delay in taking steps to prevent the obstruction, and that he was entitled to a mandatory injunction requiring the defendant to remove it.

PROVABUTTY DABEE v. MOHENDRO LALL BOSE ... VII ... 453

## Appeal—

*Insolvency—Refusal to grant Application to be declared Insolvent—Code of Civil Procedure (Act X of 1877), ss. 351, 588, cl. 17.* An order refusing to grant an application to be made an insolvent, is appealable under cl. 17, s. 588 of the Code of Civil Procedure.

Such an order must be considered to be one made under s. 351.

NUBBI BUKSH v. CHASNI ... .. VI ... 168

*Jurisdiction—Time from which an Order of Appointment dates.]*

An Assistant Magistrate convicted an accused on the 12th August, and by an order of even date, such Magistrate was invested with power to act as a Magistrate of the first class, although the fact, that he had been so invested with full powers, was not communicated to him until the 23rd idem. The accused appealed to the District Magistrate, and was acquitted. On motion made to the High Court to set aside the acquittal, on the ground that, after the date of the order of the Lieutenant-Governor investing the Assistant Magistrate with further powers, no appeal lay to the District Magistrate, —*held*, that even supposing the Lieutenant-Governor's order conferred first class powers upon the Assistant Magistrate from the moment it was made, it must be shown before the District Magistrate's decision could be set aside, that the order of the Lieutenant-Governor was signed before the conviction.

*Quære.*—Whether an order investing a Magistrate with first class powers, is of any force, or amounts to an authority to exercise such powers, until the order has been officially communicated to the Magistrate?

IN THE MATTER OF THE PETITION OF MOHAMED ESHAK.  
CHUNDRO MARWARI v. MOHAMED ESHAK ... .. VI .. 476

**Appeal—(continued.)**

*Order by Judge of the High Court presiding over the Privy Council Department—Letters Patent, s. 15—Judgment—Certified copy of Order of the Privy Council—Civil Procedure Code (Act X of 1877), s. 610.* A decree obtained on appeal by certain defendants in the High Court, was appealed to the Privy Council by one only of the two plaintiffs to the suit, and the decision of the High Court was reversed; the plaintiff who had appealed assigned her share in the order of the Privy Council to one of the defendants, and delivered him the certified copy of the decree made in the Privy Council. The plaintiff who had not appealed to the Privy Council applied to the High Court for leave to transmit the order to the Court of first instance for execution of the share decreed to him, but on account of the assignment abovementioned, was unable to produce the certified copy of the decree of the Privy Council. The Judge presiding over the Privy Council Department in the High Court held, that the production of a certified copy of the order of the Privy Council was excusable under the circumstances, but refused the application, on the ground that the decree of the Court of first instance, which was affirmed by the Privy Council, could only be executed as a whole and not partly by one of the plaintiffs.

*Held on appeal per GARTH, C.J.—*That the duties of a Judge in dealing with the meaning of decrees of the Privy Council are purely ministerial, and that any order made in such ministerial capacity could not be considered a judgment, and could not, therefore, be made the subject of an appeal to a Bench of the High Court under s. 15 of the Charter.

*Per WHITE and MITTER, JJ.—*An order of a Judge presiding over the Privy Council Department in the High Court, rejecting an application for execution, is a final order, and is a judgment within the meaning of s. 15 of the Charter, and is therefore appealable.

IN THE MATTER OF THE PETITION OF KALLY SOONDERY DABIA. KALLY SOONDERY DABIA v. HURRISH CHUNDER CHOWDHRY ... .. VI ... 594

*Refusal of District Judge to recall a Certificate under Act XXVII of 1860.]* No appeal lies from an order of a District Judge, refusing an application to recall a certificate granted by him under Act XXVII of 1860.

IN THE MATTER OF THE PETITION OF NANUK PERSHAD. NANUK PERSHAD v. LALLA NITYA LALL ... .. VI ... 40

**AGAINST ORDER REJECTING PLAINT—**

*Plaint insufficiently Stamped—Court Fees Act (VII of 1870), s. 12, para. 1, sched. ii, div. v, art. 17, part in—Civil Procedure Code (Act X of 1877), s. 1, tit. "Decree."]* An appeal lies against an order rejecting a plaint on the ground of its being insufficiently stamped.

AJOODHYA PERSHAD v. GUNGA PERSHAD ... .. VI ... 249

**AMENDMENT OF RECORD ON.** See **AMENDMENT OF RECORD ON APPEAL** ... .. VI ... 626

**CHANGE OF DEFENCE ON.** See **ESTOPPEL BY PLEADING.** VI ... 55

**FROM APPELLATE DECREE—**

*Appellant dissatisfied with Findings in Judgment—Civil Procedure Code (Act X of 1877), ss. 540 and 584.* An appellant, who has obtained a decree setting aside the decision of the Court of first instance, is not entitled to a further appeal to the High Court, on the ground that he is dissatisfied with some of the findings recorded in the judgment of the lower Appellate Court, an appeal from an appellate decree under s. 594 being strictly restricted to matters contained in the decree alone.

KOYLASH CHUNDER KOOSARI v. RAM LALL NAG ... .. VI ... 206

**Appeal—(continued.)**

**ORDER ON APPLICATION FOR REVIEW.** See **LIMITATION** ...

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**IN CASES COGNIZABLE BY SMALL CAUSE COURT.** See **CIVIL PROCEDURE CODE**, s. 586 ...

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*Rent-Suit under Rs. 100—Title—Beng. Act VIII of 1869, s. 102—Civil Procedure Code (Act X of 1877), s. 622.* A and B, both of whom set up a claim to certain land, brought separate rent-suits against the tenants. In none of these suits did the amount claimed exceed Rs. 100. Subsequently to the institution of the rent-suits, A sued B to establish his title to the land in dispute. The District Judge, before whom the rent-suits came on appeal, allowed them to stand over until the decision in the suit between A and B. That suit was decided in favour of B, and the Judge then decided the rent-suits instituted by B in his favour, and dismissed the suits instituted by A.

*Held*, that no second appeal would lie in the rent-suits, as no question of title between parties having conflicting claims was decided in them.

*Held* also, that there was no such irregularity on the part of the District Judge in the course which he pursued, of making his decision in the rent-suit depend upon the decision in the suit to establish title, as would justify the Court in interfering under s. 622 of the Civil Procedure Code.

- Section 102 of Beng. Act VIII of 1869 was enacted in order to protect parties in the position of ryot-defendants, and to prevent their being dragged up to the High Court in cases where the decree or demand is under Rs. 100. In such cases the decree is intended to have the same effect as that of a Small Cause Court.

**DOORGA NARAIN SEN v. RAM LALL CHHUTAR** ...

VII ... 330

*Representative—Civil Procedure Code (Act X of 1877), s. 244, cl. (c), and ss. 278, 283.* The holders of a taluq hypothecated certain other property belonging to them as security for the rent. A decree for rent was obtained against them. Prior to attachment, the taluqdars assigned their interest in eight annas of the hypothecated property to A, and made a mourasi lease of the remaining eight annas to him. The decree-holder then obtained an order for summary sale for the rent due for 1876-77. She then attempted to sell the property hypothecated to her. An objection by A was allowed. A regular suit was then instituted by the decree-holder against A, and it was declared that she was, after selling the taluq, entitled to sell the hypothecated property. The decree-holder again attempted to execute her rent-decree by attaching and selling the hypothecated property, and an objection by A was disallowed.

*Held*, that no appeal lay from the order disallowing the objection, as A could not be considered to be a 'representative' of the taluqdars within the meaning of s. 244, cl. (c) of the Civil Procedure Code; and was therefore, debarred from appealing under ss. 278 and 283.

**RASHBEHARY MOOKHOPADHYA v. MAHARANI. SUR-NOMOYEE** ...

VII ... 403

*Award—Order refusing to file Award—Civil Procedure Code (Act X of 1877), ss. 525, 588.* Matters in dispute were referred to arbitration without the intervention of the Court. An award was made, and upon an application under s. 525 of the Civil Procedure Code to file the award, one of the parties showed cause why the award should not be filed, and the Subordinate Judge held the objection to be good.

*Held*, that no appeal lay.

**SREE RAM CHOWDHRY v. DENOBUDDHO CHOWDHRY** ...

VII ... 490

**Appeal—(concluded.)**

*Decree—Civil Procedure Code (Act X of 1877), s. 540—survey—Measurement—Beng. Act VIII of 1869, ss. 25, 37, 38.* An order made under s. 37, Bengal Rent Act (Beng. Act VIII of 1869), is a decree within the meaning of the definition contained in the Civil Procedure Code (Act X of 1877), and an appeal lies therefrom under the provisions of s. 540.

BROJENDRO COOMAR ROY v. KRISHNA COOMAR GHOSE ...	VII ...	684
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*TO PRIVY COUNCIL—Application for Leave to Appeal—Judgment of one Judge—Ministerial and Judicial Acts—Letters Patent, cl. 15.* The plaintiff obtained a decree in the Court of first instance. On appeal to the High Court, the decision of the lower Court was upheld, but the decree was varied in respect of some matters relating to the mode in which the relief to which the plaintiff was declared entitled should be granted. The defendant applied for leave to appeal to the Privy Council, but the application was refused, on the ground that the judgments in the High Court and the Court of first instance were in effect concurrent judgments, and that no substantial point of law was involved in the case. The defendant appealed under cl. 15 of the Letters Patent.

*Held*, that no appeal would lie.

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**Appealable Order—**

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**Appellate Decree—**

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**Application—**

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EXECUTION OF DECREE— <i>Res Judicata</i> . An order refusing an application to execute a decree is not an adjudication within the rule of <i>res judicata</i> .		

HURROSOONDARY DASSEE v. JUGOBUNDHOO DUTT ...	VI ...	208
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ORDER REVOKING PROBATE. See PROBATE ...	VI ...	429
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*PROBATE—Limitation Act (XV of 1877), sched. ii, Art. 178.* The Limitation Act is not applicable to an application for probate; such an application, therefore, is not barred by art. 178 of sched. ii of that Act.

IN THE MATTER OF THE PETITION OF ISHAN CHUNDER ROY ...	VI ...	707
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*REHEARING—Appeal, Ex parte—Civil Procedure Code (Act X of 1877), s. 560.* An applicant, presenting a petition for the rehearing of an appeal decided *ex parte*, must, at the time of making such application, be prepared to satisfy the Court, that the notice of appeal was not duly served upon him, or that he was prevented by sufficient cause from attending when the appeal was called on for hearing.

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A person alleged to be a lunatic, though not found so under Act XXV of 1858, may appear either by vakeel or in person.

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**Arbitration—**

- *Civil Procedure Code (Act X of 1877), chap. xxxvii—Kabuliat, Suit for—Suit under Act X of 1859.* Notwithstanding that chap. xxxvii of Act X of 1877 (in reference to arbitration) does not refer specially to suits brought under Act X of 1859, yet, if both parties to a suit for a kabuliat brought under the latter Act agree to refer the matters in dispute between them to certain arbitrators named by them, and file a joint petition in the Court of the Deputy Collector, stating that they had so agreed, and praying that the case may be referred to such arbitrators, neither of them will be afterwards at liberty to object to a decree made, embodying the award of the arbitrators, on the ground that the reference to arbitration was irregular, and not warranted by any of the provisions of Act X of 1877.

When a case has been so referred, the arbitrators are at liberty to determine what appears to them to be a fair and equitable rate of rent, and notwithstanding the amount so found is less than that demanded by the plaintiff in his plaint, the Court out of which the reference issued is not at liberty on that ground to dismiss the suit, but is bound to order the defendant (with the alternative of eviction) to execute a kabuliat in favour of the plaintiff, engaging himself to pay rent to the plaintiff at the rate determined by the arbitrators to be fair and equitable.

KHEMNA GOWALA v. BUDOLOO KHAN ... VI ... 251

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*Award—Finality of Decree—Civil Procedure Code Act VIII of 1859, ss. 318, 323, 324, and 325.* A case was referred by consent to arbitration, and after having been recalled into Court was again referred. An award was made by the arbitrator and filed in Court. The defendants then objected, on the ground that they had no notice, after the second reference, and that they were not heard, and that the arbitrator had otherwise misconducted himself. These objections were disallowed by the Subordinate Judge, who gave a decree in the terms of the award. This decree was upheld by the Judge on appeal, who, however, found that the arbitrator had been guilty of misconduct.

*Held,* that if the decree of the first Court was not final under s. 325, Act VIII of 1859, all that the lower Appellate Court could do, was to remand the case to be dealt with on its merits; but inasmuch as there had been an award and a decree

**Arbitration—(concluded.)**

thereon, which was final within the terms of that section, the lower Appellate Court had no jurisdiction to hear the appeal or to express any opinion on what had passed in the first Court.

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*Filing of Award—Time within which Award should be filed—Civil Procedure Code (Act X of 1877). s. 516—Limitation Act (XV of 1877), sched. ii, art. 176.* The act of an arbitrator, in handing in an award to the proper officer of the Court, for the purpose of the award being filed, cannot be considered as an 'application' within the meaning of the Limitation Act.

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**Arrears—**

OF RENT, SUIT FOR. See LIMITATION ... VI ... 325

*OF RENT—Rate of Rent payable—Duty of Court—Beng. Act VIII of 1869.* The plaintiff sued for arrears of rent for the year 1282 at the rate of Rs. 2-8 per bigha. The defendant alleged that the rent was only fifteen annas per bigha. The Judge found that the plaintiff had not proved that the rate of rent was Rs. 2-8 per bigha, and, without finding that the proper rate was fifteen annas, gave the plaintiff a decree for that amount. The plaintiff brought a subsequent suit for arrears of rent for the year 1283, when it was held by the Court of first instance and by the lower Appellate Court that he could only recover arrears of rent at the rate of fifteen annas, that being the rate of "rent payable for the previous year" within the meaning of s. 14, Beng. Act VIII of 1869.

*Held*, that the decisions were wrong, and must be reversed.

In a suit for arrears of rent, where the plaintiff fails to prove the rate of rent claimed in the plaint, it is the duty of the Court to find the proper rate of rent payable by the tenant to his landlord, and not to give a decree merely for the rent admitted by the tenant.

PUNNOO SINGH v. NIRGHIN SINGH ... VII ... 29

*Voluntary Payment—Mistake—Payment under a mistake.* The plaintiffs, believing that they held a four anna share, and the defendants the remaining twelve anna share, in a patni, the revenue of which was in arrears, paid to the zemindar, on the 8th of March 1876, a portion of the arrears corresponding to the share in the patni to which they considered themselves entitled. It was afterwards decided, in a suit between the parties, that the plaintiffs were not entitled to any share in the patni, and that the defendants were entitled to the whole sixteen annas thereof. Subsequently to this decision, the defendants, in paying up the arrears of revenue due on the patni, took the benefit of the payment made by the plaintiffs on the 8th of March 1876 and paid in only so much as, together with previous payment, made up the whole arrear. The plaintiffs then brought the present suit to recover from the defendants the amount of the payment made to the zemindar on the 8th of March 1876.

*Held*, that the payment was not a voluntary payment, and that the plaintiffs were entitled to recover.

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*Enhancement—Notice of Enhancement—Beng—Act VIII of 1869. s. 14.* Per GARTH, C. J., PONTIFEX and MITTER, JJ. (MOORE and McDONELL, JJ., dissenting).—A suit for arrears of rent at an enhanced rate brought by all the

**Arrears—(continued.)**

shareholders will lie, notice under s. 14 of Beng. Act VIII of 1869 having been issued at the instance of some of the persons entitled to the rent.

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**Attaching-Creditor—**

*Right to Redeem Mortgage—Civil Procedure Code (Act X of 1877), ss. 276, 282, 295.* An attaching creditor has not, as such, any right to redeem a mortgage subsisting prior to his attachment.

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**Attachment—**

**BEFORE JUDGMENT—**

*Civil Procedure Code (Act VIII of 1859), s. 240—Objection as to non-compliance with requirements of s. 239—Burden of Proof—Civil Procedure Code (Act X of 1877), ss. 274, 276.* A suit on a mortgage foreclosed under Reg. XVII of 1806, s. 8, comprising property attached before the date of the mortgage under s. 81 and the following sections of Act VIII of 1859, was brought against the purchaser of the attached property, which had been sold under the decree obtained by the attaching creditor. The defence was, that the mortgage falling within the provisions of s. 240 of the Act was void as against the attaching creditor and those claiming under him. For the mortgagee it was contended, that the attachment could not prevail, it not having been proved affirmatively that the requirements of s. 239 relating to the intimation of the attachment had been complied with.

*Held*, that this objection to the validity of the attachment could not be raised for the first time on this appeal, even if it was not rather for the mortgagee, seeking to deprive the attaching creditor of his possession, to prove the non-observance of the formalities in question.

*Semle.*—A re-attachment of property after decree does not imply an abandonment of an attachment obtained before decree.

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## Attestation—

*Succession Act (X of 1865), s. 50—Hindu Wills Act (XXI of 1870), s. 2.* Section 50 of the Succession Act (X of 1865) clearly intends that the two attesting witnesses to a will shall sign their names after the testator or testatrix shall have executed the will.

If a testatrix admits a signature on a will to be hers before a Registrar of Assurances, and is identified before him by one of the witnesses to the signature, and both the Registrar and the identifier sign their names as witnesses to the admission made—

*Held*, that such an attestation would be sufficient to satisfy s. 50 of Act X of 1865.

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## Attorney and Client—

*Attorney's Lien—Discharge by Dissolution of Partnership—Contract Act (IX of 1872), ss. 1, 171.* Where a firm of attorneys dissolved partnership after the death of a client, there being at that time papers and documents belonging to the client in their hands, and a debt due in respect of costs from the client to them—

*Held*, that the dissolution of partnership operated as a discharge by the firm, and that the attorneys were not entitled to retain the papers and documents until their costs were paid, but were bound to hand them over to the administrator of the client.

Section 171 of the Contract Act does not give an attorney an absolute lien. Section 1 provides that nothing in the Act contained shall affect any usage or custom of trade, and, as no part of the English law is inconsistent with s. 171, cases arising in this country must be governed by the English authorities. According to those authorities, while the relation of attorney and client exists, the client may either continue to employ the attorney or change him. When he claims to do the latter, the attorney being willing to act, he cannot ask the attorney to give up papers in his possession without first satisfying the lien. The attorney has his option—he may, if he chooses, either go on acting for his client, or cease to act; if he adopt the latter course he must give up the papers. On the death of the client his representatives stands in exactly the same position with respect to the attorney as the client did.

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*Defaulting Purchaser, Liability of—Civil Procedure Code (Act X of 1877), ss. 298, 297, 306, 308, and 309.* The provisions of s. 298, Act X of 1877 (Civil Procedure Code) for making a defaulting purchaser at a sale liable for any deficiency on a resale, extend to all sales, whether of moveable or immovable property, and also to resales held under ss. 297, 306, and 308.

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<b>Bailment—</b>		
<i>Passenger's Luggage—Ticket—Conditions endorsed—Negligence—Registration of luggage—Common Carriers—Foreign Steam Ship Company—Contract Act (IX of 1872), s. 151. In a suit for damages for loss of passenger's luggage by the wreck of a ship belonging to a foreign company, it appeared that the plaintiff had received a ticket in the French language, which on its face stated that it ought to be signed by the passenger, and that it was issued subject to certain conditions on the back. These conditions, among other things, stated that the company would not be responsible for loss or damage arising from accidents or risks of the sea; that the ticket was delivered subject to the conditions that certain articles of a specified nature should be made the subject of a special declaration in default of which the company would not be liable; that the company would not be answerable for unregistered luggage; and that luggage might be insured at any of the company's offices. It was not stated where registration of luggage might be effected. The ticket was not signed by the plaintiff. The plaintiff alleged that he did not understand the French language, and that the conditions had not been explained to him by any person.</i>		
<i>* Held that the company being a foreign company were not common carriers;</i>		
<i>that the plaintiff was bound by the clauses and conditions on the back of the passage-ticket;</i>		
<i>that none of the conditions had the effect of relieving the company from the consequences of their own negligence;</i>		
<i>that, in order to establish a defence upon the ground that the plaintiff's luggage was not registered, it was necessary for the defendants to prove, not only that the plaintiff was bound by the conditions, but also that they were ready and willing to register the plaintiff's luggage, and that the plaintiff did not in fact register it;</i>		
<i>that as the contract was made in Calcutta, the defendants were bound by the provisions of s. 151 of the Indian Contract Act.</i>		
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of Beng. Act VIII of 1869, cannot be said to have made a "due enquiry," and therefore should not make an order under that section that the tenures have lapsed, until he has made use of all the powers given him by s. 40 in order to procure the attendance of witnesses.

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s. 58—

*Limitation—Execution of Decree—Delay and Laches—Costs.*

In a suit for arrears of rent under Beng. Act VIII of 1869, a decree was obtained, on the 30th June 1876, for a sum which with costs amounted to less than Rs. 500. Application for execution was made, in December 1877, against property other than that for which the rent was due; but was, in the first Court, opposed successfully by the judgment-debtor, on the ground that the undertenure should first be proceeded against, though such undertenure had already been sold away in execution of another decree, and the execution-proceeding was struck off on the 15th March 1878, and the property released from attachment. The judgment-creditor appealed, and was successful both in the lower Appellate Court and the High Court, the latter decision being dated 26th February 1879. The costs awarded him in these proceedings, if added to the amount of the decree, would amount to a sum of more than Rs. 500. The next application for execution was made on 19th August 1879.

*Held*, that the costs of the appeals in the execution-proceedings should not be added to the decree; and, therefore the decree being for less than Rs. 500, the provisions of s. 58, Beng. Act VIII of 1869, applied to it.

*Held* also, that the attachment having been removed in March 1878, the execution of the decree was barred under that section.

The question of due diligence on the part of a judgment-creditor can be gone into on a second appeal.

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**VII OF 1878—**

See BENG. EXCISE ACT, ss. 9, 58, 74. EXCISE ... VI ... 575, 621, 832

EXCISE ACT (Beng. Act VII of 1878), ss. 9, 58, 74—*Introduction into Calcutta of Spirituous Liquor manufactured elsewhere—Limits fixed by Collector—Additional Punishment—Alternative Sentence of Imprisonment.* The provisions of s. 74

**Bengal Acts—(continued.)****VIII OF 1878—(continued.)**

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of the Beng. Excise Act as to additional punishment, where there has been a "previous conviction for a like offence," contemplate merely the case of the offender having been already convicted of an offence punishable with a fine of Rs 200 or upwards, and being again convicted of another offence punishable with the same punishment; it is not necessary that he should have been previously convicted of the same offence.

The accused were sentenced by the Presidency Magistrate, under ss. 58 and 74 of the Beng. Excise Act, to a fine of Rs. 200 each, in default to three months' imprisonment, and in addition to six months' imprisonment, which was the maximum term that could be awarded under s. 74. *Held*, that the sentence of imprisonment was not in excess of the powers given to the Magistrate by s. 12 of the Presidency Magistrates' Act, the imposition of the additional sentence of imprisonment not affecting the Magistrate's powers as regarded the original sentence under s. 58.

No limits with regard to any distilleries in Calcutta having been fixed under s. 9 of the Act within which spirituous liquor manufactured otherwise than in that particular distillery, shall be introduced or sold without a special pass, and the fixing of such limits being necessary to a conviction of an offence under s. 58, the convictions in this case were set aside.

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BENG. EXCISE ACT ( <i>Beng. Act VII of 1878</i> ), ss. 15, 59, 60—			
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\* s. 58—

*Sale by licensed Vendor contrary to Terms of his License.* Section. 53 of the Beng. Excise Act does not apply to sales by a licensed vendor contrary to the terms of his license. That section provides for a breach of the condition of a license not covered by the second clause of s. 59 of the Act.

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**Bond—**

*Description of Property—General Words—Registration.* In consideration of a loan, A gave a bond, by which he covenanted "not to alienate the property of himself and his daughter, or the rest of his own property, until the loan secured by the bond was paid." The bond was recorded under the Registration Act in the book numbered "four" required to be kept by the Act. A subsequently sold his immoveable property, and the conveyance was recorded in the book numbered "one," in which documents

**Bond—(continued.)**

relating to immoveable property have to be recorded. In a suit by the bond-creditor against the purchaser seeking to establish a lien on A's immoveable property by virtue of the bond—

*Held*, that the general words used in the bond were not sufficient to give a lien upon any specific property, and that the fact that the bond had been recorded in book "four" showed that it was not the intention of the parties that the immoveable property of the debtor should be charged.

NAJIBULLA MULLA v. NUSIR MISTRI ... ..	VII ...	196
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<i>Limitation Act (XV of 1877), s. 25, sched. v, art. 66.</i> Where a bond, by its terms, stated that money advanced should be repaid on the 30th Pous 1283 B.S., and it so happened that, in the year 1283, the month of Pous consisted only of twenty-nine days (the 29th Pous, answering to the 12th January 1877), <i>held</i> , that a suit brought on the 13th January 1880 was in time.		
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**THE PEACE—**

*Criminal Procedure Code (Act X of 1872), s. 530—Omission of Magistrate to record Preliminary Proceeding.* In order to justify a Magistrate in interfering under s. 530 of the Criminal Procedure Code, it is necessary that he should be satisfied that there exists a dispute concerning land which is *likely to induce a breach of the Peace*,—i.e., there must be a reasonable apprehension that a disturbance of the peace is likely to occur, rendering it necessary for him to take immediate steps to prevent it, and not merely that it is *probable* a breach of the peace may occur if proceedings under s. 530 be not taken.

*Quere.*—Whether it is necessary that a preliminary proceeding should first be recorded to give the Magistrate jurisdiction?

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**TRUST—**

*Mixing Trust Funds with Money of Trustees—Commission on Trust Moneys.* It is a grave breach of duty in trustees, or administrators taking out letters of administration to estates in this country under powers-of-attorney from executors or next-of-kin abroad, to mix the incomes raised by them from trust-properties, or the funds of the estate, in one common fund with their own moneys, and such a course of dealing may expose the trustees or administrators to criminal as well as civil liabilities.

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**Breach of—(continued.)**

*Impossibility to perform a portion arising after Execution—Suit to cancel such portion—Contract Act (IX of 1872), s. 56—Specific Relief Act (I of 1877, chaps. iv and v.* A contract was entered into between the plaintiff and the defendant, by which the plaintiff agreed to cultivate indigo for the defendant, for a specified number of years, in certain specified lands situated in different villages, with respect to portion of which lands the plaintiff was a sub-tenant only. Subsequently, during the continuance of the contract, the plaintiff lost possession of those lands, through his immediate landlord having failed to pay the rent, and having been in consequence ejected therefrom by the owner. In a suit by him, under the above circumstances, to have so much of the contract as related to those lands cancelled, on the ground that it had become impossible of performance through no neglect on his part—

*Held*, that such a case came within the provisions of Cl. 2. s. 56 of Act IX of 1872 (Contract Act), and that the mere fact that the plaintiff could have paid up the debt due by his immediate landlord and so retained possession of the land, was not sufficient to constitute such an omission or neglect on his part as to take it out of the provisions of that section.

*Held* also, that chap. iv of Act I of 1877 (Specific Relief Act) did not apply to such a case, but that the plaintiff was entitled to the relief he sought under s. 40 of that Act, inasmuch as the contract was evidence of different obligations—viz., to cultivate indigo in different villages.

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**Causes of action—**

*Declaratory Decree—Specific Relief Act (I of 1877, s. 42—Civil Procedure Code (Act X of 1877), s. 53.* In a suit for confirmation of possession and declaration of title in respect of land, where the plaint did not disclose any facts from which it could be said that the defendants denied the plaintiff's title, but from the proceedings in the original cause it was established, that, before the suit was brought, there was a dispute existing between the parties as regards the title, and that a decree in favour of the plaintiffs had been passed by the original Court on the merits of the case—

*Held*, that though the plaint might have been rejected in the first instance under s. 53 of the Civil Procedure Code, on the ground that it did not disclose any cause of action, it was too late for an Appellate Court to reverse the decree solely on that ground, without being satisfied that no such cause of action was established on the evidence.

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<i>In summing up the case to the jury, the Judge omitted to call their attention to the evidence of the witnesses for the defence. This evidence appeared to the High Court to be untrustworthy.</i>		
<i>Held, that the summing up was not defective on account of this omission on the part of the Judge.</i>		
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s. 32— <i>Adding Parties as Plaintiffs—Act XXVII of 1860, s. 2— Holder of Certificate of Administration.</i> A sued as only son and heir of his father B. C, the widow of B, having, with the concurrence of A, taken out letters of administration to B's estate, was, on the application of A at the hearing of the suit, made a co-plaintiff under s. 32 of the Civil Procedure Code.		
<i>Held</i> , that C ought not to have been joined as a plaintiff in the suit, inasmuch as A had no right at all to sue.		
Section 32, as far as the addition of plaintiffs is concerned, only applies to those cases in which the original party who brought the suit had some title to sue.		
<i>Per</i> PONTIFEX, J.—The power given by s. 27 of the Code ought to be exercised before the first hearing of the case.		
<i>Held</i> also, that s. 2 of Act XXVII of 1860 prohibited A from suing alone, for although he was, no doubt, beneficially entitled to recover it, yet there was no vexatious or fraudulent withholding of the debt within the meaning of that section.		

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*Per GARTH, C.J.*—A debt cannot be said to be "vexatiously withheld" within the meaning of that section, simply because the debtor omits to pay it.

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s. 586—*Appeal in cases cognisable by a Small Cause Court.* A was the proprietor of nine annas of a mouza, B and his family of one anna, and C and others of the remaining six annas. B and his family having occupied and enjoyed, to the exclusion of their co-shareholders, fifty-four bighas of the mouza, failed to pay any rent in respect of such occupation. A instituted a



**Civil Procedure Code—(continued.)**

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suit against them (making C and the other holders of the six-anna share defendants to the suit) to recover the sum of Rs. 412-8 of the sum justly due to him after making all proper deductions, including as well the share of the rent of the fifty-four bighas to which the six-anna shareholders were entitled, as also the share which B and his family were entitled to retain as proprietors of a one-anna share. *Held*, that the facts showed an implied contract on the part of B and his family to pay to their co-shareholders whatever, upon taking an account, should appear to be due to them; and that, inasmuch as the total amount sought to be recovered in the suit by A did not exceed 500 rupees, the suit was one which might have been brought in a Small Cause Court, and therefore the plaintiff had no right of second appeal to the High Court under s. 586 of the Code of Civil Procedure.

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**Common Ancestor—**

*Claim as Collateral Heir—Evidence.* Where the plaintiff claimed as paternal uncle's grandson and only heir of N, and the evidence showed that N's father was one of three brothers, but it was not stated in the plaint, nor shown by the evidence, who was the father of the three brothers—*held*, that the suit ought to be dismissed, it being incumbent on the plaintiff, claiming as a collateral heir, to show who the common ancestor was from whom he derived title.

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<b>Compromise—</b>		

*Suit to set aside—Fraudulent Representations—Sanction by Court of Compromise entered into by a Minor—Misapprehension or mistake as to Material Facts—Contract Act (IX of 1872), s. 20—Inquiry as to whether it would be for benefit of Minor to set aside Compromise.* The plaintiff, a minor, was, as daughter and one of the heirs of A, entitled to 7-24ths of his estate. The value of A's estate was uncertain, and depended on whether or not A had been a partner in business with M, and whether or not a sum of Rs. 90,000 had been paid by M to A in satisfaction of all claims which A had against M in respect of the estate of K, a deceased brother of A and a former partner in the same business. M having, on A's death, possessed himself of all the estate of A, the plaintiff brought a suit against M, in which a decree was made, ordering an account to be taken of the estate of A which had come into the hands of M. Pending such account, M died, leaving a will, by which he appointed the son of A and another his executors, and the suit was revived against them. In their application for probate they stated that the value of M's estate, so far as they had been able to ascertain and were aware, was Rs. 4,41,000. Shortly after probate was granted, negotiations were entered into between the executors and the advisers of the plaintiff for a compromise, and a petition was, with the concurrence of the executors, presented by the plaintiff to the Court, asking for its sanction to the terms agreed upon by the parties, which were, that the plaintiff should receive Rs. 20,000 in full of all demands, and Rs. 5,000 for her costs of suit. This petition took, as the value of M's estate, the amount stated by the executors in their application for probate, and stated that the value of A's estate, in case the abovementioned payment by M was proved, would be Rs. 30,000, and in case it was not proved, then a moiety of the estate of M; and that, considering the difficulties the plaintiff had to meet in proving her case, and with a view to put an end to further trouble, litigation, and expense, the above terms had been agreed to on her behalf. These terms of compromise were sanctioned by the Court on the 11th September 1876. Shortly afterwards, further property was discovered belonging to the estate of M. The plaintiff brought a suit against the executors to set aside the compromise, alleging that the terms had been accepted by her on the faith of the representation made by the executors in their application for probate, and charging them with wilful and fraudulent concealment. There was evidence to show that some of the property subsequently discovered was such that the defendants as executors ought to have known, even if they did not of its existence at the time of the compromise. *Held*, that even though the executors had no such knowledge, and there was no

**Compromise—(concluded.)**

actual fraud, yet there was such culpable ignorance and neglect of duty on their part as to amount to fraud, and carry with it the consequences of knowledge, and as the compromise had in consequence been entered into by the parties and sanctioned by the Court under a misapprehension of material fact, the plaintiff was entitled to have the compromise set aside, and the parties restored to their rights in the former suit at the time it was effected.

*Per* PONTIFEX, J.—In cases where the sanction of the Court is required, as where there is an infant concerned, each party is bound to see that the materials on which the sanction of the Court is asked for are unimpeachable.

*Per* PONTIFEX, J.—*Quære*.—Whether in this suit, if the questions were found to arise, it would be necessary for the Court to consider whether it would be for the benefit of the minor that the compromise should be set aside?

*Per* GARTH, C.J.—*Semble*.—Even if it only appeared that the compromise had been entered into and sanctioned under an entire mistake of the parties and of the Court with regard to the subject-matter of the agreement, it ought to be set aside under s. 20 of the Contract Act.

*Per* GARTH, C.J.—In a substantive suit by a minor to set aside a compromise made with the sanction of the Court obtained by fraud or mistake, it is not the province of the Court to inquire whether it would or would not be for the benefit of the minor that the compromise should be set aside; though it might be otherwise on an application for review to the Court which granted the sanction.

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**OF PROSECUTION BY ADVOCATE OR ATTORNEY—**

*Permission by Magistrate—Presidency Magistrates' Act, (IV of 1877), s. 129.* With the exception of the Advocate-General, Standing Counsel, Government Solicitor, or other officer generally or specially empowered by the Local Government in that behalf, no person, whether counsel or attorney, can claim the right to conduct the prosecution of any criminal case without the permission of the Presidency Magistrate.

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**Confession—**

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*Persons jointly charged—Statement by Prisoner in absence of Co-prisoners—Evidence Act (I of 1872), s. 30.* Several persons were charged together with offences under ss. 148, 302, 324, and 326 read with s. 149 of the Penal Code. The Sessions Judge, when about to examine the prisoners, required all but the prisoner under examination to withdraw from the Court,

**Confession—(concluded.)**

until his turn for examination came round, and convicted each prisoner chiefly upon what was said by his co-prisoners during his absence from the Court.

*Held* that the evidence so given was inadmissible.

IN THE MATTER OF THE PETITION OF CHANDRA NATH SIKKAR AND OTHERS. THE EMPRESS<sup>1</sup>. CHANDRA NATH SIKKAR. ... .. VII ...

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**Constructive Notice—**

*Principal and Agent—Fraud by Agent—Liability to Third Persons.* When a person is proved to have had a knowledge of certain facts, or to have been in a position, the reasonable consequence of which knowledge or position would be, that he would have been led to make further enquiry, which would have disclosed a particular fact, the law fixes him with having himself had notice of that particular fact. There may be such wilful negligence in abstaining from the enquiry into fact which would convey actual notice, as may properly be held to have the consequences of notice actually obtained. But if there is not actual notice, and no wilful or fraudulent turning away from an enquiry into, and consequent knowledge of, facts which the circumstances would suggest to a prudent mind, then the doctrine of constructive notice ought not to be applied.

Constructive notice may apply as against third persons from a neglect to call for deeds and documents of title, but not to the same extent where a Registration Act is in operation, as it would where no Registration Act prevails.

If an agent, authorized to sell property, commits a fraud against his principal, the principal is the person who ought to suffer, and not a stranger.

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**Contagious diseases—**

ACT (XIV of 1868), ss. 11, 21—*Rules 13 and 27 passed under the Act—Magistrate, Competency of—Jurisdiction.* Any woman desirous of ceasing to carry on the business of a common prostitute is, under the provisions of the Indian Contagious Diseases Act, 1868, absolutely entitled to have her name removed from register; and any rule, or portion of a rule, purporting, to have been framed under the provisions of that Act which places any obstacle on the way of her doing so, is *ultra vires*, and therefore void.

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<b>Contagious Disease—(continued.)</b>		
Where a woman is prosecuted before a Magistrate under s. 11 of Act XIV of 1868, she is not precluded from pleading that she has ceased to be a common prostitute, and that she has taken steps, under s. 21 and the rules framed thereunder, for the removal of her name from the register; and the Magistrate is competent to entertain such a defence.		
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<b>Contract—</b>		
<i>Breach of contract—Time for Performance.</i> A contract for the sale of seed contained the following provision:—"Refraction guaranteed at four per cent., with usual allowance up to six per cent., exceeding which the seller is to reclean the seed at his expense within a week, failing which buyers to have the option of cancelling that portion of the contract tendered, or of buying against the seller, or of taking the parcel as it stands, with usual allowance for excess refraction. Delivery from seller's godown in pile up to the 15th of July next." On the 10th July, the vendor tendered the seed. On examination the refraction was found to be above the contract rate. It was agreed that the vendor should reclean the seed; and on the 15th July, the purchasers went to take delivery of the seed, which was found still to be not sufficiently cleaned. On the 15th July, the vendor said that he should require a week longer for that purpose. The purchaser then cancelled the contract. In a suit by the vendor for damages for breach of contract—		
<i>Held—</i> (1), that the breach of the contract was with the plaintiff; (2), that the week allowed for recleaning commenced from the 10th July; and that as the plaintiff had not succeeded in reducing the rate of refraction to the contract rate, the defendants had a right to reject the seed; and that the plaintiff was not entitled to further time to reclean it again.		
BUDDREE DOSS v. RALLI	VI ...	678
ADDING PARTIES IN ACTIONS OF. See PARTIES	VI ...	815
COMPENSATION FOR BREACH OF. See LIMITATION ACT, XV OF 1877, SCHED. II, ARTS. 66, AND 116	VI ...	24
<b>CONSTRUCTION OF—"Delivery in whole of November on seven days' notice from Buyer"—Breach of Contract.</b> A contract for delivery by the defendants to the plaintiff of 1,000 bags of ginger, stated that "delivery was to be taken and given in the whole of November on seven days' notice from the buyer." On the 5th November, the plaintiff gave notice to the defendants requiring delivery to be given "within seven days;" and again on the 11th, that he was prepared to take delivery on the following day. On the 12th, the defendants wrote to the plaintiff, stating that they would give delivery on the 28th, 29th, and 30th November. On the 15th, the plaintiff gave notice that he considered the contract at an end. In a suit for damages for non-delivery— <i>held</i> (affirming the decision of the Court below), that the words "on seven days' notice from the buyer" were intended to give the buyer the right of fixing the particular time in November at which the delivery was to commence, and that the defendants were, therefore, bound to commence delivery on the expiration of the seven days' notice.		
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s. 265— <i>Suit for Adjustment of Accounts of a Partnership—Jurisdiction.</i> Section 265 of the Contract Act, while it enables a partner, after the termination of a partnership, to apply to the District Court to wind up the business, does not take away the ordinary right of suit in any Civil Court having jurisdiction to have the accounts of the partnership taken.		
LUCHMAN LALL v. RAM LALL	VI ...	521
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<b>Control—</b>		
OF EXECUTION. See EXECUTION	VI ...	485
<b>Contribution—</b>		
<i>Co-Sharers—Small Cause Court—Jurisdiction.</i> No suit for contribution between coparceners in a revenue-paying estate, or for contribution between coparceners in a jama, will lie in the Small Cause Court.		
NOBIN KRISHNA CHAKRAVATI v. RAM KUMAR CHAKRAVATI, BUNNIJAN BIBI v. MAHAMMAD HOSSAIN	VII ...	605
<b>Conveyance—</b>		
SUBSEQUENTLY REGISTERED. See SPECIFIC PERFORMANCE.	VI ...	534
<b>Conviction—</b>		
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<b>Copyright Act—</b>		
(XX of 1847), s. 7— <i>Small Cause Court Acts (IX of 1850 and XI of 1865)—Zilla Court—Act XII of 1876.</i> As the class of cases provided for by s. 7 of the Copyright Act (XX) of 1847 was transferred to the jurisdiction of the Calcutta Court of Small Causes by Act IX of 1850, notwithstanding the express language used in s. 7 of the Copyright Act, so by analogy the jurisdiction in the same class of cases arising in the Mofussil was transferred to the jurisdiction of the Mofussil Courts of Small Causes by Act XLII of 1860 and Act XI of 1865.		
But sched. i of Act XII of 1876, amending Act XX of 1847, has now re-transferred the jurisdiction in such suits to the District Courts.		
IN THE MATTER OF THE PETITION OF HAMEEDDOOLAH. HAMEEDDOOLAH v. MAHOMED ASGHUR HOSSEIN	VI ...	499
<b>Co-Sharer—</b>		
SALE OF INTEREST OF ONE. See HINDU LAW	VI ...	749

## Co-Sharers—

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*Enhancement—Notice of Enhancement.* Held, in a suit for Enhancement by one co-sharer, to which the other co-sharer was made a party, that one co-sharer is not competent to issue a proper notice of enhancement without the consent of the other co-sharers previously obtained, though the rent has been paid to each co-sharer separately. Under the ruling of the full Bench, in the case of *Guni Mahomed v. Moran*, he must first establish his right to a separate contract to recover his rent separately on his individual share.

KASHEEKISHORE ROY CHOWDHRY v. ALIP MUNDUL	...	VI ...	149
JUDGMENT AGAINST. See RES JUDICATA	...	VI ...	31

*Partition—Portion of an Estate—Parties.* The owner of a twelve annas share in a joint zamindari granted to the plaintiff a mokurari lease of his share in a small portion of land within the zamindari. The owners of the remaining four annas share granted a patni of his share in the whole zamindari to the defendants. The plaintiff brought a suit against the defendants for partition of the small plot of land.

Held, that such a suit would not lie, because the zamindars were not made parties; and also that a partition could not be enforced of a part of the estate held by the defendants, who, if the plaintiff's claim was allowed, might, in respect of the same estate, be subjected to many claims for partition at the suit of persons in the plaintiff's position.

PARBATI CHURN DEB v. AIN-UD-DEEN	...	VII ...	577
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See COVENANT	...	VII ...	470
See EJECTMENT	...	VII ...	414

## OF LAND—

*Suit by one for Separate Share of Rent—Landlord and Tenant—Rent-Suit.* Where one of a number of co-sharers of certain property, the rent of which was paid by the tenant to a person acting as agent of the co-sharers, from whom they received it in proportion to their respective shares, brought a suit against the tenants for arrears of rent, and it appeared that the agent had been dismissed by the other co-sharers without the consent of the plaintiff, and contrary to her wish, and that she had given notice to the tenant to continue the payment of her share as before and not to pay any newly appointed agent, and it also appeared that the other co-sharers were colluding with the tenants, and the plaintiff made them parties defendants with the tenants—

Held, that such a suit would not lie, and that the proper course to pursue was that pointed out in *Tara Bunder Banerjee v. Ameer Mundle*.

JADOO SHAT v. KADUMBINEE DASSEE	...	VII ...	150
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## Costs—

See BENG. ACT VIII OF 1869, s. 58	...	VI ...	554
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*Abatement or Dismissal of Suit for want of Jurisdiction—Presidency Small Cause Court Act (IX of 1850), ss. 42, 52.* Where a plea as to the jurisdiction of the Small Cause Courts established under Act IX of 1850 is successful, the judgment ought to be one dismissing the suit. But whatever the form, it should be stated that the suit abates or is dismissed "for want of jurisdiction." In such a case the Court has power to award costs to the Defendant.

FRECK v. HARLEY	...	VI ...	418
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*Application on behalf of Arbitrators—Reference.* There is nothing in the Civil Procedure Code which authorizes arbitrators to apply to the Court for confirmation of an order passed by them, making payment of their fees a condition precedent to the hearing of a reference.

STEEL v. ROBERTS	...	VI ...	809
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**Costs—(continued.)**

*Suit on Hathchitta—Partnership—Some Partners denying debt others admitting debt.* In a suit brought against several partners to recover a sum of money on a hathchitta, some of the partners denied the debt and the partnership, whilst others admitted both the partnership and the liability; the Court found in favour of the plaintiffs, and gave them a decree for the amount sued for with costs, and ordered the defendants who had disputed the debt and the fact of the partnership, to pay the costs of the other defendants, who had admitted their liability.

JUGGUT CHUNDER ROY v. ROOP CHAND SHAW...	...	VI ...	811
See PARTNERSHIP	...	VII ...	428
See PRACTICE	...	VII ...	177, 401
OF MINOR. See MINOR	...	VII ...	140

**Court Fees Act—**

s. 11, PARA. 2. See EXECUTION-PROCEEDINGS	...	VI ...	472
s. 12, PARA. 1, AND SCHED. II, DIV. II, ART. 17, PT. III. See APPEAL AGAINST ORDER REJECTING PLAINT	...	VI ...	249
s. 12. See VALUATION OF SUIT	...	VII ...	348
INTERFERENCE OF. See ACT XXXV OF 1858	...	VI ...	539
TO EXECUTE DECREE. See EXECUTION OF DECREE	...	VI ...	513

**Covenant—**

*Forfeiture—Breach of Covenant—Joinder of Plaintiff—Co-Sharers—Mokurari.* Where it is optional with several joint lessors to avail themselves of a condition of re-entry upon breach of certain covenants, one or more of the lessors cannot insist upon a forfeiture without the consent of the others.

*Held,* therefore, in a suit which was brought for the cancellation of a mokurari lease, and the recovery of *seer* possession, on the ground of forfeiture for breach of covenant, that all the co-sharers should join as plaintiffs; and that as some of the co-sharers, who were made defendants, appeared and opposed the cancellation of the lease, the suit must be dismissed.

REASUT HOSSEIN v. CHORWAR SINGH	...	VII ...	470
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**Covenant in Lease—**

BREACH OF. See LIMITATION ACT, XV OF 1877, SCHED. II, ART. 120	...	VI ...	
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**Covenant not to lease—**

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**Criminal Case—**

TRANSFER OF. See TRANSFER OF CRIMINAL CASE	...	VI ...	491
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**Criminal Procedure Code—**

*Act X of 1872, s. 36—Confirmation of Sentence by Sessions Judge.* Section 36 of the Criminal Procedure Code, as regards the necessity for confirmation of the sentence by the Sessions Judge, refers to cases in which the sentence of imprisonment is a sentence of upwards of three years, without including any additional sentence as to fine or whipping.

*IN THE MATTER OF THE PETITION OF SHUMSHER KHAN. THE EMPRESS v. SHUMSHER KHAN* ...

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s. 64. See TRANSFER OF CRIMINAL CASE	...	VI ...	491
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s. 66—*Dishonestly retaining in British Territory—Property stolen beyond British Territory.* A Nepalese subject, having stolen cattle in Nepal, brought them into British territory, where he was arrested and sentenced to one year's rigorous imprisonment. *Held,* that he could not be tried for the theft itself, but that he might be convicted of dishonestly retaining the stolen property.

THE EMPRESS v. SUNKER GOPE	...	VI ...	307
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**Criminal Procedure Code—(continued.)****ACT X OF 1872—(continued.)—**

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ss. 82, 84. See <b>PRIVILEGE</b> ...	VI ...	83
ss. 118, 119— <i>Penal Code (Act XLV of 1860), s. 191.</i> Neither the words "shall answer all questions" in s. 118 of the Code of Criminal Procedure, nor the words "shall be bound to answer all questions" in s. 119 of the same Code, constitute "an express provision of the law to state the truth" within the meaning of s. 191 of the Penal Code.		
Sections 118 and 119 are merely intended to oblige persons to give such information as they can to the police, in answer to the questions which may be put to them, and they impose no legal obligation on those persons to speak the truth.		
<b>THE EMPRESS v. KASSIM KHAN. THE EMPRESS v. MUSSAMUT DAHLIA</b> ...	VII ...	12
ss. 144, 147, 468, 470, AND 471. See <b>FALSE CHARGE</b> ...	VII ...	208
s. 211— <i>Order of Acquittal—Compensation to Accused.</i> An order for compensation against a complainant may be made on an order of acquittal under s. 211 of the Criminal Procedure Code.		
<b>MONA SHEIKH v. ISHAN BARDHAN</b> ...	VI ...	581
ss. 217, 218. See <b>RECALLING WITNESSES</b> ...	VII ...	28
s. 227, CL. (h)— <i>Recording Reasons for Conviction—Practice of High Court on Revision.</i> Under cl. (h) of s. 227 of the Criminal Procedure Code, although a Magistrate is not required to record any evidence, he should, in recording his reasons for the conviction, state them so, that the High Court, on revision, may judge whether there were sufficient materials before him to support the conviction.		
Where they were not so stated, the High Court, on motion, set the conviction aside.		
<b>IN THE MATTER OF THE PETITION OF PANJAB SINGH. THE EMPRESS v. PANJAB SINGH</b> ...	VI ...	579
s. 237. See <b>PLEA OF GUILTY</b> ...	VII ...	96
ss. 243, 250, 264, 265. See <b>EXAMINATION OF ACCUSED</b> ...	VI ...	96
ss. 283, 296. See <b>PENAL CODE, ss. 114, 372, 479, 498</b> ...	VII ...	662
s. 359. See <b>EVIDENCE</b> ...	VI ...	714
s. 454, ILLUS. (f). See <b>PRACTICE</b> ...	VI ...	718
s. 468. See <b>SANCTION TO PROSECUTION</b> ...	VI ...	440
ss. 471, 467, 198— <i>Institution of Criminal Prosecution pending Appeal in Civil Court.</i> If in the course of a proceeding, either civil or criminal, a Judge or Magistrate finds clear ground for believing that either the parties to the proceeding or their witnesses have committed perjury or any other offence against public justice, he is justified in directing criminal proceedings against such person under s. 471 of the Criminal Procedure Code without any further enquiry than that which he has already held in his own Court.		
As a matter of discretion and propriety, it is right for a Court, before committing a person on a charge of perjury upon his own uncontradicted statement, to await the hearing of the appeal, where an appeal is pending, in the case in which he is charged with such perjury.		
<b>IN THE MATTER OF MUTTY LALL GHOSE</b> ...	VI ...	308
ss. 491, 530— <i>Dispute likely to cause Breach of the Peace—Decision on Title by Civil Court—Police Report—Incorporation of, by Reference.</i> On the 20th of March 1879, A applied to have certain lands, which he had lately purchased, registered in his name. The order of the Deputy Collector, declaring that A had proved possession, and was entitled to registration, was not passed until the 24th December 1879. Prior to A's purchase, B and C had, on the 6th March 1879, obtained registration of the same property. The proceedings were sent to the Commissioner, who, on the 29th September 1880,		

**Criminal Procedure Code—(continued.)****ACT OF 1872—(continued.)**

declared A to be entitled to the land; and in October the registration in the names of B and C was cancelled, and A's name was finally registered. In July 1880, proceedings under s. 530 of the Criminal Procedure Code were commenced upon the petition of certain ryots, who alleged that other ryots, at the instigation of A, were going to do acts which would lead to a breach of the peace. The Deputy Magistrate, the same person who as Deputy Collector had decided the land-registration case in favour of A, proceeded under s. 530 to consider the question as to who was in possession, and found that B and C were in possession.

*Held*, that the Deputy Magistrate could not, in these proceedings, set aside the order which he had made in the registration-case, as that order could only be set aside in a regular suit.

The proceedings recorded by the Deputy Magistrate did not set forth in express language that he was satisfied that a dispute likely to create a breach of the peace existed in respect of the land in question, between A on the one side, and B and C on the other; nor did it set forth the grounds upon which he was so satisfied that such dispute existed.

*Held*, that the proceeding was therefore defective.

In the proceedings, the Magistrate referred to a police report, which, however, did not show that a breach of the peace was imminent.

*Held*, that although this report might be taken to be incorporated by reference, yet that it was not sufficient to justify the order.

*Per FIELD, J.*—Unless the parties are able to show that there is such a dispute as is likely to induce a breach of the peace, the Magistrate should hold his hand and not proceed further. When the rights of the parties have been determined by a competent Court, the dispute is at an end, and it is the duty of the Magistracy to maintain the rights of the successful party, and the proper course for the Magistrate to pursue, if the defeated party does any act that may probably occasion a breach of the peace, is to take action under s. 491 of the Criminal Procedure Code, and require from such person security to keep the peace.

IN RE GOBIND CHUNDER MOITRA ... VI ... 835

ss. 505, 506—*Deposit of Cash in lieu of Security-Bond for Good Behaviour.* The powers given by ss. 505 and 506 of Act X of 1872 should be exercised with extreme discretion; the former of these sections is not intended to apply to persons of "by no means a reputable character."

An order requiring persons to deposit cash in lieu of entering into a bond as security for their future good behaviour, is bad in law.

THE EMPRESS v. KALA CHAND DASS... VI ... 14

ss. 521, 523, 530. See JURISDICTION ... VI ... 291

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s. 530. See BREACH OF THE PEACE ... VII ... 885

s. 530, *Record of Grounds—Police Report, Incorporation of—Evidence of Possession—Evidence of Title.* In proceedings under s. 530 of the Criminal Procedure Code, the Magistrate recorded the following words—"whereas from the police report a breach of the peace is probable," and found that certain persons were in possession.

*Held* that, although the record of grounds was unsatisfactory, as the initial proceeding did not contain within itself all which the law requires to be recorded—*viz.*, in the first place, that

**Criminal Procedure Code—(concluded.)**

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**ACT X OF 1872—(concluded.)**

the Magistrate is satisfied that a dispute likely to induce a breach of the peace exists, and in the second place, the ground upon which he is so satisfied—yet that, as the police report from which the grounds for apprehending a breach of the peace appeared was incorporated by reference, the final order was not defective.

No sufficient evidence of possession was produced before the Magistrate, but evidence as to the title of the person in whose favour the Magistrate found was given, and the Magistrate based his decision upon the latter evidence, and determined the case with reference to the merits of the claims of the parties to the right of possession.

Held that, although the Magistrate would have been justified in looking to the evidence of title in corroboration of the evidence of possession, he was wrong in basing his decision on the evidence of title, and his order was set aside.

IN THE MATTER OF THE PETITION OF KALI KRISTO  
THAKUR v. GOLAM ALI CHOWDHRY ... ..

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**Criminal Trespass—**

See DISTRAINT ... .. VII ...

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**Culpable Homicide—**

*Riot—Unlawful Assembly—Fight between two contending Factions each armed with Deadly Weapons—Penal Code (Act XLV of 1860), s. 300, excep. 5.* Where death results in a fight between two bodies of men deliberately fighting together, a greater proportion of the men composing both sides being armed with deadly weapons, and it being further apparent from the evidence that the man slain was an adult, and that no unfair advantage was taken by the one side or the other during the fight, the offence committed is culpable homicide, but does not amount to murder.

SAMSHERE KHAN v. THE EMPRESS ... .. VI ...

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**Cumulative Sentence—**

See PRACTICE ... .. VI ...

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**Custody of Minors—**

See MAHOMEDAN LAW, SHIAH SCHOOL ... .. VII ...

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**Damages—**

*Inundation—Embankments—Liability to Repair—Beng. Act VI of 1873—Regs. II, VIII, and XXXIII of 1793—Reg. VI of 1806—Reg. XI of 1829—Act XXXII of 1855.* In a suit for damages caused by the overflow of a river through an embankment on the defendants' land, it appeared that the defendants held under a kabuliati from Government, which provided that the zamindar should not object to pay rent on the score of drought or inundation; that he should bear all losses incurred on that account; and also, that he should do embankment work at the proper time, and should be liable for loss from negligence. It did not appear whether the embankment was in existence when the kabuliati was granted. It was proved that the defendants received an annual sum from Government as a contribution to the repairs of embankments, but such payment was not provided for in the kabuliati, and no evidence was given as to the terms of the agreement under which it was paid.

Held, that there was no common law liability to repair imposed on the defendants.

That it not having been proved that the embankment in question was in existence at the date of the kabuliati, the defendants were not liable *ratione tenuræ*, and that if the sum paid by

**Damages—(continued.)**

Government was in consideration of the defendants' maintaining the embankment in question, and if the terms of the agreement under which it was paid showed that it was intended to impose the obligation to repair for the public benefit, the defendants would be liable.

Regulations and Acts relating to embankments in Bengal considered.

NUFFER CHUNDER BHUTTO v. JOTENDRA MOHUN TAGORE. VII ... 505

**Darpatnidar—**

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OF JUDGMENT-DEBTOR PRIOR TO SALE. See HINDU LAW, MITAKSHARA ... VII ... 52

**Debts—**

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CHARGE OF, BY TESTATOR. See TRUST ... VII ... 772

OF FATHER, LIABILITY OF SON TO PAY. See HINDU LAW ... VI ... 185

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**Deceased Husband's Estate—**

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**Decision—**

OF TITLE BY CIVIL COURT. See CRIMINAL PROCEDURE CODE, ss. 491, 530 ... VI ... 835

**Declaration—****OF TITLE—**

*Adverse Possession—Case made in Plaintiff.* Where a specific title has been alleged, but not proved, and the plaintiff endeavours to succeed in the first Court or second Court of appeal upon a title by twelve years' adverse possession, he must be prepared to show that this other title by twelve years' adverse possession was raised in the Court of first instance with sufficient clearness, to enable his adversary to understand that he claimed to succeed as well by twelve years' adverse possession as by the specific title alleged.

KRISHNA CHURN BAIKACK v. PROTAR CHUNDER SURMA ... VII ... 560

TO LAND IN ASSAM. See LAND IN ASSAM ... VII ... 437

**Declaratory Decree—**

See CAUSE OF ACTION ... VII ... 343

*Cause of Action—Civil Suit to contest the Genuineness and Validity of a Registered Document—Registration—Onus of Proof—Registration Act (III of 1877), ss. 74, 75—Specific Relief Act (I of 1877), s. 89.* Under the special procedure provided in the Registration Act (III of 1877), the defendant, in whose favour a document was said to have been executed, succeeded in obtaining, an order from the District Registrar for the registration of the same, although the plaintiff, who was alleged to have executed it, appeared before the Sub-Registrar, and subsequently before the Registrar, and denied executing it, and alleged it to be a forgery.

**Declaratory Decree—(continued.)**

In a suit brought under the above circumstances to have the document declared void, and to have it cancelled, the Court placed the onus of proving its genuineness and its execution by the plaintiff on the defendant—

*Held*, that the proceedings of the Registrar, when he enquired whether the document had been duly executed or not, were in no sense those of a "competent Court," but only those of an executive officer invested with *quasi*-judicial functions, and that consequently, such a suit was maintainable; and that, under the circumstances, the onus of proof was properly placed on the defendant.

*Held* also, that the Specific Relief Act (I of 1877) applied, s. 39 evidently contemplating and providing for such a suit.

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**FOR SALE—**

*Sale and Confirmation—Execution barred at time of Sale—Position of Auction-Purchaser—Civil Procedure Code (Act X of 1877), s. 316—Act XII of 1879—Imitation Act (XV of 1877), sched. ii, art. 165.* A person purchased certain property at a sale in execution of a decree in November 1878; his purchase was confirmed, and he obtained a certificate of sale on the 23rd May 1879, from which date he remained in possession. The judgment-debtor applied to have the sale set aside for irregularity, but his application was dismissed both at the hearing and on appeal. He had applied, before the sale took place, to stay the sale, on the ground that the right to apply for execution was barred. This application was dismissed, but was allowed on appeal. It did not appear that the auction-purchaser was a party to the proceeding, or that he was cognizant of the application.

Two years from the date of the sale, and one-and-a-half year from its confirmation, the judgment-debtor, on a summary application, obtained an order setting aside the sale and putting the auction-purchaser out of possession.

*Held*, that the order was erroneous, the Subordinate Judge having no power, after the sale had been confirmed, to set aside the sale by a summary order; and that, under art. 165, sched. ii of Act XV of 1877, the application for such an order was barred.

The words "*subsisting decree*," in s. 316 of Act X of 1877, as amended by Act XII of 1879, mean a decree *unreversed and in full force*, and not merely one upon which execution cannot be issued.

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OF COMPLAINT— <i>Presidency Magistrates' Act</i> (IV of 1877), s. 124— <i>High Courts Criminal Procedure Act</i> (X of 1875), s. 147— <i>Institution of Fresh Proceedings</i> . An order of dismissal under s. 124 of Act IV of 1877 does not operate as an acquittal.		
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<b>Distrain—</b>		
<i>Rent Act (Beng. Act VIII of 1869), ss. 72, 74, 76—Criminal Trespass</i> . A, the servant of B, was convicted of criminal trespass in going upon the land of C, one of B's tenants, and preventing him from cutting his crops. B was convicted of abetment of criminal trespass. A and B pleaded that they were acting in the exercise of the legal right of distrain.		
It appeared that no written demand under s. 72 of the Rent Act (Beng. Act VIII of 1869) for the amount of the arrears, together with an account exhibiting the grounds on which demand had been made, was served on C, and that no written authority under s. 76 had been given by B to A.		
<i>Held</i> , that it lay upon A and B to show that they had conformed to the provisions of the law, or at least had acted with the <i>bona fide</i> intention of distraining the complainant's crops; and that the conviction was right.		
<i>Held</i> also, that as, under s. 74, standing crops and ungathered products may, notwithstanding distrain, be reaped and gathered by the cultivator, A had no right, even if he was acting <i>bona fide</i> , to restrain C from cutting his crops.		
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<i>Seizure of Property in Possession of Mortgagees</i> . Where moveable property upon leasehold premises has been mortgaged by the lessee, and the mortgagee is in possession, the landlord cannot seize it under a distress warrant, as it is not property "belonging to the person from whom the rent is claimed," within the meaning of s. 10 of the Distress Act.		
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<b>Dower—</b>		
<i>Introduction of English Law—Freehold Estates of Inheritance—</i>		
<i>Armenian Widow—English Law how far applicable in</i>		
<i>Calcutta—Succession Act (X of 1865), s. 4—Estoppel—21 Geo.</i>		
<i>III, c. 70, s. 17—Dower Act (XXIX of 1839.) The widow of an</i>		
<i>Armenian, married before the Dower Act (XXIX of 1839), is</i>		
<i>entitled to dower out of lands which her husband held during</i>		
<i>the marriage for an estate of inheritance, as against a Hindu</i>		
<i>purchaser for value from the husband during his life, the</i>		
<i>English law of dower having been recognized in this country</i>		
<i>amongst Europeans and Armenians as a branch of the law of</i>		
<i>inheritance.</i>		
<i>Per GARTH, C.J.—Estates which have been held by British sub-</i>		
<i>jects under the name of freehold estates of inheritance, are, in</i>		
<i>all essential respects, the same estates which have been held in</i>		
<i>England under the same name.</i>		
<i>The case of The Mayor of Lyons v. The East India Co. does</i>		
<i>not mean to decide that the Courts of this country are justified</i>		
<i>in adopting just so much of the law of inheritance, or of dower, or</i>		
<i>of any other law, as they consider equitable, and rejecting the rest.</i>		
<i>It only points out that there are certain portions of the English</i>		
<i>Statute law which from their very nature were only passed for</i>		
<i>reasons connected with England, and which would not be</i>		
<i>applicable in India or any Colony of the British Crown—e.g.,</i>		
<i>the Mortmain Acts, the Law of Aliens, and the like.</i>		
<i>The provisions of s. 4 of the Succession Act are prospective, and</i>		
<i>leave rights unaffected which had already been acquired before</i>		
<i>the Act passed.</i>		
SARKIES v. PROBONOMOYEE DOSSEE ... ..	VI ...	794
<b>Duties of judge—</b>		
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<b>Easement—</b>		
See USER, RIGHT OF PRIVATE WAY ... ..	VI ...	894, 606
<i>Limitation, Plea of—Limitation Act (XV of 1877), s. 26—Pre-</i>		
<i>sumption of a Grant. In a suit to establish an easement when</i>		
<i>limitation is pleaded, the proper issues to frame under s. 26 of</i>		
<i>Act XV of 1877 (Limitation Act) are:—</i>		
(i) Whether the easement in question was peaceably, openly,		
and as of right enjoyed by the plaintiff, or those through		
whom he claims, within two years of the institution of the		
suit; and		



**Easement—(continued.)**

- (ii) in the event of the above issue being found in the negative, whether there is evidence of enjoyment on the part of the plaintiff, or those through whom he claims, of such a character and duration as to justify the presumption of a grant or other legal origin of the plaintiff's right independent of the provisions of Act XV of 1877, s. 26.

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*Right of Way—Prescription—Effect of Illustrations—Limitation Act (XV of 1877), s. 26, and illus. (b).* On the 6th of April 1878, the plaintiffs sued for obstructing a right of way for boats in the rainy season. The defendants admitted the obstruction, but denied the right of way. The plaintiffs proved that the right was peaceably and openly enjoyed, and actually used by them, claiming title thereto as an easement and as of right, without interruption, from before 1855 down to November 1875, since when no actual user of the way by the plaintiffs had taken place. The lower Appellate Court dismissed the suit, on the ground that the plaintiffs had made no actual use of the way within two years previous to the institution of the suit. *Held* reversing the decision of the Court below, that, notwithstanding Act XV of 1877, s. 26, illus. (b), actual user within two years previous to the institution of the suit is not necessary, in order that the right claimed may be acquired under Act XV of 1877, s. 26.

Illustrations in Acts of the Legislature ought never to be allowed to control the plain meaning of the section to which they are appended, especially when the effect would be to curtail a right which the section in its ordinary sense would confer.

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*Right of Passage for Boats in the Rainy Season—Water.* A right of passage for boats in the rainy season over a channel wholly in another man's land, is, in respect of extent, analogous to an ordinary right of way; and the dominant owner cannot complain of the servient owner's narrowing the channel, so long as the latter, by so doing does not prevent the former from passing and repassing as conveniently as he has always been accustomed to do.

A right of passage for boats in the rainy season over another person's tank must be claimed in a particular direction in order to be valid.

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*Right of Way—Unity of Possession—Severance—Nuisance arising from acts of several Persons.* The words 'appurtenant' or 'belonging' will ordinarily carry only actual existing easements and therefore will carry no right of way over the land of the grantor, though, under certain circumstances, even these words will have a wider construction.

Where further words, are used, such as 'therewith held or used,' such words will carry a way formerly enjoyed as an easement, but as to which the right has been suspended by unity of possession. But such words will not carry a way made by the owner of both properties during the unity of possession, for his own greater convenience in the use of the two properties jointly.

But where, during the unity of possession, a way, which has never existed as an easement, is in fact used for the convenience of one of the tenements afterwards severed, the authorities show that the words in question are large enough to carry it.

One who has a right of passage over any place, must not, any more than the owner of the soil might, use it in an excessive or improper manner so as to obstruct the exercise by others of their rights.

**Easement—(concluded.)**

The acts of several persons may together constitute a nuisance, though the damage occasioned by the acts of any one, if taken alone, would not be appreciable.

CHUNDER COOMAR MOOKERJI v. KOYLASH CHUNDER SETT VII ... 665

**Effect—**

OF ILLUSTRATIONS. See EASEMENT ... VII ... 182

**Ejectment—**

*Co-Sharer—Trespassers—Co-Sharer's Right.* Where a tenant has been put into possession of ijmal property with the consent of all the co-sharers, no one or more of the co-sharers can turn the tenant out without the consent of the others; but no person has a right to intrude upon ijmal property against the will of the co-sharers or any of them; if he does so, he may be ejected without notice, either altogether, if all the co-sharers join in the suit, or partially, if only some wish to eject him; and the legal means by which such a partial ejectment is effected, is by giving the plaintiffs possession of their shares jointly with the intruder, as explained in the case of *Hulodhur Sen v. Gooroodoss Roy*.

RADHA PROSHAD WASTI v. ESUF ... VII ... 414

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INTRODUCTION OF. See DOWER ... VI ... 794

**Enhancement—**

*Assessment of Rent—Decree for Rent at Enhanced Rate—Beng. Act VIII of 1869.* On the 25th of January 1864, the plaintiffs obtained a decree against the defendants for assessment of enhanced rent. Shortly afterwards, the defendants executed a kabuliast, at a reduced rate, for eleven years ending the 31st Assin 1282 (16th October 1875). After the term had expired, the plaintiffs sought to recover rent from the defendants at the rate settled by the decree of 1864.

*Held*, that the decree had been superseded by the subsequent arrangement, and that the plaintiffs could not recover rent at an enhanced rate, except under the provisions of Beng. Act VIII of 1869.

NOBIN CHUNDER SIRCAR v. GOUR CHUNDER SHAHA ... VI ... 759

NOTICE OF. See CO-SHARERS ... VI ... 149

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**OF RENT—**

*Parties to suit—Enhancement by single Shareholder.* Even if a single shareholder can raise the rent of a joint tenant without the consent of his coparcener, he can only do so in a suit to which all the sixteen annas proprietors must be made parties.

GOPAL v. MACNAGHTEN ... VII ... 751

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<b>Estoppel—</b>		
<i>Admissions by Conduct.</i> The deed of conveyance of land in Calcutta recited that the vendor was "seised of, or otherwise well entitled" to, the property intended to be sold "for an estate of inheritance in fee-simple," and it purported to convey such an estate. In a suit for dower by the vendor's widow against the heirs of the purchaser—		
<i>Held</i> , that although, as between the plaintiff and the defendants, there was no estoppel which could prevent the defendants from proving that the estate sold was other than an estate in fee-simple, yet, as the purchaser bought the property as and for an estate of inheritance and paid for it as such, the recital was <i>prima facie</i> evidence against the purchaser and persons claiming through him, that the estate conveyed was what it purported to be; it being an admission by conduct of parties, which amounted to evidence against them.		
SARKIES v. PROSONOMOYEE DOSSEE ... ..	VI ...	794
BY PLEADINGS— <i>Ejectment Suit—Denial of Tenancy—Change of Defence on Appeal—Occupancy Right.</i> It is not open to a defendant to change the whole nature of his defence at the last moment, and to set up in a Court of appeal a plea which he has directly and fraudulently repudiated in the Court below.		
In an ejectment suit, the defendants, from whom the plaintiff alleged that he had purchased the land from which he sought to eject them, and who had before suit by parol disclaimed the plaintiff's title, set up in their written statement an adverse title in themselves. The lower Court found the plaintiff's allegation to be true.		
<i>Held</i> , that the defendants were estopped from contending on appeal that they were occupancy-ryots, and therefore not liable to be ejected; and that by their own conduct they had forfeited the rights which they claimed.		
SUTYABHAMA DASSEE v. KRISHNA CHUNDER CHATTERJEE ..	VI ...	55
<i>Act I of 1872, s. 115</i> Section 115 of the Evidence Act, which contemplates a person "by his declaration, act, or omission intentionally causing or permitting another person to believe a thing to be true and to act on that belief," in which case he cannot "deny the truth of the thing" refers to the belief in a fact and not in a proposition of law.		
RAJNARAIN BOSE v THE UNIVERSAL LIFE ASSURANCE CO. .	VII ...	594
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<i>Secondary Evidence—Bond—Loss or Destruction of Instrument—</i>		
<i>Evidence Act (I of 1872), s. 65, cl. (c).</i> In a suit by the purchaser of a debt, the plaintiff stated that, in 1873, A executed a bond in favour of B to secure the repayment of Rs. 1,000, and that he had purchased the interest of B at a sale in execution of a decree against him. The plaintiff now sued A upon the bond, making B a party. At the trial, A denied the execution of the bond, and it was not produced by the plaintiff, who, having served B with notice to produce, tendered secondary evidence of its contents. B was not examined as a witness, and no evidence was given of the loss or destruction of the bond.		
<i>Held by PONTIFEX and MORRIS, JJ. (PRINSEP, J., dissenting), that secondary evidence was not admissible.</i>		
WOMESH CHUNDER GHOSE v. SHAMA SUNDARI BAI ...	VII ..	98
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TO PROVE INCREASED VALUE OF PRODUCE. See SUIT FOR ENHANCEMENT ...	VII ...	263
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<i>Documents upwards of Thirty years old—Proof of—Evidence Act (I of 1872), s. 90.</i> A Court is not bound to accept as genuine the signature on a document upwards of thirty years old, even though it be produced from proper custody. Before accepting such document as proof of title, the Court must satisfy itself that the person who purports to have affixed his signature to the document was a person who at the time was entitled to grant such a document.		
UGGRAKANT CHOWDHRY v. HURRO CHUNDER SHICKDAR ...	VI ...	209
<i>Secondary Evidence of Contents of Document.</i> By the law of evidence administered in England, which has been in a great measure, with respect to deeds, made the law of India, the first condition of the right to give secondary evidence of the contents of a document not produced in Court, is the accounting for the non-production of the original.		
BRUBANESWARI DEBI v. HARISARAN SURMA MOITRA ...	VI ...	720
<i>Summoning Witnesses—Refusal of a Magistrate to summon Prisoner's Witnesses—Criminal Procedure Code (Act X of 1872), s. 359.</i> A Magistrate is not at liberty to refuse to summon a witness tendered by an accused person, except on the grounds specified in s. 359 of the Criminal Procedure Code; and if he does refuse, he is bound to proceed under that section. The fact that the accused declines to examine a witness is no reason for refusing to summon him to meet fresh evidence given subsequent to the defence being closed.		
IN THE MATTER OF THE PETITION OF DEELA MAHTON v. SHEO DYAL KOERI ...	VI ...	714
<b>ADMISSIBILITY OF—</b>		
<i>Judgment in Civil Suit out of which Criminal Prosecution arises.</i> In suit by A against the obligors of a bond, the Court held, for		

**Evidence—(continued.)**

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the reasons stated in its judgment, that the signature of the obligors were not genuine, and directed the prosecution of A on a charge of forgery. On the trial of A before a jury, this judgment of the Civil Court was put in evidence on behalf of the prosecution, and its contents commented on by the Sessions Judge in his charge to the jury.

*Held*, that this judgment had been illegally admitted.

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*Receiving Illegal Gratification—Penal Code (Act XLV of 1860), ss. 161, 165—Evidence of Subsequent but Unconnected Receipt, showing footing on which Parties stood—Evidence Act (I of 1872), ss. 5—13 & 14.* The accused was charged with having received illegal gratification from C and Co. on three specific occasions in 1876, In 1876, 1877, and 1878, C. and Co. were doing business as commissariat contractors, and the accused was the manager of the Commissariat office. *Held*, that evidence of similar but unconnected instances of receiving illegal gratifications from C. and Co. in 1877 and 1878, was not admissible against him under ss. 5 to 13 of the Evidence Act.

*Held*, per GARTH, C.J. (MACLEAN, J., concurring), the evidence was not admissible under s. 14

*Per* GARTH, C.J.—Section 14 applies to cases where a particular act is more or less criminal or culpable according to the state of mind or feeling of the person who does it; not to cases where the question of guilt or innocence depends upon actual facts, and not upon the state of a man's mind or feeling

- *Per* MITTER, J.—If the receipt of the illegal gratifications mentioned in the charge be considered proved by other evidence, and if it were necessary to ascertain whether the accused received them as a motive for showing favour in the exercise of his official functions, the alleged transactions of 1877 and 1878 would be relevant under s. 14, but they would not be relevant to establish the fact of payments in 1876.

THE EMPRESS v. M. J. VYAPOORY MOODELIAR ... VI ... 655

OF ORAL AGREEMENT. See SPECIFIC PERFORMANCE ... VI ... 584

ON COMMISSION IN CRIMINAL CASE. See EVIDENCE ACT, s. 33 ... VI ... 582

SETTLING CASE WITHOUT. See SANCTION TO PROSECUTION ... VI ... 440

**Evidence Act—**

(I OF 1872), ss. 5—13, AND 14 See EVIDENCE ... VI ... 655

ss. 13, 40, 41, 43—*Admissibility in Evidence of Judgments not "inter parties"* *Per* GARTH, C.J., JACKSON, PONTIFEX, and MORRIS, JJ. (MITTER, J., dissenting).—A former judgment, which is not a judgment *in rem*, nor one relating to matters of a public nature, is not admissible in evidence in a subsequent suit, either as a *res judicata*, or as proof of the particular point which it decides, unless between the same parties or those claiming under them.

In a suit between A and B, the question was whether C or D was the heir of H. If C was the heir of H, then A was entitled to succeed; otherwise not. The same question had been raised in a former suit brought by X against A, and decided against A; and this former judgment was admitted in evidence in the suit between A and B, and dealt with by the Courts below as conclusive evidence against A upon the point so decided.

*Held* (MITTER, J., dissenting), that the former judgment was not admissible as evidence in the suit between A and B, either as "a transaction" under s. 13, or as "a fact" under s. 11, or under any other section of the Evidence Act.

GUJU LALL v. FATTEH LALL, ... VI ... 171

**Evidence Act—(continued.)****I OF 1872—(continued.)**

ss. 25, 26—*Admission made to Police Officer before Arrest.* An admission made by an accused person to a Police officer before arrest is admissible in evidence.

THE EMPRESS v. DABEE PERSHAD ... VI ... 530

ss. 30, 138—*Confession—Admission—Examination of Witnesses—Judge—Penal Code (Act XLV of 1860), ss. 114, 149, and 302.* A prisoner, charged together with others with being a member of an unlawful assembly, made a statement before the Committing Magistrate implicating his fellow-prisoners and another person. He subsequently withdrew this statement, and made another, in which he endeavoured to exculpate himself.

*Held*, that this statement was not evidence against the other prisoners under s. 30 of the Evidence Act. It was not a confession, nor did it amount to any admission by the prisoner that he was guilty in any degree of the offence charged; but it was simply an endeavour on his part to explain his own presence on the occasion in such a manner as to exculpate himself, and any mention made by him in such a statement of other persons having been engaged in the riot, was altogether irrelevant, and not evidence against them.

At a trial before a Sessions Court, the Judge, on the examination-in-chief of the witnesses for the prosecution being finished, questioned the witnesses at considerable length upon the points to which he must have known that the cross-examination would certainly and properly be directed.

*Held*, that such a course of procedure was irregular, and opposed to the provisions of s. 138 of the Evidence Act.

It is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions; and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in s. 138 of the Act.

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s. 33—*Evidence of Witness taken upon Commission when admissible in Criminal Trial—High Courts' Criminal Procedure Act (X of 1875), s. 76—Presidency Magistrates' Act (IV of 1877), s. 158.* The evidence of a witness taken upon commission is not admissible in a criminal trial held before the High Court, unless it can be shown that such evidence was so taken upon an order made by that Court under s. 76 of Act X of 1875, or unless it is admissible under s. 33 of the Evidence Act.

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s. 30. See CONFESSION ... VII ... 65

s. 32, cl. 1, and s. 33—"Questions in Issue"—*Charges added at Sessions—Depositions before Magistrate—Witness dying or absconding—Qualification of Jurymen.* In the proceedings before a Magistrate on a charge of causing grievous hurt, two (among other) witnesses, one of whom was the person assaulted, were examined on behalf of the prosecution. The prisoners were committed for trial. Subsequently the person assaulted, died, in consequence of the injuries inflicted on him. At the trial before the Sessions Judge, charges of murder and of culpable homicide not amounting to murder were added to the charge of grievous hurt. The deposition of the deceased witness was put in and read at the Sessions trial.

*Held*, that the evidence was admissible either under s. 32, cl. 1, or s. 33 of the Evidence Act, notwithstanding the additional charges before the Sessions Court.

**Evidence Act—(concluded.)**

**I OF 1872—(concluded.)**

The question whether the proviso to s. 33 of the Evidence Act is applicable—that is, whether the questions at issue are substantially the same—depends upon whether the same evidence is applicable, although different consequences may follow from the same act.

At the trial it was proved that the other witness who had been examined before the Magistrate had disappeared, and that it had been found impossible to serve him with a summons. His deposition was put in and read.

*Held*, that it was properly admitted under s. 33.

IN THE MATTER OF THE PETITION OF ROCHIA MOHATO.  
THE EMPRESS *v.* ROCHIA MOHATO ... .. VII ... 42

s. 33—"Incapable of giving Evidence." The incapacity to give evidence mentioned in s. 33 of the Evidence Act need not be a permanent incapacity.

IN THE MATTER OF THE PETITION OF ASGUR HOSSEIN  
THE EMPRESS *v.* ASGUR HOSSEIN ... .. VI ... 774

s. 65, CL. (c). See EVIDENCE ... .. VII ... 98

s. 74. See PUBLIC DOCUMENTS ... .. VII .. 76

s. 90. See EVIDENCE ... .. VI ... 209

s. 91.—*False Evidence in Judicial Proceeding—Deposition of the Accused when admissible as Evidence—Civil Procedure Code (Act X of 1877), ss. 178, 182, 183, and 647.* Failure to comply with the provisions of ss. 182 and 183 of Act X of 1877 (Civil Procedure Code) in a judicial proceeding, is an informality which renders the deposition of an accused inadmissible in evidence on a charge of giving false evidence based on such deposition, and under s. 91 of Act I of 1872 (Indian Evidence Act), no other evidence of such deposition is admissible.

IN THE MATTER OF THE PETITION OF MAYADER GOSSAMI.  
THE EMPRESS *v.* MAYADER GOSSAMI ... .. VI ... 762

s. 92, PROVISIO 3—*Parol Evidence in addition to condition in Kistbundi—Part Performance of portion of obligation in Kistbundi.* Per GARTH, C. J.—Where, at the time of the execution of a written contract, it is orally agreed between the parties that the written agreement shall not be of any force until some condition precedent has been performed, the rule that parol evidence of such oral agreement is admissible to show that the condition has not been performed, and consequently that the contract has not become binding, cannot apply to a case where the written agreement had not only become binding, but had actually been performed as to a large portion of its obligations.

The true meaning of the words "any obligation" in the 3rd proviso to s. 92 of Act I of 1872 is any obligation whatever under the contract, and not some particular obligation which the contract may contain.

JUGTANUND MISSER *v.* NERGHAN SINGH ... .. VI ... 433

s. 92, PROVISIOES 1 AND 6. See SPECIFIC PERFORMANCE ... .. VI ... 328

s. 115. See ESTOPPEL ... .. VII ... 594

**Examination—**

**OF ACCUSED—**

*Sessions Judge—Code of Criminal Procedure (Act X of 1872), ss. 243, 250, 264, 265.* The authority given to a Sessions Court to examine an accused does not contemplate the cross-examination of such accused, nor can the Judge endeavour, by a series

**Examination—(continued.)**

**OF ACCUSED—(continued.)**

of searching questions, to force the accused to criminate himself. The real object involved in the power given to the Court under s. 250 of the Code of Criminal Procedure is to enable the Judge to ascertain from time to time from the accused (especially if he be undefended) such explanation as he may desire to give regarding any statement made by the witnesses, or, at the close of the case for the prosecution, to elicit from the accused how he proposes to meet such portions of the evidence which, in the opinion of the Court, implicates the accused in the commission of the offence with which he stands charged.

HOSSEIN BUKSH v. THE EMPRESS ... ..	VI ...	96
IN ABSENCE OF ACCUSED. See WITNESSES .. ..	VI ...	774
OF WITNESSES. See EVIDENCE ACT, ss. 30, 138 ...	VI	279

**Exchange—**

* BILL OF. See PROMISSORY NOTE ... ..	VII ...	256
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**Excise—**

*Sale by Wholesale—Sale by Servant—Beng. Act VII of 1878, ss. 15, 59, and 60.* A sale of more than twelve quart bottles, of two gallons of spirituous or fermented liquors of the same kind, made at one transaction is a sale by wholesale.

*Quære.*—Whether a sale of twelve quart bottles of one kind of liquor, and three quart bottles of another kind, at the same time, comes within the prohibition in the explanation clause of s. 15.

The licensed retail vendor himself is the only person liable to conviction under s. 60.

THE EMPRESS v. NUDDIAR CHAND SHAW . . .	VI ...	832
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**Exclusion of Time—**

See LIMITATION . . . . .	VII ...	367
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**Execution—**

*Attachment by more than one Judgment-Creditor of Property of Judgment-debtor in Court—Priority—Civil Procedure Code (Act X of 1877), ss. 272 and 295.* In execution of a decree of a Munsif's Court, the plaintiff attached certain money, the proceeds of decrees which her judgment-debtor had obtained against third parties, then lying in a Small Cause Court to her credit, and subsequently obtained an order from the Munsif directing the same to be paid to her in satisfaction of her decree, which order was duly communicated to the Small Cause Court Judge. Subsequently, the defendant, who held another decree against the same judgment-debtor, attached the same sale-proceeds. The Small Cause Court Judge then proceeded, under s. 272 of the Civil Procedure Code, to enquire whether the plaintiff was entitled to any priority over the second attaching creditor, and having decided that question in the negative, divided the sale-proceeds rateably between them. In a suit brought by the plaintiff, under the above circumstances, to recover from the defendant the portion of the sale-proceeds so paid to him—

*Held,* that s. 295 of the Civil Procedure Code had no application, inasmuch as the plaintiff had not applied to the Small Cause Court Judge to execute her decree, and it had never been transferred to that Court for execution; and that, the proviso in s. 272 is merely intended to mean that any question of title



**Execution—(continued.)**

or priority is to be determined by the Court in which, or in whose custody, the property is, and not by the Court which made the order of attachment.

*Held*, also, that, previous to the order by the Munsif directing the payment to be made to the plaintiff, the Small Cause Court Judge would have had jurisdiction to deal with the question he had tried; but, as that order was made prior to the attachment by the defendant, the judgment-debtor had no interest in the money which could be so attached, the effect of that order being to vest the property in the money in the plaintiff, and to take it out of the disposal of the Small Cause Court Judge, and consequently the order for distribution was wrong, and the plaintiff was entitled to the decree she sought.

*Quere*.—Whether an order made by a Court under s. 272 was intended by the Legislature to be a final order?

GOPEE NATH ACHARJE v. ACHCHA BIBE 553

*Irregularities in Proclamation of Sale—Evidence of such Irregularities—Nazi's Report—Civil Procedure Code (Act X of 1877), ss. 274, 287, 289, 290, 291, and 295—Sale to satisfy Judgment-creditor who has not attached.* The proclamation of sale required by s. 274 of the Civil Procedure Code, to be made at some place adjacent to the property to be sold, and the fixing up of a copy of the order in a conspicuous part of the property, are acts which must precede the posting of the notices in the Court-house as required by s. 290.

Where the sale-proceeds of a portion of several parcels of property are sufficient to satisfy the decree of a judgment-creditor who has attached the property, another judgment-creditor, although he has not attached the property, is still entitled to have the remainder of the property sold to satisfy his decree under the provisions of s. 295 of the Civil Procedure Code.

Three mouzas were attached in execution of decrees obtained by A and B. Prior to the sale, C, who had also obtained a decree against the owner of the land, applied for leave to execute his decree, in order that he might participate in the sale-proceeds under s. 295 of the Civil Procedure Code. Upon the day fixed for the sale, the Deputy Commissioner was unable, through illness, to attend; and he postponed the sale for three days. Two of the mouzas were sold, and realized more than enough to satisfy the decrees of A and B. The third was then sold in satisfaction of C's decree. Upon an application by the judgment-debtor to set aside the sale on the ground of irregularity, it appeared, that notice of the sale had been posted in the Court-house more than thirty days before the date fixed for the sale, but had only been published on the properties to be sold five days before that date; that notice of the existence of a mortgage on the properties, but no further particulars, was given, and the mortgagee was allowed to purchase, and that the Deputy Commissioner had accepted the reports of the Nazir and Court-peon as to the proclamation of sale, and had refused to allow the judgment-debtor to give evidence of its insufficiency.

*Held*, that the proclamation of sale on the property having taken place only five days prior to the date of sale, and the particulars of the mortgage not having been given, there had been such material irregularities in the publication as to entitle the judgment-debtor to give evidence of them and the other allegations made by him, in order to show that he had suffered material injury by reason of such irregularities.

*Held* also, that the Deputy Commissioner was not entitled to proceed upon the reports of the Nazir and Court-peon, but was

**Execution—(continued.)**

bound to hear the evidence tendered by the judgment-debtor, though he was justified, under s. 291, in postponing the sale as he had done.

*Held* further, that the third judgment-debtor, who had not attached the property, was still entitled to have the sale proceeded with and his decree satisfied under the provisions of s. 295.

MOHUNT MEGH LALL POOREE v. SHIB PERSHAD MADI ... VII .. 34

*Irregularity in Publishing and Conducting a Sale—Waiver of Irregularity by the Judgment-Debtor.* Previous to the date fixed for the sale of certain property in execution of a decree, the judgment-debtors presented a petition, praying for a month's further time to be allowed them in order that they might complete the arrangements they were making for the purpose of paying off the debt, and stating that the decree-holder had attached and advertised the property for sale. That petition being refused, the sale took place, and subsequently the judgment-debtors came in and objected to the sale, and asked to have it set aside, on the ground that there had been material irregularity in the publication of the attachment and sale-proclamation, and that, consequently, they had suffered substantial injury. The Subordinate Judge refused to hear evidence on this point, holding that the petition was an admission that the proceedings were in order.

*Held*, that the petition presented prior to the sale did not amount to an admission by the judgment-debtors that the publication and proclamation of the sale had been duly made, and that consequently, the Court was bound to hear the evidence tendered by the judgment-debtors on that point, and to find whether there had been such irregularities in publishing and conducting the sale as to occasion substantial injury to the judgment-debtors.

THAKOOR MAHATAB DEO v. LEELANUND SINGH ... VII ... 613

*Limitation—Civil Procedure Code (Act X of 1877), ss. 230, 235, 236, and 237.* In execution of a decree passed more than twelve years before the date of the Civil Procedure Code (Act X of 1877), certain judgment-creditors applied for the attachment and sale of certain specified property belonging to their judgment-debtor, previous to the date on which the three years allowed for such execution, under s. 230, would have expired. Subsequently, after the three years had elapsed, they filed a fresh application, praying that certain other property of their judgment-debtor might be attached and sold in lieu of that specified in their former application, and that the latter might be released.

*Held*, that execution of the decree was barred by limitation.

*Per PRINSEP, J.*—Under s. 230 of the Civil Procedure Code, it was intended by the Legislature that a decree-holder seeking to execute a decree passed more than twelve years before, should have one opportunity to execute that decree, and that, if he fails to satisfy it on that application, any further application becomes barred.

SREENATH GOOHO v. YUSOOF KHAN... VII ... 556

*Limitation—Appellate Court—Privy Council—Limitation Act (IX of 1871), sched. ii, arts. 167, 169—Act VI of 1874, s. 21—Limitation Act (XV of 1877), sched. ii, arts. 177, 179, and 180—Interest, Rate of.* The term 'appeal' in art. 167 of sched. ii of the Limitation Act (IX of 1871) includes an appeal to the Privy Council, and the term 'Appellate Court' in the same article includes the Judicial Committee of the Privy Council sitting for the purpose of hearing appeals from orders passed by British Courts in India.

**Execution—(continued.)**

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Where an appeal had been preferred to Her Majesty in Council from a decree of the High Court reversing the decree of the Court of first instance, and the High Court's decree was affirmed by an order of Her Majesty in Council, dated the 15th February 1873, and an application for execution of the High Court's decree was made on the 17th November 1875, more than three years after the date of the decree, but within that period of the order of Her Majesty in Council—

*Held*, that, under art. 167 of sched. ii, Act IX of 1871, the limitation of such application must be computed from the date of the order of Her Majesty in Council, and consequently that the application for execution was not barred.

GOPIAL SAHU DEO *v.* JOYRAM TEWARY

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*Mortgage-Decree—Stay of sale pending Administration-Suit—Appealable order—Civil Procedure Code (Act X of 1877), s. 244, cl. (c).* In execution of a decree on a mortgage-bond executed by the father of the judgment-debtors, since deceased, which decree directed that the mortgage lien should be enforced—*first* by sale of the property specifically mortgaged; and *secondly*, if the debt remained unsatisfied, by the sale of the other property in the possession of the judgment-debtors, the judgment-creditor proceeded to have the mortgaged property sold. • After the issue of the sale-notification, and three days prior to the date fixed for the sale, one of the judgment-debtors applied to have the sale stayed, on the ground that an administration-suit was pending with respect to the property of his father, the mortgagor, and also asked that a receiver might be appointed and arrangements made for the purpose of paying off the mortgage-debt and saving the property from being sold. On this application the Court passed an order staying the sale.

*Held*, that such order was appealable, being a question arising between the parties to the suit in which the decree was passed and relating to the execution of that decree, and as such coming within the provision of cl. (c), s. 244, Act X of 1877 (Civil Procedure Code).

*Held* also, that the Court was wrong in passing such order, inasmuch as there were no reasonable grounds why a secured creditor should be debarred from enforcing his security pending the administration-suit.

KRISTOMOHINY DOSSEE *v.* BAMA CHURN NAG CHOWDRY

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APPLICATION FOR. See APPLICATION FOR EXECUTION OF DECREE ...

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BARRED AT TIME OF SALE. See DECREE FOR SALE ...

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BY HIGH COURT, APPELLATE SIDE, See HIGH COURT, APPELLATE SIDE ...

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PRIVATE SALE OF PROPERTY ATTACHED IN. See

PRIVATE SALE OF PROPERTY ATTACHED IN EXECUTION ...

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OF DECREE—

*Arrest—Purdahnashin Lady—Entering Zenana Civil Procedure Code (Act X of 1877), ss. 271, 336, 640.* It is not necessary that a special order of Court should be made, empowering an officer authorized to arrest a purdahnashin lady to enter the zenana of the house in which she resides. Under s. 336 of the Civil Procedure Code, if the officer is able to enter the house, he may break into any room in the house, including the zenana, in order to effect the arrest.

S. M. KADUMBHINE DOSSEE *v.* S. M. KOYLASHKAMINEE DOSSEE

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*Debt payable by Instalments—Failure to Pay—Limitation Act (XV of 1877), sched. ii, art. 179.* The terms of compromise in a suit for money provided that the debt should be paid by monthly instalments, and that, on the failure to pay any three successive instalments, the entire amount should be

**Execution—(continued.)****OF DECREE—(continued.)**

recoverable by application to execute the full decree. The decree was dated the 12th June 1875, the first instalment was due in July 1875, and the last in October 1877. Default was made in payment of the first three instalments, but the decree-holder did not apply for execution, and accepted subsequent payments. On the 13th December 1879, he applied for execution for the amount then remaining due.

*Held*, that the period of limitation prescribed by art. 179, sched. ii of Act XV of 1877, began to run on the third default taking place, and that no subsequent payment could stop limitation once begun.

\* **ASMUTULLAH DALAL v. KALLY CHURN MITTER** ... VII ... 56

*Partial Satisfaction under Arrangements made by Court—Limitation—Subsequent Application for Execution.* In execution of a decree, an order was made by the Court, directing the payment of the rents of certain property, which had been attached, as they became due from the mukuridar to the judgment-debtors, to be made to the decree-holder, to satisfy his decree; and afterwards the execution case was struck off the file. Subsequently, default having been made by the mukuridar in the payment of the rents of certain years, and the decree not having been fully satisfied, the decree-holder applied for an order directing the payment of the rents which were in arrear to be made by the mukuridar in accordance with the previous order. Notice having been directed to be served on the judgment-debtors, they came in, and pleaded limitation.

*Held*, that as the application was not strictly one for fresh execution, limitation could not apply; and that, as the effect of the order in the execution-proceedings was virtually to appoint the decree-holder receiver under the provisions of s. 243 of Act VIII of 1859, and as the attachment was still in force, his proper course was to file a regular suit *qua*-receiver against the mukuridar.

**RADHA KISSORE BOSE v. AFTAB CHUNDRA MAHATAB** ... VII ... 61

*Merger—Foreign judgment—Act X of 1877, ss. 12 and 14.* The judgment of a foreign Court, obtained on a decree of a Court in British India, is no bar to the execution of the original decree.

\* **FAKURUDEEN MAHOMED ASSAN v. THE OFFICIAL TRUSTEE OF BENGAL** ... VII .. 82

*Sale in Execution—Material Irregularity—Civil Procedure Code (Act X of 1877), ss. 274, 289, 311.* Under ss. 289 and 274 of the Civil Procedure Code, it is necessary that a copy of the sale-proclamation should be affixed to some conspicuous place on the property attached; and the omission to do so is a material irregularity within the meaning of s. 311 of the Code of Civil Procedure.

If it is proved that the price obtained for property sold at an execution-sale is greatly inadequate, and if it be also proved that there has been a material irregularity in publishing or conducting the sale, the Court will, presume that the irregularity was the cause of the inadequacy of price, until proof is given to the contrary.

**KALYTARA CHOWDHRAIN v. RAMCOOMAR GOPTA** ... VII ... 466

*Relief asked for in accordance with Statements in Plaint not forming a separate Prayer in the Plaint—General Prayer for Relief—Control of Execution.* A, a joint owner of an estate with B, saved the joint estate from sale for arrears of Government revenue, in payment of which B had made default, for such purpose mortgaging her share in the estate to E. A then sued B for contribution. Pending that suit, B again made default, and the estate was sold and purchased by C,

**Execution—(continued.)**

**OF DECREE—(continued.)**

subject to incumbrances. Subsequently, A obtained her decree against B, and assigned her decree to D, who obtained an order for execution, and attached certain property belonging to B. D and E then entered into an agreement with C, that they would release C and the share charged with payment of A's decree, from all liability, and that they would entrust the whole conduct of the execution-proceedings to C, in consideration of his granting a perpetual lease of part of the property to D and E. In pursuance of this agreement, D and E granted a release to C, and C granted a lease to E for himself, and it was contended, also, as benamidar of D. The agreement contained a proviso that should the Court, in which the decree should be executed, of its own accord or on the petition of B, or his legal representative, notwithstanding objection on the part of D and E, make any order directing the decree to be executed against this estate, then in such case D and E should not be bound by the release, and that it should be open to C, to cancel the agreement. D applied for execution against the estate of the adopted son of B (who had died), but subsequently abandoned all proceedings and transferred his decree to the High Court to obtain execution against a house belonging to C, in Calcutta. The adopted son and widow of B, in a suit brought against C and D, objected to the execution-proceedings, and after paying the sum due to D into Court, asked for an injunction staying all further proceedings in execution until the hearing of the suit.

*Held*, that D had obtained, out of the lien directed by the decree, some benefit or advantage, which the plaintiffs might have a right to have valued at the hearing, and that, notwithstanding this did not from the subject of a separate prayer in the plaint, the Court would grant the injunction.

KRISTO MOHINIFY DOSSEE v. KALLY PROSONNO GHOSE ..

VI ... 485

*Civil Procedure Code (Act X of 1877), ss. 248 and 311.*

When a judgment-debtor has died after decree, but before application has been made to execute the decree, the Court, before directing the attachment and sale of any property to proceed, must issue a notice to the party against whom the execution is applied for to show cause why the decree should not be executed against him, and its omission to do so will invalidate the entire subsequent proceedings.

IN THE MATTER OF THE PETITION OF RAMESSURI DASSEE.

RAMESSURI DASSEE v. DOORGADASS CHATTERJEE ...

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*Civil Procedure Code (Act X of 1877), s. 234—Representative of*

*Deceased Husband's Estate—Form of Decree against Hindu widow* A Hindu widow instituted a suit to recover possession of certain property belonging to her deceased husband, and that suit was dismissed with costs. The widow having died before execution for the costs was taken out, the decree-holder sought to take out execution against the next heirs of the late widow's deceased husband. *Held*, that the fact, that the widow did not in her suit seek to recover any interest personal to herself, but that she contracted the judgment-debt in the effort to recover a portion of her husband's estate, to which in its entirety the next heirs or her late husband had succeeded, was sufficient to make the whole estate liable, and would entitle the decree-holder to satisfy his decree against "the legal representatives" of the late widow's husband, under s. 234 of Act X of 1877.

In a decree against a Hindu widow, it should be stated whether the decree, is a personal decree, or one against her as representing her deceased husband.

RAMKISHORE CHUCKERBUTTY v. KALLYKANTO CHUCKERBUTTY ...

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**Execution—(continued.)****OF DECREE.—(concluded.)**

*Court which passed the decree—Civil Procedure Code (Act X of 1877, as amended by Act XII of 1879), ss. 223, 649—Limitation Act (XV of 1877), sched. in. art. 179, cl. 4.* *Per* GARTH, C.J. Section 649 of the Civil Procedure Code, as amended by Act XII of 1879, which explains the meaning of the expression the "Court which passed the decree," does not *exclude* the Court which originally passed the decree as being a Court in which an application for execution should be made, but merely *includes* another Court.

When, therefore, a Court which has passed a decree has ceased to have jurisdiction to execute it, the application for execution may be made either to that Court, although it has ceased to have jurisdiction to execute the decree, or to the Court which (if the suit wherein the decree was passed were instituted at the time of making application to execute it) would have jurisdiction to try the suit.

*Per* FIELD, J.—A Court does not cease to be "the Court which passed the decree" merely by reason that the head-quarters of such Court are removed to another place, or merely because the local limits of the jurisdiction of such Court are altered.

An application for the transfer of a decree under the provisions of s. 223 and the following section of Act X of 1877, is a step in aid of the execution of the decree within the meaning of cl. 4, art. 179, sched. II of Act XV of 1877.

LATCHMAN PUNDEH v. MADDAN MOHUN SHYE ... VI .. 519

*Satisfaction, plea of, in Bar—Civil Procedure Code (Act X of 1877), ss. 244 and 258* Where a decree-holder, declared to be entitled to possession of certain land, subsequent to decree executed a patta in favour of his judgment-debtor, who was then in possession, and afterwards took out execution under his decree—

*Held*—on an objection by the judgment-debtor that, under these circumstances, he was not entitled to possession—that satisfaction of the decree not having been entered up, such objection could not be dealt with under s. 244 of the Civil Procedure Code.

*Held* also, that s. 258 of the Civil Procedure Code deals with the adjustment of any decree, and not merely with the adjustment of a money-decree.

BABA MOHAMED v. WEBB ... VI ... 786

See SALE BY SHERIFF IN EXECUTION OF DECREE.  
REVIVOR. BENG. ACT VIII OF 1869, s. 58 ... VI ... 356

OF JOINT DECREE. See LIMITATION ACT, XV OF 1877,  
SCHED. II, ART. 179 ... VI ... 194

*Sale of undertenure—Sale of other Immoveable property of Judgment debtor—Beng. Act VIII of 1869, ss. 59—61.* A judgment-creditor, who has obtained a decree for arrears of rent due in respect of an undertenure transferable by its own title-deeds or by the custom of the country, is not bound to bring that undertenure to sale in execution before he can proceed against other immoveable property belonging to his judgment-debtor.

The case of *Desaratullah v. Nawab Nazim Nazar Ali Khan* which was decided upon s. 105 of Act X of 1859, is not applicable to ss. 59—61 of Beng. Act VIII of 1869.

KRISTO RAM v. JANOKEE NATH ROY ... VII ... 748

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**OF MORTGAGE-DECREE—**

*Beng. Act VII of 1868—Sale of mortgaged Property—Surplus sale-proceeds—Attachment of surplus sale-proceeds.* The purchaser of property, sold subject to the incumbrances thereon, at a sale under Beng. Act VII of 1868, subsequently became the purchaser of a decree passed prior to the sale in a suit upon a mortgage of the property, such decree being declared not only a charge on the mortgaged property, but also personal against the mortgagor.

*Held,* that the purchaser was not entitled to execute the decree against the surplus sale-proceeds under such sale, although he abandoned his lien on the property.

<b>GOLUK CHUNDER MAHINDA v. SURBOMANGALA DABI</b> ...	VI ...	711
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**PROCEEDINGS—**

*Mesne profits—Amount awarded in execution larger than that claimed in plaint—Court Fees Act (VII of 1870), s. 11, para. 2.* The plaintiff brought a suit for possession, and for a certain sum as mesne profits, which he assessed at three times the annual rent paid to the defendant by tenants in actual possession of the land. He obtained a decree for possession, and the decree ordered that the amount of mesne profits due to him should be determined in the execution-proceedings. On an investigation, a larger sum was found to be due to him for mesne profits than that claimed by him in his suit. The plaintiff, therefore, paid the excess fee as provided by para. 2 of s. 11 of Act VII of 1870; but *held,* that the amount of mesne profits recoverable by him must be limited to the amount claimed in the plaint.

<b>BABOJAN JHA v. BYJNATH DUTT JHA</b> ... ..	VI ...	472
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<b>PROOF OF. See ONUS PROBANDI</b> .. ..	VI ...	268
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**SALE.—**

*Material Irregularity—Sale of a Portion of a Tenure—Sale for Arrears of Rent—Mortgage-decree—Civil Procedure Code (Act X of 1877), s. 311.* The mere fact that the amount of rent payable in respect of a tenure brought to sale in execution of a decree is not stated in the sale-proclamation, is not a material irregularity within the meaning of s. 311 of the Civil Procedure Code (Act X of 1877), though, if the amount of rent payable were stated to be more than it actually was, that might constitute such an irregularity, as tending to lessen the price at which purchasers might be willing to buy.

Where decree for arrears of rent had been obtained by fractional share-holders in a tenure, and in execution thereof a moiety of the tenure had been sold, it appeared that the other moiety had been sold at the same time in execution of a mortgage-decree against some of the judgment-debtors in the rent-suits, on an objection being taken to the confirmation of such sale on the ground that the whole tenure should have been sold in execution of the rent-decrees—

*Held,* that all that the decree-holders were entitled to have sold, was the right, title, and interest of their judgment-debtors, and that they were in the position of ordinary creditors having no lien on the tenure, and that, consequently, the mortgagor being entitled to enforce his lien against the moiety covered by his mortgage, the sale of the remaining moiety in satisfaction of the rent-decrees was a good sale, and could not be set aside.

<b>MOHENDRO COOMAR DUTT v. HEERA MOHUN COONDOO AND ISHANESWARY DASEE v. GOPAL DAS DUTT</b> ...	VII ...	723
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<b>WITHDRAWAL OF. See MORTGAGE DECREE FOR ACCOUNT AND SALE</b> ... ..	VI ...	377
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**Executors—**

*Administration-Bond—Indian Succession Act (X of 1865), s. 256*  
*—Probate.* Executors, as well as administrators, are liable, under s. 256 of the Succession Act, to give a bond to the Judge of the District Court for the due collection, getting in, and administering the estate of the deceased.

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**Explanation of Documents—**

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**Extinguishment of Right—**

See LIMITATION ACT, IX OF 1871, s. 20 ... VI ... 340

**Fabricating False Evidence—**

See PENAL CODE, ss. 192, 464, CL. 2 ... VI ... 482

**Failure—**

BY WIDOW TO ADOPT. See HINDU WILL, ADOPTION .. VII ... 288

**Fair Rent—**

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**False Charge—**

See PENAL CODE, s. 211 ... VI .. 582  
 PROSECUTION FOR. See PENAL CODE, s. 211 ... VI ... 496, 584  
 TO COURT OR OFFICER HAVING NO JURISDICTION.  
 See PENAL CODE, s. 211 ... VI ... 620

*Penal Code (Act XLV of 1860), s. 211—Opportunity of substantiating Charge.* Upon a trial for bringing a false charge with intent to injure, it appeared that the original complaint was lodged in the Court of the Extra Assistant Commissioner, and a local enquiry by a competent police officer was directed. The officer reported that the charge was false, and recommended that the prisoner should be prosecuted. The Extra Assistant Commissioner ordered the papers to be sent to the Deputy Commissioner, who ordered the prosecution, and the prisoner was convicted.

*Held* that the conviction was bad. Tho Extra Assistant Commissioner should, on receipt of the report of the police, have communicated its contents to the prisoner and afforded her an opportunity of substantiating her complaint, and should then have decided the case.

IN THE MATTER OF THE PETITION OF SOKHINA BIBI. THE EMPRESS v. GRISH CHUNDER NUNDI ... VII 87

*Dismissal of Complaint—Prosecution under s. 211 of Penal Code (Act XLV of 1860)—Criminal Procedure Code (Act X of 1872), ss. 144, 147, 489, 470, and 471.* Where a charge had been preferred against a person and the Magistrate, before whom it



**False Charge—(continued.)**

was heard, after hearing the statement of the complainant, but not those of his witnesses, dismissed the complaint; and subsequently, on the application of the person charged, granted him leave under s. 470 to prosecute the complainant for bringing a false charge—

*Held*, that the proceedings were not irregular, and that the Magistrate was justified in acting as he had done.

*Held* also, that there is a distinction in the proceedings to be adopted when a sanction is given under s. 470, and the institution by the Court of its own motion of proceedings under s. 471.

**IN THE MATTER OF GYAN CHUNDER ROY v. PROTAP CHUN-**

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<i>Attempt to commit forgery—Indian Penal Code (Act XLV of 1860), ss. 465 and 511. A person cannot be convicted of an attempt to commit an offence under s. 511 of the Indian Penal Code, unless the offence would have been committed if the attempt charged had succeeded</i>		
A prisoner, who was charged with attempting to commit forgery of a valuable security, was found guilty by the jury of attempting to commit forgery. The jury explained their finding by saying that the prisoner had ordered certain receipt forms to be printed similar to those used by the Bengal Coal Company, and that one of these forms had actually been printed and the proof corrected by him; that the prisoner had had an intention of making such addition to the printed form as would make it a false document; and that he did this dishonestly and with intent to commit fraud. The Sessions Judge sentenced the prisoner to rigorous imprisonment for one year under ss. 465 and 511 of the Indian Penal Code for attempting to commit forgery		
<i>Held</i> , that the conviction was wrong, and must be set aside.		
IN THE MATTER OF THE PETITION OF RIASAT ALI <i>alias</i> BABU MIYA, <i>alias</i> BODIUZZUMA. THE EMPRESS v. RIASAT ALI, <i>alias</i> BABU MIYA <i>alias</i> BODIUZZUMA...	VII ...	352
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<i>Altering a document—Material alteration—Bond—Forgery.</i> A person, who had a bond executed in his favour by one of three brothers, forged the signatures of the other two brothers to the bond, and brought a suit upon it in its altered form against the three brothers. The forgery having been established, the Court of first instance dismissed the suit as against all the three defendants, and this decision was affirmed on appeal. On second appeal to the High Court.—		
<i>Held</i> , that the decision was correct, as a material alteration in a bond is, if fraudulently made, sufficient to render the bond void.		
A party who has the custody of an instrument made for his benefit is bound to preserve it in its original state, and any material alteration of it will vitiate the instrument.		

**Fraud—(continued.)**

Where a person brings a suit upon a document which, when produced in evidence, is found to have been fraudulently altered to the knowledge of the plaintiff, no Court ought to allow an amendment to enable him to succeed upon it in its original state.

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**Gift—**

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**Goods—**

**SOLD UNDER EXECUTION—**

*Limitation Act (XV of 1877) s. Sched. ii, art. 11.* A person whose goods are illegally sold under an execution, does not lose his right to them, although he may have claimed them unsuccessfully in the execution-proceedings. He may follow them into the hands of the purchaser or of any other person, and sue for them or their value without reference to anything which has taken place in the execution-proceedings, except that, under art. 11, sched. ii, Act XV of 1877, he must bring his suit within one year from the time when the adverse order in the execution-proceedings was made.

SHIBOO NARAIN SINGH v. MUDDEN ALLY ... VII ... 608

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<b>Grandmother—</b>		
RIGHT OF, TO SHARE ON PARTITION. See HINDU LAW, PARTITION ... .. VII ...		191
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<i>Application for Certificate—Grounds for Refusal—Right of Appeal</i> —Act XL of 1858, s. 28. An application for a certificate under Act XL of 1858 (which, if successful, would, in effect, prolong the minority of an infant from eighteen to twenty-one), should not be granted when the alleged minor is admittedly on the point of attaining the age of eighteen, unless under particular circumstances, as where very great weakness of mind is proved, or where it is shown that there is some absolute necessity for making such order.		
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IN THE MATTER OF THE PETITION OF NAZIRUN MUHAMDEE v. NAZIRUN ... .. VI ...		19
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<b>APPELLATE SIDE—</b> <i>Jurisdiction to execute Decrees—Civil Procedure Code (Act X of 1877), s. 649. Although the High Court in its Appellate Side does not, as a general rule, execute its own decrees or orders, yet this circumstance in no way affects the vitality of its jurisdiction in this respect, and it cannot therefore be included among Courts which have ceased to have jurisdiction to execute decrees as specified under s. 649 of the Code of Civil Procedure.</i>		
HURRO PERSHAD ROY CHOWDHRY v. BHUPENDRO NARAIN DUTT ... .. VI ...		201
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<i>Adoption among Sudras—Execution of Mutual Deeds</i> —Actual giving and taking of Child. Although it has been held that, in the case of Sudras, no ceremonies except the giving and taking of the child are necessary to an adoption,		

**Hindu Law—(continued.)**

yet it is not to be taken for granted, that such giving and taking can be completed by the execution of mutual deeds without more; but, *semble*, that, according to Hindu usage which the Courts should accept as governing the law, the giving and taking in such an adoption ought to take place by the father handing over the child to the adoptive mother, the latter intimating her acceptance of the child in adoption.

In this case it was found on the evidence, that it was not the intention of the parties to complete the adoption by the mere execution of the deeds.

SHOSHINATH GHOSE *v.* KRISHNASUNDERI DASÍ ... VI ... 381

*Adoption of Grandnephew—Reflection of a Son—Appointment.* A grandnephew may be validly adopted under Hindu law.

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FAMILY, CONTRACT BY ONE MEMBER OF. See JURISDICTION ... VII ... 739

**MITAKSHARA—**

*Mortgage of Ancestral Estate by Father for Family Purposes—Attachment of Property in Execution of Decree—Death of Judgment-Debtor prior to Sale.* Where a decree on a mortgage was obtained against the father of a joint Hindu family governed by the Mitakshara law, the debt having been incurred for joint family purposes, and in execution thereof the joint family property was attached, but prior to sale the judgment-debtor died, in a suit subsequently brought by the other members of the joint family, praying for a partition of their shares, and for a declaration that such shares were not liable to be sold in execution of the mortgage decree—

*Held*, that there could not be a partition as between a person already dead and his sons, and that the whole of the ancestral property was liable for the mortgage-debt, the only declaration to which the plaintiffs could be entitled being, that they were not liable to pay the debt.

GOHURDHON LALL *v.* SINGESSUR DUTT KOER ... VII ... 52

*Minor—Partition—Specification of Shares under Land Registration Act (Beng. Act VII of 1876)—Certificate under Act XL of 1858.* B, a Hindu governed by the Mitakshara law, died, leaving two minor sons, J and K, and also a widow L and two minor sons by her, the mother of J and K having predeceased him. On J's attaining majority, the Court of Wards, which had taken possession of all the property, withdrew from the management; and L then applied under Act XL of 1858, and obtained a certificate with respect to the shares of K and her two minor sons. Subsequently K having attained majority, his share was excluded from the operation of the certificate. On the death of J, leaving H, his widow, and an infant son by her, H applied for a similar certificate, under Act XL of 1858, with respect to the property of her son, and it appeared that K was incapable of managing the property.

*Held*, that, though the certificate granted to L had been improperly obtained, H was not entitled to one as, no partition having taken place since B's death, the property was still the joint family property.

*Held* also, that neither the granting of the certificate to L, nor the registration of the specific shares of each of the coowners under the provisions of the Land Registration Act, amounted to a partition, such as to justify the Court in granting the certificate asked for.

HQOLASH KOOEER *v.* KASSEER PROSHAD. ... VII ... 369

**Hindu Law—(continued.)****PARTITION—**

*Grandchildren—Right of grandmother to share.* In a suit for partition among the members of a joint Hindu family, consisting of the heirs, in different degrees, of five brothers, a decree for partition according to certain proportions was made, subject, so far as the decree affected property derived through the eldest brother, to maintenance for his widow A. Among other parties to the suit were B, the granddaughter by the eldest son of A, and C, her second son. C died in 1880, leaving a widow D and four infant sons.

A, who was not party to the partition suit, now sued B and D and the infant sons of C for a declaration that she, as such widow and mother, was entitled to a share in the partitioned properties equal to those of her granddaughter B, and her grandsons, the infant sons of C.

*Held*, that such a suit would lie, it not being a suit for partition exclusively among grandsons, and that A was entitled to an equal share with her granddaughter and grandsons in the properties which, under the partition decree, had been allotted to the representatives of her husband, and to a life-interest in the income of the property remaining unpartitioned.

SIRBOSOONDERY DABIA v. BUSSOOMUTTY DABIA...

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**WILL—**

*Estate Tail—Accumulation.* A Hindu, by his will, directed that his estate should remain intact, and that the profits should be applied, in the first place, towards performing religious duties; and he provided that his immoveable property, business, and the capital stock thereof should also remain intact, and that his heirs, sons' sons, and great grandsons in succession, should be entitled to the profits, no person having any right of alienation.

The testator then provided that his eldest son should act as manager and shevart, and prepare accounts, and that he should have no power of alienation. He then made provisions for the payment of Government revenue, and declared that, of the surplus profits, six-sixteenths should be applied, in part, towards the worship of his ancestral deities, and the residue towards the maintenance of all the members of the family, and religious ceremonies; the remaining ten-sixteenths to be carried to the credit of his estate. In case of disputes between his eldest son and the testator's third wife, the mother of the testator's minor children, the testator directed that his eldest son should receive five-sixteenths of the ten annas share; if another son should be born of the testator's third wife, the remaining eleven-sixteenths was to go to her sons. If no son was born, then the eldest son was to take five and-a-half-sixteenths, and the sons of the third wife the remaining ten and-a-half-sixteenths, absolutely, as long as the family remained joint; the expenses of the *debsheva* and maintenance of the family were to be defrayed from the six annas share. In case of separation, the shares of the sons were to be placed to their respective credits every year, each son on attaining majority to be entitled to his share.

The testator then provided, that, in case of separation, his sons (with the exception of the landed properties and capital stock of the business, and the articles used by the idols) should be at liberty to take the moveable property absolutely, according to the conditions laid down for the division of the ten annas share of the profits. He then provided for the maintenance of his third wife and minor sons out of the six annas share, each son on attaining majority to be entitled to his share under the will absolutely. After providing that his sons should live in his ancestral dwelling house, but that none of them should have

**Hindu Law—(continued.)**

**WILL—(continued.)**

any power of alienation, the testator directed that, if any of his heirs died without male issue, the widow of such heir should receive maintenance only, and that his grandson by a daughter should get nothing, but his share should go over to the surviving sons. The testator finally directed that his eldest son, sons' grandsons, and other heirs in succession should perform the duties of kurta and shevat.

In a suit by the widow of one of the testator's sons by his third wife, seeking to recover such a share of the testator's property as she would have been entitled to in case of intestacy—

*Held*, that the intention of the testator, in disposing of the profits of the six annas share, was not an intention to create a valid estate in the *corpus* in favour of any individual, but to tie up such *corpus* and to give the profits only to his male descendants; or, in other words, to create a sort of estate in tail male in the profits, and that the bequest was void.

*Held* also, that the disposition of the ten annas share of the profits was void, there being in one event a direction to accumulate for ever without a disposition of the profits; and in the other event, the gift was void for the same reasons as the gift of the six annas share

*Held* further, that the disposition of the family dwelling-house, save in so far as it prohibited alienation, was good, and that there was a sufficient disposition of the moveable property.

SHOOKMOY CHUNDER DASS v MONOHARI DASSI ...

VII ... 269

*Construction of—Use of Words "putrapoutradi krane"—Condition subsequent.* In a will, the words "*putra poutradi krane*," recognized as apt for conveying an estate of inheritance, do not limit the succession to male descendants and will include female heirs of a female, where by law the estate would descend to such heirs.

The will of a Hindu, who died, leaving only a widow, a daughter's daughter, and a brother, directed as follows —

"7. If no daughter or daughter's son of mine should be living at the time of the death of my wife, then my granddaughter (daughter's daughter) shall become the proprietress of my property, and shall remain in undisputed possession thereof, '*putra poutradi krane*.'"

"8. If the death of my wife should take place before my daughter's daughter arrives at majority and bears a son, then the whole of the estate shall remain in charge of the Court of Wards until she arrives at majority and bears a son.

"9. If my daughter's daughter should be barren or a sonless widow, or if she should be otherwise disqualified, she shall not become entitled to my property, but shall receive an allowance of Rs. 300 per mensem for her life."

"20. If no son or daughter should be born to me, and if my daughter's daughter should die before she bears a son, or if she should be barren or become a sonless widow, or be otherwise disqualified, then the whole of my properties shall pass into the hands of the Government."

The will further directed the use of the money by the Government in that event, for certain charitable purposes.

In an administration-suit brought by the Secretary of State in Council against the testator's brother, wife, and granddaughter, for the carrying out of the trusts of the will—

*Held*, that clause 7, if it stood alone, would confer an absolute estate on the daughter's daughter on the death of the widow;

**Hindu Law—(continued.)****WILL—(concluded).**

That the disqualifications in clause 9 must come into operation, if at all, at or before the death of the widow, and that it was unnecessary to decide whether, if they had been conditions subsequent, they would or would not have been in violation of Hindu law.

That clause 20 was supplementary to clause 9, and that by it, the gift over to the Government was to take effect, if at all, immediately upon the widow's death, in the event of the grand-daughter dying before her without having borne a son, or in the event of the grand-daughter being disqualified at the date of such death.

One possible event not having been provided for by the will, viz., that of the granddaughter predeceasing the widow, having borne a son; their Lordships did not decide what would happen on the occurrence of that event. The rights of a son yet unborn would not, in the case supposed, be affected by any judgment in these proceedings.

**RAMLAL MOOKERJEE v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL** ... ..

VII .. 904

*Adoption by Widow—Contingent Reversionary heir—Collusion—Party to suit to contest Adoption.* Although a suit, to contest an adoption made by a Hindu widow of a son to her deceased husband, may be brought by a contingent reversionary heir, yet it is not the law that any one who may have a possibility of succeeding to the estate of inheritance held by the widow for her life is competent to bring such a suit. The right to sue must be limited. As a general rule, the suit must be brought by the presumptive reversionary heir—that is to say, by the person who would succeed to the estate if the widow were to die at the time of the suit. But it may be brought by a more distant heir, if those nearer in the line of succession are in collusion with the widow, or have precluded themselves from interfering. The rule laid down in *Bhikaji Apaji v. Jagannath Vithal* approved. Reference made to *Koori Goolab Sing v. Rao Kurun Sing*.

If the nearest heir had refused, without sufficient cause, to institute proceedings, or if he had precluded himself by his own act or conduct from suing, or had colluded with the widow, or had concurred in the act alleged to be wrongful, the next presumable heir would be, in respect of his interest, competent to sue. In such a case, upon a plaint stating the circumstances under which the more distant heir claimed to sue, a Court would exercise a judicial discretion in determining whether he was or was not competent, in that respect, to sue; and whether it was requisite or not, that any nearer heir should be made a party to the suit.

In a suit to have an alleged adoption set aside, the plaintiff, a minor, through his guardian, claimed to sue, on the strength of being the adopted son of the husband of a daughter of a brother of the father of the deceased, under whose authority the adoption was alleged to have been made by the widow, the defendant. The Judicial Committee, without deciding that, as an adopted son, this minor had the same rights as a naturally born son, and without deciding that he would have been entitled, in default of nearer relations, to succeed to the estate of inheritance, after the death of the widow, pointed out, that he could only have succeeded as a distant bandhu, and that he had not a vested but at most a contingent interest. And held, that there being, in fact, heirs nearer in the line of succession than this minor, the grounds of his competence to sue in respect of his interest, assuming that interest to exist, should have been made out in the manner above indicated.

**RANI ANAND KUNWAR v. THE COURT OF WARDS** ...

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**Hindu Law—(continued.)**

*Alienation by Widow—Grounds supporting charge on the Inheritance by a Widow for her debt.* In transactions such as the alienation by a widow of her estate of inheritance derived from her husband, any creditor, seeking to enforce a charge on such estate, is bound, at least, to show the nature of the transaction, and to show that, in advancing his money, he gave credit, on reasonable grounds, to an assertion that the money was wanted for one of the recognized necessities. The principle is, that the lender, although he is not bound to see to the application of the money, and does not lose his rights, if, upon *bona fide* inquiry, he has been deceived as to the existence of the necessity which he had reasonable grounds for supposing to exist, still is under an obligation to do certain things. These are to inquire into the necessity for the loan and to satisfy himself, as well as he can, with reference to the parties with whom he is dealing, that the borrower is acting in the particular instance for the benefit of the estate. This principle, laid down in *Hinnoman Persaud Panday v. Musamat Babooee Murraj Koonweree*, in regard to the manager for an infant, has been applied also to alienations by a widow of her estate of inheritance, and to transactions in which a father, in derogation of the rights of his son, under the Mitakshara law, has made an alienation of ancestral family estate.

KAMESWAR PERSHAD v. RUN BAHADUR SINGH... VI ... 848

*Inheritance—Adoption—Succession of adopted son to relatives of adoptive mother.* According to Hindu law, an adopted son takes by inheritance from the relatives of his adoptive mother in the same way as a legitimate son.

UMA SUNKER MOITRO v. KALI KOMUL MOZUMDAR ... VI ... 256

*Inheritance—Adopted son.* An adopted son is not precluded from inheriting the estate of one related lineally, although at a distance of more than three generations from the common ancestor.

MOKUNDO LALL ROY v. BYKUNT NATH ROY ... VI ... 289

*Inheritance—Mitakshara—Definition of Sapinda—Sister's Daughter's Son.* A sister's daughter's son is an heir according to the Mitakshara.

The author of the Mitakshara, in verse 3, Sec 5, Chap. II, uses the word "sapinda" in the sense of "connection by particles of one body," and not in the sense of "connection by funeral oblations."

In order to determine whether a person is a "sapinda" of the prepositus, within the meaning of the definition given by the author of the Mitakshara in Acharakanda (chapter treating of rituals, it is necessary to see whether they are related as "sapindas" to each other, either through themselves or through their mothers and fathers.

UMAID BAHADUR v. UDOI CHAND alias MUNMUN .. VI .. 119

*Mitakshara—Liability of son to pay father's debts.* Under Mitakshara law, according to the rulings of the Judicial Committee, the payment, even in the father's lifetime, of an antecedent debt due by him, is a pious duty on the part of the son, and its discharge is, therefore, such a necessary purpose as to give validity to a sale or mortgage by the father as against his minor sons. Such antecedent debt means a debt antecedent to the transaction—*viz.*, the sale or mortgage purporting to deal with the property.

In a suit upon a mortgage by the father alone, where the sons are made parties, the decree would be good as against the sons, even though they may have been adult when the debt

**Hindu Law—(continued.)**

(assuming it was not for immoral purposes) was incurred, and the whole property would be bound, notwithstanding verse 29, Chap. I, sec. i, and verse 10, Chap. I, sec. vi of the Mitakshara.

In respect of ancestral property the son is equally liable for his father's debts, if not incurred for immoral purposes, as for his own debts. The interest of an adult son, however, could not, ordinarily, be affected by a decree against the father alone.

Where, however, an adult son, although neither an executant of the bond on which the suit was brought, nor a party to such suit, yet was shown to be himself liable for a large proportion of the antecedent debt due on the bond, and by his conduct had made it apparent that he approved of and fully acquiesced in the sale of the whole ancestral property, and moreover, that he allowed the mortgagee to take and remain in possession for upwards of eleven years and to go to expense in paying off encumbrances on the estate—it was, in a suit by the son to recover his share of such ancestral property, *held*, that he was not entitled to succeed. Under the circumstances the son ought to have been made a party to the suit brought by the mortgagee.

The principles laid down by the Privy Council, and in the Full Bench case of *Lachmuni Dass v. Giridhar Choudhry* by the High Court, discussed.

LALJEE SAHOY v. FAKKER CHAND ... VI... 185

*Mitakshara—Mortgage of Family Property—Sale of Interest of one of several co-sharers in a joint estate.* In a suit on a mortgage against a member of a joint Hindu family governed by the Mitakshara law, the whole of the interest of the joint family in the estate was decreed to the mortgagees, who subsequently obtained possession of it. Afterwards a suit was brought by another member of the family, who had attained majority prior to the mortgage, to set it and the decree aside, so far as he was concerned, and to recover possession of his share of the joint family property.

*Held*, that the circumstance of an antecedent debt was not in itself sufficient to bind him, and that the alienation was not good as against him, unless it could be shown that he had either expressly or impliedly given his consent to the mortgage.

UPOOROO TEWARY v. LALLA BANDHJEE SUHAY ... VI ... 749

*Partition—Trust—Agreement restraining Partition—Right of purchaser of share—Trust for Idol.* By an agreement entered into between five brothers, who formed a joint Hindu family, it was provided, that none of the parties, "nor their representatives, nor any person, should be able to divide the real and personal property belonging to the family into shares, that, while the male descendants of any of the brothers lived, the sons of the daughters of the deceased persons should not be entitled to the real and personal properties, nor to the proceeds thereof; that none of the brothers, nor any of their male descendants, should be able to adopt a son; that during the lifetime of the brothers, or of the one of them who should be the last survivor, their earnings should be regarded as joint property, and that, if any brother or son of a brother separated himself from the family, he should only get Rs. 20,000 as his share." The agreement further provided for the maintenance of widows and infant children, and that the sum of two lakhs of rupees should be taken from the joint khatta for the purpose of carrying on certain businesses. The family dwelling-house had belonged to the mother of the brothers. She made a gift by deed of the house and lands and houses appertaining thereto to an idol, and appointed her sons managers, and directed that they should live in the house, and should not have power to

**Hindu law—(continued.)**

partition or alienate any portion of the properties settled. The deed contained provisions as to the disposition of the profits arising from the lands and houses, viz., to provide accommodation for the families of the managers, and to invest the surplus in the purchase of lands in the name of the idol.

A son of one of the brothers sold his share in the family property. In a suit by the purchaser for partition and an account of the property—

*Held*, that the general scheme of the arrangement between the brothers was such as could only be binding upon the actual parties to it, not upon a purchaser from one of the parties, and *a fortiori* not upon a purchaser from the heir of one of the parties.

The object of the arrangement was to settle the family property upon the trust for the maintenance of the members of the family born and to be born. This could not be done by a gift, and what cannot be done by a gift cannot be done by the intervention of a trust.

The owner of property cannot by mere contract during his life prevent his heirs from partitioning property after his death, and such a prohibition is not binding upon an assignee of the heir.

*Held* also, that there was a good gift of the family dwelling-house to the idol, and that the plaintiff was not entitled to any share therein.

RAJENDER DUTT v. SHAM CHUND MITTER ... VI ... 106

*Suit to set aside Alienations by Hindu Widow—Suit to restrain Hindu Widow from committing Waste—Contingent Reversionary Interest.* Persons having a contingent reversionary interest in lands, expectant on the death of a Hindu widow, though they cannot sue for a declaration of title to the lands as against third persons, may sue as presumptive heirs to set aside alienations of the property made by the widow, upon the ground of there being no legal necessity for such alienations, or to restrain her from committing waste.

Unless such suits could be brought, it might be impossible, if the widow lived to a great age, to bring evidence after her death to prove that there was no legal necessity for the alienations. Nor would it be possible to prevent the widow from committing irremediable mischief to the estate.

CHOTTOO MISSEER v. JEMAH MISSEER... VI ... 198

*Will—Construction of Will—Restriction of gift to male descendants void—How such a gift should be construed.* A gift by will upon condition that the subject-matter should descend to heirs male only, is void by Hindu law.

By his will a Hindu testator made a gift of certain immoveable property to his nephews and their descendants in the male line with a condition that, "if any of them die childless, then his share shall devolve on the survivors of my nephews and their male descendants, and not on their other heirs."

*Held*, that the gift was bad in so far as it restricted the subject-matter of the gift to male descendants, but that the language used relating to the gift over to the testators surviving nephew or nephews, was not inconsistent with the intention of the testator that the whole augmented share should pass to the plaintiff, the sole surviving nephew; but that having regard to the doctrine frequently acted upon by the Courts of India, he was only entitled to a life-estate therein.

SHOSHI SHIKHURESSUB ROY v. TAROKESSUR ROY... VII ... 322

*Money borrowed to defray Grand-daughter's Marriage—Expenses—Liability of Reversioner.* A Hindu widow borrowed a sum

**Hindu Law—(concluded.)**

of money for the purpose of defraying the marriage expenses of a grand-daughter, the child of son who had pre-deceased his father.

*Held*, that such sum, although it could not properly be considered a charge on the grand-mother's estate, yet was one which was legally recoverable from the heirs, who, on the death of the widow, succeeded to the possession of such estate.

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**Hindu Widow—**

SALE OF RIGHT, TITLE, AND INTEREST OF. See RIGHT TITLE, AND INTEREST	...	VII	...	357
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*Will—Adoption—Failure by Widow to adopt—Inheritance, Widow's Right to.* A husband's express authorization, or even direction, to adopt, does not constitute a legal duty on the part of the widow to do so, and for all legal purposes it is absolutely non-existent till it is acted upon.

A widow's refusal to comply with such a direction is no ground of forfeiture as regards her rights of inheritance.

When a Hindu, by his will, gave his widow authority to adopt, if necessary, from one to three *dattaka* sons, and she, having neglected to do so, brought a suit, to recover possession of her husband's property and for an account of the administration, against the administrator of the estate, after having ineffectually attempted to get the letters of administration recalled and fresh letters granted her as heiress of her husband—

*Held*, that she was entitled to the decree she prayed for.

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**Holding—**

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(11 and 12 Vict., c. 21), s. 23— <i>Reputed Ownership—Possession Order, or Disposition—Consent of True Owner—Partner out of Jurisdiction—Mortgage of Chattels—Priority.</i> In 1878, the		

**Insolvent Act—(continued.)**

members of the firm of A and Co. mortgaged the live and dead stock, chattels, and effects belonging to the firm to B, the mortgage deed containing a clause to the effect that as long as there was anything due on the mortgage, the mortgaged property should be treated and considered as the property, and in the order and disposition, of the mortgagee. A and Co. subsequently obtained further advances from B; at this time A was residing out of the jurisdiction of the Court, and the instruments creating the further charges were signed by his attorney. C and D, the two members of the firm residing in Calcutta, remained in possession of the mortgaged property up to the 10th May 1880, when they became insolvent, and their property was vested in the Official Assignee, who entered into possession. On the 12th May the mortgagee also entered into possession. On the 26th June, A, the remaining partner of the firm, returned to Calcutta and filed his petition of insolvency.

Upon a petition by the mortgagee claiming to be paid his mortgage-money in priority to the other creditors of the firm—

*Held*, that the goods and chattels of the firm which were covered by the mortgage and further charges did not vest in the Official Assignee upon the insolvency of C and D.

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(11 and 12 Vict., c. 21), s. 51—*Deferring Personal Discharge*. The words in s. 51 of the Insolvent Act relating to debts contracted—"without having any reasonable or probable expectation at the time when contracted of paying them"—are pointed, not at the case of a man who incurs a debt knowing that he cannot pay his debts generally, but at that of a man who incurs a debt knowing that he cannot repay that debt. The words in the same section—"if it shall appear that the Insolvent's whole debts so greatly exceeded his means of providing for the payment thereof during the time when the same were in course of being contracted, reference being had to his actual and expected property as to show gross misconduct in contracting the same,"—apply not to this or that debt, or class of debts, but to all the debts, contracted for some years past. And under the circumstances of the case afford ground not for excepting any specified debt under s. 51, but for deferring the discharge under s. 47.

The insolvents carried on business as bankers and commission agents, receiving the money of their constituents, on deposit, for investment or for remittance, charging a commission on each transaction, and allowing 4 per cent. interest on deposits. An opposing creditor, one of their constituents, sent them in April 1880 a letter instructing them to invest Rs. 40,000 in Municipal debentures. The insolvents failed in November, and it was found on the evidence that they could not have procured the desired quantity of Municipal debentures without paying more than the market-price for them. They purchased Rs. 18,000 worth of such debentures, and were debtors to the opposing creditor for the balance. *Held*, that the money was in their hands as bankers and not as agents; and this being so, they were not bound to keep the Rs. 40,000 separate from their own funds, nor even after the letter received in April to set it apart for investment.

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### ACT XXXII OF 1839—

Interest is given under Act XXXII of 1839 by way of damages, on the ground that a debtor has wrongfully refused to pay ; but where there is no hand to receive payment, and to give a complete discharge, there can be no wrongful refusal.

RAJNABAIN BOSE v THE UNIVERSAL LIFE ASSURANCE CO. VII ... 594

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### RATE OF—

Where, in the course of executing a decree, accounts, in which interest was entered and charged, had, from time to time, been filed in Court, and an objection had been taken thereto by the judgment-debtor from 1870 up to 1880—

*Held*, that it was too late to object to interest being allowed, and that the High Court would not interfere to alter the rate where it appeared that the District Judge had found that the rate ruling in the District was 12 per cent., and had allowed that rate accordingly.

GOPAL SAHU DEO v. JOYRAM TEWARY ... VII ...

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### IN PLACE OF TRIAL—

*District Judge holding cutcherry in Munsif's Court.* Where a District Judge took advantage of his presence in the locality, and heard and decided a suit in the Munsif's Court, which had originally been instituted in that Court, but subsequently transferred to the Judge's Court for trial, and it appeared that the course taken was with the consent, implied, if not express, of both parties, who were represented at the hearing—

*Held*, that the District Judge was justified in taking the course he had done.

MADARY v. GOBURDHUN HULWAI ... VII ... 694

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<i>Adding Plaintiffs—Consent—Civil Procedure Code (Act X of 1877), s. 32. Under s. 32 of the Code of Civil Procedure, no person can be added as a plaintiff unless he has previously consented thereto; and if a person objects to be added as a plaintiff, the proper course is to make him a defendant.</i>		
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<i>Winding up Partnership—Subordinate Court—District Court— Contract Act (IX of 1872), s. 265—Civil Courts Act (VI of 1871), s. 11. The Court of a Subordinate Judge is inferior to the Court of a District Judge within the meaning of s. 11 of the Civil Courts Act.</i>		
The word 'may' in s. 265 of the Contract Act has a somewhat similar force to the words 'it shall be lawful' in a Statute which merely make that legal and possible which there would otherwise be no right or authority to do. And the words 'may apply' in the section create a new jurisdiction, which must be exercised strictly in accordance with the Statute which creates it—that is to say, the jurisdiction created by the section must be exercised exclusively by a Court not inferior to the Court of a District Judge, within the local limit of whose jurisdiction the place or principal place of business of the firm which it is sought to wind up is situated.		
It was the intention of the Legislature. in enacting s. 265 of the Contract Act, to create a new jurisdiction to be exercised exclu- sively by the Court of the District Judge, and in the absence of a contract to the contrary, the members of a partnership, or their representatives, cannot obtain the relief mentioned in the section except by resorting to that Court.		



**Jurisdiction—(continued.)**

The presumption that the existing jurisdiction of a Court is not intended to be taken away unless express words have been used for that purpose, usually applies only to the jurisdiction of the superior Courts. Unless the jurisdiction of a superior Court is expressly and clearly taken away, such jurisdiction will be presumed to continue.

PROSAD DOSS MULICK v. RUSSICK LALL MULLICK. and PROSAD DOSS MULLICK v. KEDAR NATH MULLICK	...	VII ...	157
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*Right of Way—how far finding of Magistrate thereon binding on Civil Court—Code of Criminal Procedure (Act X of 1872), ss. 521, 523, 530—Estoppel.* A Civil Court is not competent to set aside the order of a Magistrate made under s. 521 of the Code of Criminal Procedure, on the ground that such order was made without jurisdiction, because the land in respect of which the order was made is private property, and not a thoroughfare or public place. A Civil Court can, however, irrespective of an order made under s. 521 by a Magistrate, try the question, whether the land which formed the subject of such order is private property, and not a thoroughfare or public place, as between the parties to such suit and those who claim under them.

*Per FIELD, J.*—A person who, on receipt of an order made by a Magistrate under s. 521 of the Code of Criminal Procedure, declaring the existence of a right of way over such person's lands, demands, under s. 523 of the same Code, the appointment of a jury to try whether such order was reasonable, is not by such action estopped from afterwards bringing a suit in a Civil Court, seeking to establish his right to the exclusive enjoyment of the same lands.

MUTTY RAM SAHOO v. MOHI LALL ROY	...	VI ...	291
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**OF SUBORDINATE JUDGE—**

*Joinder of Causes of Action—Civil Procedure Code (Act VIII of 1859), ss. 6, 8; (Act X of 1877), s. 15—Bengal Civil Courts Act (VI of 1871), s. 19.* Section 6 of Act VIII of 1859 (corresponding with s. 15 of Act X of 1877), which provides that "every suit shall be instituted in the Court of the lowest grade competent to try it," does not affect the jurisdiction of a Subordinate Judge to try a suit wherein several causes of action are joined, the cumulative value of which is over Rs. 1,000; notwithstanding that, if separate suits had been brought on these several causes, such suits must have been instituted in the Court of the Munsif.

MASHOOLAH KHAN v. RAM LALL AGURWALLAH	...	VI ...	
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*Valuation of Suits—Exclusion of Time of Proceeding in another Court—Parties—Adding defendants—Limitation Act (XV of 1877), ss. 14 and 22.* A suit was instituted in the Court of the Subordinate Judge, who, after seven months, returned the

# Jurisdiction—(continued.)

plaint to be filed in the Munsif's Court, on the ground that the suit had been overvalued. There was nothing to show want of *bona fides* in the plaintiff's instituting the suit in the Court of the Subordinate Judge.

*Held* that, in computing the period of limitation prescribed for the suit, the time during which the plaint was on the file of the Subordinate Judge's Court must be deducted.

A suit for property in the possession of several persons was brought by the plaintiff against one of those persons only. After the institution of the suit, and after the period of limitation prescribed for a separate suit on the same cause of action against the other persons in possession had elapsed, these latter were added as defendants.

*Held*, that the suit must be dismissed as against the added defendants, on the ground that it was barred by limitation

OBHOY CHURN NUNDI v. KRITANTHAMOYI DOSSEE

VII ...

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*Act VI of 1871, s. 18—Sale in Execution of Decree—Civil Procedure Code (Act X of 1877), s. 285.* A, who had obtained a decree in the Court of the Second Munsif of B, in September 1877, attached certain property within the jurisdiction which had been assigned to the Munsif by the District Judge, under s. 18 of Act VI of 1871. In the previous month, C, who had obtained a decree in the Court of the Additional Munsif of B (to whom jurisdiction had similarly been assigned), had attached the same property. The sale in execution of A's decree took place first, and A became the purchaser. A then objected in the Court of the Additional Munsif that the property could not again be sold; but his objection was overruled, and two days subsequently, the property was again put up for sale in execution of C's decree, and he became the purchaser. A brought various suits against the tenants for arrears of rent, in which C intervened.

*Held*, that the jurisdictions of the Munsifs were confined to the particular limits assigned to them, and that, as the property was situate within the limits assigned to the Second Munsif, the Additional Munsif had no jurisdiction to attach or sell it, and that the attachment by C was made improperly and without jurisdiction.

*Quære*.—Whether s. 285 of the Civil Procedure Code applies to immoveable property?

OHYOY CHURN COONDOO v. GOLAM ALI, alias NOCOURY MEAH.

VII ...

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*Property situated in different districts—Pleading—Multifariousness—Civil Procedure Code (Act X of 1877), ss. 28, 31—Parties—One Member of Joint Hindu Family contracting alone—Undisclosed Principal—Splitting Cause of Action.* A, B, C, and D were the proprietors of a 2a. 13g. share in mouza E, and also of a 2a. 13g. share in a Mouza F, both in the district of Bhalapore. On the 19th September 1872, A mortgaged a 1a. 4p. share of E to H. On the 20th September 1872, A, B, C, and D mortgaged their shares in E and F, together with property in the district of Tirhoot, to the plaintiff. On the 24th March 1873, A mortgaged his share in E and F to J. On the 18th November 1874, A and B mortgaged their shares in E to K.

On the 25th March 1874, J obtained a decree on his mortgage, and the interests of A and B were purchased on the 5th January 1875 by L.

On the 17th April 1874, M, to whom the first mortgage had been assigned, obtained a decree and attached the property mortgaged. L objected that he had already purchased the interests of A, and on the objection being allowed, M instituted a suit against

**Jurisdiction—(concluded.)**

L for a declaration of priority, and obtained a decree on the 9th August 1876. In execution of this decree the property first mortgaged was sold on the 4th March 1878, and after satisfying the mortgage a surplus of Rs. 7,664 remained. After the institution of the first suit, and before L's purchase, the plaintiff instituted a suit upon his mortgage in the Tirhoot Court without having obtained leave to include that portion of the mortgaged property situate in the Bhagalpore district. On the 17th July 1874, a decree was made in this suit. On the 17th January 1877, K obtained a decree on his mortgage, and the shares of A and B in E were sold, and purchased on the 3rd September 1877 by N. The plaintiff had his decree transferred for execution to the Bhagalpore Court, and he attached the surplus sale-proceeds and a 1a. 9g. share in E. This attachment was withdrawn on the objection of L, who drew out the surplus sale-proceeds. The share purchased by N was also released from attachment.

The plaintiff now sued L, N, and the mortgagors for a declaration that his decree of the 17th July 1874 affected the E property, to recover the surplus sale-proceeds from L, and in case the decree should not be valid to the extent mentioned, for a decree declaring his prior lien on the property in E.

It was contended for the defendants, that the Tirhoot Court had no jurisdiction in respect of the Bhagalpore property, that the suit was bad for multifariousness; that certain persons, co-sharers with the plaintiff, should have been made parties, and that the cause of action had been split.

*Held*, that the Tirhoot Court had no jurisdiction in respect of the Bhagalpore property;

that the suit was not bad by reason of multifariousness; and that it was not necessary to make the plaintiff's co-sharers parties, as he might be regarded as contracting on behalf of himself and the other members of the family as undisclosed principals.

*Held* also, that the cause of action had not been split.

BUNGSEE SINGH v. SOODIST LALL	...	...	VII ...	739
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**Juryman—**

QUALIFICATION OF.	See QUALIFICATION OF JURYMAN	...	VII ...	42
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**Justice—****OF THE PEACE—**

*Disqualifying Interest—Summons issued at instance of, and determined by, a Servant of the Prosecutor—Evidence, Refusal to hear—Finality of Assessment—Beng. Act IV of 1876, ss. 75, 77, 78, 79, 846, and 851—High Court's Criminal Procedure Act (X of 1875), s. 147.—* A, alleged to have carried on business in Calcutta without having taken out a license under Beng. Act IV of 1876, was summoned at the instance of the Corporation by B, a servant of the Corporation and also a Justice of the Peace. The case was subsequently heard by B, and it was shown that notice of the assessment under clause ii, sched. 3, had been duly served on A, and, that though he then denied his liability to take out any license, and stated that he carried on no business as alleged, he had not appealed against the

**Justice—(continued.)**

**OF THE PEACE—(continued.)**

assessment under s. 79. It was further shown that the assessment had been confirmed by the Chairman of the Corporation, but that the amount had not been paid. A thereupon tendered evidence to show that he was not liable to take out any license; but B refused to hear such evidence, and convicting A, sentenced him to pay a fine. On an application, under the above circumstances, to the High Court under s. 147, Act X of 1875—

*Held*, that the finality of the decision of the Chairman referred to in s. 79 has only reference to the class under which a particular person, who is admittedly bound to take out a license under s. 75, should be assessed, and not to the case where the liability to take out a license at all is denied, this being a question which can only be determined judicially after taking evidence by a competent Court in a prosecution under s. 77, and that, therefore, the refusal of B to hear the evidence tendered by A on this point, was illegal.

*Held*, also, that the proceedings and ultimate conviction of A were illegal, inasmuch as B being a servant of the prosecutor, *i.e.*, the Corporation, had such an interest as might give him a bias in the matter, and that consequently he ought not to have sat as Justice of the Peace either at the granting or upon the hearing of the summons.

WOOD v. THE CORPORATION OF THE TOWN OF CALCUTTA VII ... 322

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IN SUMMONING WITNESSES. See SALE IN EXECUTION OF  
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**Land Acquisition Act—**

**OF 1870—**

*Apportionment of Compensation-money—Zamindar—Patnidar—Darpatnidar—Construction of Document.* Where a patni and a darpatni has been given of land, which is afterwards acquired by the Government for public purposes, under the provisions of the Land Acquisition Act, the zamindar is, generally speaking, entitled to as much of the compensation money as the patnidar is.

As a rule, ryots having a right of occupancy in such land, and the holders of the permanent interest next above the occupancy ryots, are the persons entitled to the larger portion of the compensation-money.

The principles on which compensation-money should be apportioned among the different holders discussed and explained.

Construction of darpatni lease.

GODADHAR DASS v. DHUNPUT SINGH ... VII ... 585

ss. 38 AND 39—*Proceedings under—Finality.* In proceedings under the Land Acquisition Act (X of 1870), ss. 38 and 39, the persons entitled to take land compulsorily, deal only with those who are in possession of it, or who are ostensibly its owners. It may happen that the real owner, being an infant, or a person otherwise under disability, does not appear, and is not dealt with in the first instance. There is, therefore, a proviso in s. 40 to the effect that nothing contained in that or the preceding sections "shall affect the liability of any person who may receive the

**Land Acquisition Act—(continued.)**

OF 1870—(continued.)

whole, or any part, of any compensation awarded under the Act to pay the same to the person lawfully entitled thereto." This applies only to persons whose rights have not been dealt with in adjudications in pursuance of ss. 38, 39, and 40; and does not permit a person whose claim has been disposed of in the manner pointed out in the Act, to have that claim re-opened, and again heard, in another suit.

RAJA NILMONI SINGH DEO BAHADUR *v.* RAM BANDHU RAI. VII ... 388

s. 39—*Title—Res Judicata.* Under s. 39 of the Land Acquisition Act, it is the duty of the Judge in apportioning the compensation-money which he is directed to apportion, to decide the question of title between all persons claiming a share of the money

*Semle.*—No decision under the Land Acquisition Act should be treated as *res judicata* with respect to the title to other parts of the property belonging to persons who may come before the Judge under s. 39

NOBODREP CHUNDER CHOWDHRY *v.* BROJENDRO LALL ROY VII ... 406

**Land in Assam—**

*Suit for declaration of title to—Jurisdiction of Civil Court—Registration of claimant's name by Collector.* A person claiming a right to rent-bearing land in Assam, held under a patta from Government in the names of the persons against whom he claims, is entitled to sue in the Civil Court for a declaration of his title and right to have his name registered as co-owner in the Collectorate, and the Civil Court has jurisdiction to determine such suits, although the Collector has not been first applied to, but should not pass any order against the Collector in any suit to which he is not a party, but merely declare what the plaintiff's rights are.

BEJOY KEOT *v.* GORIA KEOT ... VII ...

**Landlord and Tenant—**

*Forfeiture of holding—Denial by a Tenant of his Landlord's Title.* A, a ryot with rights of occupancy, in a rent-suit brought against him by B, the purchaser of an *aima mehal*, denied the existence of the relationship of landlord and tenant between himself and B, on the ground that the lands occupied by him were not included on the *aima mehal* purchased by B. B's rent suit having been dismissed for failure of evidence on this point, B afterwards brought a regular suit to evict A, and for mesne profits. *Held* that A, by denying the title of B, in the rent-suit, thereby forfeited his rights of occupancy, and became liable to eviction.

MOZHURUDDIN *v.* GOBIND CHUNDER NUNDI ... VI ... 436

*Suit for Rent—Evidence—Plea of payment—Onus of proof.* In a suit by a landlord against his tenant for arrears of rent due for a portion of the year 1283 (1876), the defendant pleaded payment and called as his witness the plaintiff's agent, who admitted the receipt of certain payments from the defendant's under-tenants during the time for which the arrears were demanded; but swore that they were payments made in respect of arrears due on account of previous years. The lower Appellate Court, reversing the decree of the Court of first instance, gave the defendant credit for the payments so admitted.

*Held*, that the lower Appellate Court was wrong; that the defendant having pleaded payment was bound to prove that the admitted payments were in respect of that portion of the year 1283 for which the arrears were claimed.

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Section 12 of the Rent Law applies to receipts given directly by the landlord to the tenant, and not to receipts given to third persons.		
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TO ERECT PLACES OF WORSHIP—		
In India, the members of a sect are at liberty to erect a place of worship on their own property, although it is more or less contiguous to a place already occupied by a place of worship appertaining to another sect. The people of any sect are at liberty to erect on their own property places of worship, either public or private, and to perform worship, provided that, in the performance of their worship, they do not cause material annoyance to their neighbours.		
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<b>License—</b>		
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**Life Policy—**

*Assignment—Death of Assignee—Death of Assured—Notice by Assignee to Company—Payment of Premia by Executors of Assignee—Absence of Legal Personal Representative of Assured—Refusal to pay over.* A, having insured his life in a certain Life Insurance Co., assigned his rights under the policy to B, the assignment on the face of it expressing no consideration whatever. The fact of the assignment was notified to the Company. B, after paying all premia due, died, appointing, C and D his executors, who took out probate of his will, and paid all subsequent premia on the policy. A died, and C and D then demanded payment of the policy-money. The Company, however, refused payment unless C and D first obtained the concurrence of the legal representative of A to the payment.

*Held*, that the Company were justified in refusing to pay the money in the absence of the legal representative of A.

RAJNARAIN BOSE *v.* THE UNIVERSAL LIFE ASSURANCE CO. VII ... 594

**Limitation—**

*Principal and Agent—Account, Suit for—Zamindar—Beng. Act VIII of 1869, s. 30.* A suit by a zamindar against his land-agent, for payment of sums not accounted for by the latter, must under s. 30 of Beng. Act VIII of 1869, be brought within three years from the termination of the defendant's agency.

The zamindar should never bring a suit of this kind for an account merely, or for the delivery of accounts or account papers merely; but the suit should be framed for an account and for payment of what, on the taking of the account, may be found due from the defendant to the plaintiff.

SHOSHI BHOOSHUN PAL *v.* GURU CHURN MOOKHOPADHYA. VII ... 89

*Instalments—Decree Payable by Instalments—Rent—Decree—Beng. Act VIII of 1869, s. 58,—Construction of Statutes.* *Per* GARTH, C.J., and MORRIS, J. (PRINSEP, J., dissenting).—The words "from the date of such judgment," in s. 58 of Beng. Act VIII of 1869, should be read as if they were "from the date when the rent is adjudged to be payable."

*Per* PRINSEP, J.—The "date of such judgment," in s. 58 of Beng. Act VIII of 1869, means the date on which the judgment was delivered.

Where the terms of an Act are clear and plain, it is the duty of the Court to give effect to it as it stands.

GUREEBULLAH SIRCAR *v.* MOHUN LALL SHAHA ... VII ... 127

*Minor's Right to Sue—Limitation Act (XV of 1877), s. 7.* A suit by a guardian on behalf of a minor is that of the minor, and is governed by the law of limitation applicable to the minor.

So, where a minor had been dispossessed of his share in certain property, which had been sold in execution of a decree, and where an application under s. 268 of Act VIII of 1869 to obtain possession of the share was made by the then guardian of the minor, and disallowed, and subsequently, but beyond the period of one year from the date of the application, a suit was brought to obtain possession by another guardian of the infant, who had been duly appointed—

*Held*, that such suit was not barred by limitation, the right to sue being that of the minor, and that it might be exercised by any one duly appointed on his behalf during his minority, or by the infant himself, within the time limited by s. 7 of Act XV of 1877, after attaining his majority.

KODABUX *v.* BUDDEE NARAIN SINGH ... VII ... 187  
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**Limitation—(continued.)**

**Possession—Onus of Proof—Alluvion Dispossession Acts of Ownership.** In a suit for declaration of title to, and recovery of possession of, alluvial lands which had been diluviated more than twelve years before the institution of the suit, the plaintiffs proved their title and possession up to the time of diluviation, and alleged that the lands had re-formed within twelve years, without alleging or proving possession during that period. The defendants, on the other hand, alleged, that the re-formation had taken place more than twelve years before suit, and that they had acquired a title to the lands by adverse possession for that period.

**Held**, that in such a case the submergence of the lands after diluvion ought to be presumed until the contrary was shown, and that the onus of proving reformation before twelve years and adverse possession, was shifted to the defendants.

**Per WILSON, J.**—As a general rule, where a plaintiff claims land from which he alleges he has been dispossessed, the burden is upon him to show possession and dispossession within twelve years.

Proof of possession within twelve years does not necessarily mean proof of acts of ownership within that time. The nature of the proof of possession must depend on the nature of the case.

There are many cases in which the party on whom the burden of proof in the first instance lies, may shift the burden to the other side by proving facts giving rise to a presumption in his favour.

In the case of lands gradually diluviated and gradually re-formed, if the diluviation has been more than twelve years before suit, the claimant, unless he can show possession since the re-formation, must at least show that he was in possession down to the date of the diluviation.

Where the true owner is in possession at the time of diluviation, his possession is presumed to continue as long as the land continues submerged, probably also afterwards, until he is

**Per FIELD, J.**—Although, according to the general rule, it lies upon the plaintiff, who is met with the plea of limitation, to show his own possession within twelve years before the institution of the suit, when the property in dispute is capable of actual or visible possession, yet, in the case of property which is not susceptible of actual and visible possession, an exception from the nature of the thing must be made to the general rule. In such cases, when the title and possession have been proved to be in a certain person up to a certain point of time—when there has been no transfer of the title to any third person—and there is no evidence that possession was exercised by a person other than the person having the title, so long as actual visible possession was possible, the possession of the person having the title will be presumed to continue until the property has again become susceptible of actual visible possession. Proof of possession is presumptive proof of ownership, because men generally own the property which they possess. And if the ownership of property is proved, and there is nothing to show that the possession of such property is with any person other than the owner, it may fairly be presumed to be with the owner. Such a presumption then takes the place of evidence to show the plaintiff's possession, within twelve years before suit, of a property in which, from the nature of the thing, evidence of actual possession is impossible.



**Limitation—(continued.)**

*Exclusion of Time—Limitation Act (XV of 1877), s. 14.* The defendants cut down and carried away some trees which had been growing on the plaintiff's land. The plaintiff's manager brought a suit in his own name against the defendants for the value of the trees so cut and carried away. This suit was dismissed, on the ground that the manager had no cause of action against the defendants. In a subsequent suit brought by the plaintiff against the defendants for the value of the same trees, he contended that the time occupied in the former suit ought to be excluded in computing the period of limitation prescribed for the second suit.

*Held*, that the provisions of Act XV of 1877, s. 14, did apply, and that the time could not be excluded, as the reason why the previous suit was dismissed, was, because it was brought in the name of the wrong person, not from defect of jurisdiction, or from any cause of a like nature.

RAJENDRO KISHORE SINGH v. BULAKY MAHTON ... VII ... 367

*Time for presenting Plaint—Beng. Act VIII of 1869, s. 31—Limitation Act (XV of 1877), s. 5.* The provisions of s. 5 of the Limitation Act (XV of 1877) apply equally to suits under the Bengal Rent Act (Beng. Act VIII of 1869).

In a suit for rent, where it appeared that a deposit had been made in Court under the provisions of the Bengal Rent Act (Beng. Act VIII of 1869), and that the six months allowed by s. 31 of that Act for the purpose of instituting a suit had expired on a day when the Court was closed for an authorized holiday, but that the plaint had been filed on the first day the Court re-opened—

*Held*, that the provisions of s. 5 of the Limitation Act (XV of 1877), applied to such cases, and that, consequently, the suit was not barred.

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*Appeal, Time for—Final Order—Review—Civil Procedure Code (Act X of 1877), s. 206.* Any order made upon an application for a review of judgment, except an order absolutely rejecting the application, becomes, if it in any way modifies or alters the original order, although the modification or alteration extends only to the rectification of a clerical mistake, the final order in the case; and the party aggrieved by the original decree is entitled, although the modification or alteration was made in his favour, to treat the order upon review of judgment as the final decree or order in the case, and if it was made by a Court, an appeal from which lies to the Court of a District Judge, he is entitled to prefer his appeal at any time within thirty days from its date.

When an application for a review of judgment is made upon several grounds, one of which refers only to the question of adjudication of costs, and the Court to whom the application is made holds all the other grounds to be untenable, but is of opinion that there has been a clerical mistake in that part of its order or judgment which refers to costs, it may reject the application absolutely and permit the applicant to apply, under s. 206 of the Civil Procedure Code, for a rectification of the clerical mistake; but if it does not do so, but, on the applica-

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## Limitation—(continued.)

tion for a review of judgment, amends the clerical mistake in its original order, the decree drawn up in conformity to this order becomes the final decree, and an appeal will lie against it if brought within the time prescribed for bringing an appeal against any other similar decree.

JOYKISHEN MOOKERJEE v. ATAOR ROHOMAN ... VI ... 22

*Suit for Arrears of Rent—Beng. Act VIII of 1869.* The last day on which a suit for the recovery of arrears of rent can be instituted under s. 29, Beng. Act VIII of 1869, is the last day of the third year from the close of the year in which the rent became payable.

The word "arrear" in that section means "rent in arrear."

KASHIKANT BHUTTACHARJI v. ROHINKANT BHUTTACHARJI VI ... 325

*Suit to recover possession of Land taken by Municipal Commissioners—Beng. Act III of 1864, s. 87.* Section 87 of Beng. Act III of 1864 is applicable only in those cases where the plaintiff claims damages or compensation for some wrongful act committed by the Commissioners or their officers, in the exercise, or honestly supposed exercise, of their statutory powers.

The notice in the earlier part of the section is meant to give the defendant an opportunity of making some pecuniary amends for the wrong without incurring the cost of litigation.

CHUNDER SIKHUR BUNDOPADHYA v. OBHOY CHURN BAGCHI. VI ... 8

*Possession, Suit for—Limitation Act (XV of 1877), sched. ii, art. 47.* In a dispute between A and B concerning the possession of a certain taluq, the Criminal Court made an order under s. 590 of the Code of Criminal Procedure retaining B in possession; and this order was, in a proceeding under ss. 295, 296 of the Code of Criminal Procedure, confirmed by the Court of Session. *Held*, that a suit by A for the recovery of the land must be brought within three years from the date of the Magistrate's order, and not from the date of the order passed by the Court of Session.

Article 47 of sched. ii, Act XV of 1877, refers to immoveable as well as moveable property.

KANGALI CHURN SHA v. ZOMURRUDONNISSA KHATOON ... VI ... 709

*Suit by Mortgagee for Possession after Foreclosure—Limitation Act (IX of 1871), sched. ii arts. 135, 145.* In a suit by a mortgagee to obtain possession after foreclosure instituted more than twelve years after such mortgagee had, upon default, become, under the words of the deed, entitled to possession, but within twelve years of the date of the expiry of the year of grace granted under the foreclosure proceedings, *held*, under s. 145 of the Limitation Act, IX of 1871, that the period of limitation must be calculated from the date of the expiry of the year of grace, and not from the time when the default was first made.

BURMAMOYE DASSEE v. DINOBUNDHOO GHOSE ... VI ... 564

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## IX OF 1871—

s. 20. *Acknowledgment—Repeal of Act—Revival of Right to sue—Authorized Agent—Signature—Civil Procedure Code (Act VIII of 1859), s. 4.* The law of limitation governing a suit for a debt, is that law which is in force at the date of its institution.

**Limitation Act—**

As far as regards debts, the Indian laws of limitation merely bar the remedy, but do not extinguish the right.

Acknowledgments which under Act XIV of 1859 were insufficient to keep alive a cause of action, because they were signed only by an agent, *held* to be sufficient to sustain a suit on the same cause of action under Act IX of 1871.

Where a series of acknowledgment of a debt have been made, each within three years of the one next preceding, and the first of the series has been made within three years of the date on which the debt was contracted, a suit for the recovery thereof is, under Act IX of 1871, in time, if instituted within three years from the date of the last acknowledgment.

Discussion as to who is an authorized agent, what is a sufficient signature, and what amounts to a sufficient acknowledgment, within the meaning of s. 20 of Act IX of 1871.

Under s. 20 of Act IX of 1871, the authorized agent may sign either his own name or that of his principal.

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SCHED. II, ART. 15. The period of limitation prescribed by art. 15, sched. ii, Act IX of 1871, for a suit to set aside an order of a Civil Court, does not apply where the order simply amounts to a declaration that the Court considers it has no jurisdiction to act in the proceeding before it.

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SCHED. II, ART. 167. The period of limitation within which application must be made for execution of an order for costs passed by the High Court, when rejecting a petition for leave to appeal to the Privy Council, is that specified in sched. ii, art. 167 of Act IX of 1871.

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s. 17—*Right of employer to call on manager for account—Accrual of right on death of manager against representatives.* A manager is bound to account to his employer whenever he is called upon to do so under reasonable circumstances.

On the death of such manager a fresh right to an account accrues to the employer as against the manager's representatives.

In a suit for an account accruing to the employer on the death of his manager, limitation will not commence to run until administration has been taken out to such manager's estate.

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SCHED. II, ARTS. 66 AND 116.\* *Registered Bond—Compensation for Breach of Contract.* A suit to recover money due upon a registered bond is a suit for compensation for breach of contract in writing registered, within the meaning of art. 116 of sched. ii to Act XV of 1877, and must be brought within six years from the time when the period of limitation would begin to run against a suit brought on a similar contract not registered.

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ARTS. 99, 132, *Suit for Share of Government revenue, and for declaration that estate is charged with amount.* A suit for recovery of Government revenue, which the defendant was bound to pay, but which has been paid by the plaintiff to save the whole estate from sale, where the plaintiff asks to have the amount so paid made a charge on the portion for which he paid it, is governed by art. 132, and not by art. 99 of Act XV of 1877.

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ART. 120. *Breach of Covenant in a Lease* The defendant took certain land from the plaintiff under a registered lease, which contained a clause prohibiting the defendant from digging a tank on the land without the plaintiff's permission. The defendant having, nevertheless, constructed a tank without such permission the plaintiff brought a suit to compel him to fill up the tank, or, in case he should fail to do so, for compensation.

*Held*, that the period of limitation applicable to such a suit was art. 120 of sched. ii of the Limitation Act.

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*Application to revive a case and restore it to the Board* After a decree had been made in a suit, the case was, in 1875, struck out of the Board for want of prosecution. No steps were taken to have it restored. In 1879, both the plaintiff and defendant died. In the same year the heirs of the plaintiff instituted a suit against the administrator of the defendant for the purpose of having the decree in the original suit carried out. This suit was dismissed by the Court of first instance under s. 13 of the Code of Civil Procedure, but the Appellate Court, holding that the original suit was subsisting and might be reconstituted, directed that the plaintiffs should be allowed to amend their plaint by putting it into the form of a petition under s. 372 of the Code. On a petition by the plaintiffs praying that the original suit might be revived and restored to the Board.

**Limitation—(concluded.)**

**XV OF 1877—(continued.)**

*Held*, that the application was not barred under art. 178 of sched. ii to the Limitation Act of 1877.

Even if art. 178 was applicable, the application would not be barred, limitation running from the time when the suit was allowed to be reconstituted.

The Legislature did not intend to include in the Limitation Act every application to a Court with reference to its own list of causes, such as applications to transfer a case from one Board to another, to transfer a case to the bottom of the Board, change of attorneys, and so forth.

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**SCHED. II, ART. 179.** *Execution of Joint decree against two or more Defendants.* In a suit for possession of land brought by A against B, C, and D, a decree was passed on the 14th of April 1874 for possession and costs against B, C, and D jointly. This decree was afterwards reversed on an appeal by B, who alone claimed the property. A then preferred a special appeal to the High Court, and on the 29th June 1877, the decision of the Judge was reversed, and the decree of the Court of first instance restored.

On the 30th December 1878, A applied to the Court of first instance for execution to issue against C and D for the costs specified in the decree passed on the 14th April 1874. C and D successfully objected in the Court of first instance and the Appellate Court that more than three years having elapsed since the date of the decree, the decree for costs could not be executed, the application for execution being barred by art. 179 of sched. ii of Act XV of 1877. *Held*, on appeal to the High Court, that, inasmuch as B's appeal had related to the whole case, and the decree obtained by him dismissing the suit would, if not reversed, have deprived A of his right to any costs at all, A, upon succeeding in getting the original decree restored upon special appeal to the High Court, was entitled to execute such restored decree at any time within three years of the order of the High Court.

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**Mahomedan Law—**

*Husband and Wife—Maintenance—Decree for past Maintenance.*

In a suit for maintenance by a Mahomedan wife against her husband, where there was no decree or agreement for maintenance before suit—*held*, reversing the decision of the Court below, that the decree should not have awarded past maintenance, but that maintenance should have been made payable only from the date of the decree.

**Mahomedan Law—(continued.)**

*Held*, also, that future maintenance should have been given only during the continuance of the marriage, and not during the term of the plaintiff's natural life.

ABDOOL FUTTEH MOULVIE v. ZABUNNESSA KHATUN ... VI ... 681

**SHIAH SCHOOL—**

*Minors—Custody—Mother.* According to the Shiah school of the Mahomedan law, a mother is entitled to the custody of her female children, unless she has been guilty of unchastity.

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*Waqf—Construction of Deed of Endowment—Settlement on Person and his descendants to three generations, and afterwards to Charity—Appropriations of Property by Settlement.* A Mahomedan settled a portion of his immovable property as follows:—"I have made waqf of the remaining four annas in favour of my daughter B and her descendants, as also her descendants' descendants' descendants, how low soever, and when they no longer exist, then in favour of the poor and needy." *Held*, this settlement did not create a valid waqf.

To constitute a valid waqf, there must be a dedication of the property solely to the worship of God or to religious or charitable purposes.

*Sembla.*—Appropriations in the nature of a settlement of property on a man and his descendants can only be treated as legitimate appropriations under the designation of waqf, where the term *sadukah* is used.

Even supposing they could be so treated, it would be necessary, in order to validate a waqf by making a settlement of property on himself or his descendants, for a man to reduce himself to a state of absolute poverty.

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The doctrine of marshalling does not apply as between a mortgagee and attaching creditors of the mortgagor who hold mere money decrees.

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**Material Irregularity—**

*Setting aside sale—Dissuading purchaser from bidding—Civil Procedure Code (Act X of 1877), s. 311—Leave to bid—Decree-holder related to manager of defendant.* When liberty is given to a decree-holder to bid at the sale of the judgment-debtor's property, he is bound to exercise the most scrupulous fairness in purchasing that property, and if he or his agent dissuades others from purchasing at the sale, that of itself is a sufficient ground why the purchase should be set aside.

Where a decree-holder was joint in family with the manager of an infant defendant, and the defendant's property was to be sold in execution of the decree—

*Held*, that the decree-holder ought not to be granted leave to purchase at the sale, because any purchase made by him would be for the benefit of the family of which the manager of the infant defendant was one of the members, and it would in fact be a purchase by an agent of the property of his principal.

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**Mesne Profits—**

*Civil Procedure Code (Act VIII of 1859) s. 459—Certificate of Sale*

The possession, with mesne profits, of land comprised in a zur-i-peshgi lease of the year 1851, was decreed to the zur-i-peshgidars in 1860; and litigation as to their rights under the lease was carried on till 1874, when, after their deaths, it ended in favour of their representatives. In 1869, one of the parties to that litigation obtained a decree for money against the zur-i-peshgidars; and in 1874, in execution of this decree, all the right, title, and interest of the representatives of the latter, in the lease of 1851, was sold to a third party.

*Held* (reversing the decision of the High Court), that the right to the mesne profits awarded by the decree of 1860 did not pass by the sale, but remained in the representatives.

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**Minor—**

*Infant—Next friend—Costs of Minor—Necessaries—Contract Act (IX of 1872), s. 68.* Where a suit has been brought against a minor, the effect of which, if successful, would be to deprive the minor of his property, the costs of successfully defending that suit on his behalf may, when his property is in the hands of the Receiver of the Court, be recovered from the minor as necessaries, in an action brought against him by his attorney.

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<b>Money-Decree—</b>			
<i>Mortgage bond—Subsequent suit by mortgagee to enforce his lien on the property mortgaged. The plaintiff, a mortgagee of certain specific property, given as security for an advance, obtained a money-decree against the representatives of his debtor. A third person, having a claim against the same debtor, seized and attached the specific property mortgaged to the plaintiff, and sold it to A, who had notice of the plaintiff's lien. The plaintiff then brought a suit against A and the representatives of his debtor, to have his lien declared and debt satisfied.</i>			
<i>Held, that, notwithstanding the plaintiff's previous money-decree, he was still entitled to enforce his lien against the property pledged.</i>			
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<b>PAID UNDER COMPULSION—</b>			
A mortgagee of two separate properties became by purchase the owner of the equity of redemption of one of them, and of this property the value was so proportioned to his payments that the mortgage-debt was in effect satisfied. This mortgagee, however, obtained a decree and order in execution for the sale of the other property, on which his mortgage was the second. Of the latter property, the plaintiffs, who also represented the first mortgagee, had become purchasers, and they filed objections to the sale. These were disallowed, and they thereupon paid into Court money sufficient to satisfy the decree in order to prevent the sale.			
<i>Held, that this was not a voluntary payment, nor a payment of money equitably due; but one made under compulsion of law, i.e., under pressure of the execution-proceedings. And held, that this might be recovered in a suit for a money-decree, the remedy not being confined to the execution-proceedings.</i>			
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**Mortgage—**

*Sale or Foreclosure—Limitation—Adverse Possession.* In 1823 the trustees of a marriage settlement invested the trust-funds in the mortgage of a house and premises at Entally in the neighbourhood of Calcutta. The mortgagor was the first tenant-for-life under the settlement, and it was agreed that he should be entitled to remain in the house as long as he pleased, the rent of the premises being set-off against the income of the trust-funds to which he was entitled under the settlement. In execution of a money-decree against the mortgagor, his right, title, and interest in the premises were purchased by the judgment-creditor, a lady who, at the time of execution and sale, lived in the mortgagor's house. After the purchase, all parties continued to live in the house as before. The mortgagor died on the 14th of August 1867, and on the 13th of August 1869, the present suit for sale or foreclosure was instituted by the plaintiff, in whom the legal and beneficial interest in the trust-funds had become vested.

*Held*, that the position of the judgment-creditor under the sale of 1866 was not adverse to the plaintiff or those under whom he claimed; that the suit was not barred by limitation, and that plaintiff was entitled to a decree for sale.

Form of decree in a suit for foreclosure or sale in the mofussil, where the mortgage is in the English form, and all parties concerned are English.

MANLY v. PATTERSON ... .. VII 394

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**BOND—**

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*Covenant not to Lease—Lease of Property mortgaged—Suit to set aside Lease.* A mortgaged certain property to B, agreeing, amongst other things, not to grant in zurpeshgi or mortgage the property to any one so as to cause any difficulty in the realization of the money advanced under the mortgage-bond. A subsequently leased in zurpeshgi part of the property to C. B obtained a sale-decree against A on his mortgage, and at the sale himself became the purchaser of the property. He then brought a suit against C to set aside the zurpeshgi lease, and to obtain khas possession. *Held*, that the covenant in the mortgage-bond merely created a personal liability between A and B., and that the sale under B's mortgage-decree did not put an end to the zurpeshgi lease or affect the interests of the zurpeshgidar; that B's suit against C was wrong in form; and that his proper course was to sue to have his right declared to sell the property in satisfaction of his mortgage-debt, so as to give the zurpeshgidar an opportunity of redeeming.

RADHA PERSHAD MISSEER v. MONOHUR DAS ... .. VI .. 317

*Money-Decree—Mortgage-Decree—Sale in Execution—Mortgagee's Lien.* A mortgagee who elects to take a money-decree, and becomes himself the purchaser of the property mortgaged at a sale in execution of that decree, may bring a suit to enforce his lien against a person who purchased the right, title, and interest of the same debtor in the same property at a prior sale in execution of a prior money-decree.

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<b>FOR ACCOUNT AND SALE—</b>		
<i>Taking of Accounts—Withdrawal of Execution-proceedings—Principle on which accounts are to be taken.</i> A mortgagee, who has obtained a decree for an account and sale, is not entitled to withdraw from the taking of accounts in his execution-proceedings, when those accounts appear to be going against him.		
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<b>Mortgagor and Mortgagee—</b>		
<i>Mortgage-bond—Money-decree—Mortgage-decree—Lien—Sale in Execution—Purchaser.</i> Where a mortgagee obtains a decree against his mortgagor for sale of the mortgaged property to satisfy his debt, he cannot sell that property reserving his own rights over it, because it is for the very purpose of satisfying those rights that the sale is made. And if, instead of obtaining a decree for the sale of the mortgaged property, the mortgagee obtains only a simple money-decree and sells the mortgaged property under it, he is precisely in the same position as far as his own interest is concerned. In either case, the purchaser at the execution-sale takes the property sold free from the mortgagee's lien.		
But where the mortgagee puts up the mortgaged property for sale at a time when the mortgagor has no longer any interest in the property, then nothing passes by the sale, and the execution-purchaser does not get any benefit from the fact that, previously to the sale, the mortgagee had a lien on the property.		
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<b>Mukhtarnama—</b>		
<i>Pardanishin woman—Extent of liability—Account stated—Explanation of document.</i> In order to charge a pardanishin woman upon an instrument or power purporting to have been executed by her, it is requisite that the person relying on such a document should give satisfactory evidence that it has been explained to, and understood by, her.		

**Mukhtarnama—(continued.)**

A mukhtarnama executed by a pardanishin woman appointed her husband to be her general mukhtar, and declared that "all acts done by the said mukhtar, such as giving and taking loans to and from others, executing on my behalf, getting executed in my favour, deed of absolute sale, " and so on, " shall be accepted by me."

It was sought to render the principal liable, on an account stated by her husband as her mukhtar so empowered, for debt, without proof that the money constituting it had been borrowed on her account.

*Held*, on the construction of the mukhtarnama, that the mukhtar had no authority to bind her by such a statement of account, whatever authority he might have had to bind her by an actual borrowing of money on her behalf.

No implication of authority in the mukhtar to bind the woman by his stated account had arisen from the carrying on of a course of business. Accordingly, when the evidence of express authority failed, the statement of account by the mukhtar was insufficient to render the principal liable

No evidence was given of the items lent, so as to establish an indebtedness independent of the account stated.

SUDISHT LAL v. MUSSAMUT SHEOBHARAT KOER ... VII ... 245

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SUIT TO RECOVER POSSESSION OF LAND TAKEN BY.

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**Mutual Benefit Society—**

*Power of majority to alter rules—payment of pensions in England—adjustment of payments in accordance with rate of exchange—Interest of subscriber to society.* The U S F. I. Fund, a Society established as stated in rule 2 of the Rules of the Society "to provide for the maintenance of the widows and children of those who shall subscribe to it upon the terms and conditions specified below, or upon such others as may be determined upon by the subscribers or by a majority of them," had, prior to 1850, passed a rule (33) that "widows, being incumbents on the Fund, shall be paid their pensions at any place they may desire, subject to the usual charges of remittance; the pensions of children, being incumbents on the Fund, shall also be so paid, and on the same condition." The subscriptions were then, and continued to be, paid in rupees and the pensions were calculated in rupees according to certain tables.\* On being admitted, a subscriber had to "promise and engage to submit to, and abide by, the rules and bye-laws of the Institution" (rule 22), and by rule 27 had to pay "a fee equal to ten per cent. on the amount of monthly pension insured." Rule 60 gave power to alter any existing rule by the duly recorded votes of a majority of the subscribers. In 1850, exchange between India and England being then about par, rule 33 was repealed, and a new rule (41) was substituted for it, which provided that "incumbents on the Fund shall be paid their annuities in India at par, or in Europe at the fixed

**Mutual Benefit Society—(continued.)**

rate of two shillings in the rupee." On the first July 1876, exchange being adverse on remittances from India to England, a rule was passed, which provided that "incumbents on the Fund shall be paid their annuities in India in full, and those residing in Europe at the rate of exchange fixed for the official year by the Secretary of State; annuities already due or hereafter becoming due on risks accepted before the 1st July 1876, shall be payable to incumbents residing in Europe at the fixed rate of two shillings to the rupee." Exchange continuing to decline, on the 22nd May 1880, the Society, by the votes of 553 against 505 of the subscribers, passed the following rule:—"Annuities already due, or becoming due before the 1st May 1880, on risks accepted before the 1st July 1876, shall be payable to incumbents residing in Europe at the fixed rate of two shillings to the rupee; but all other annuities due, or becoming due, shall be paid, if to incumbents in India, in full, and if to incumbents residing in Europe, in London, at the market rate of exchange."

The plaintiffs were the widow and children of F, a member of the society, who was admitted as a subscriber for the benefit of his widow in November 1871, for the benefit of his son in September 1873, and for the benefit of his daughter in November 1874. He commenced to pay an increased subscription for the benefit of his son in September 1878. He was not one of the majority who voted in favour of the rule of the 22nd May 1880, though he attended the meeting of subscribers. He died on the 25th June 1880, having, up to that time, duly paid his subscription to the Fund. In a suit in which the plaintiffs, who were residing in England, claimed to be paid their pensions there at the rate of two shillings in the rupee—

*Held*, that F, had no vested interest at the time of the passing of the rule of the 22nd May 1880; that the plaintiffs were, with respect to their pensions, bound by the terms of that rule, which a majority of the subscribers had full powers to pass so as to affect the nominees of all existing subscribers, and therefore the suit should be dismissed.

Rule 41 gave an undue advantage to one class of subscribers, which was *extra vires*, and open to correction under rule 60 by a majority of the subscribers. The Society being one for the equal benefit of all subscribers, even if rule 60 did not give power to adjust payments in accordance with the rate of exchange, such a power might be implied for the purpose of continuing the business of the Association.

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## TO QUIT—

*Ejectment of tenant holding over.* There is no difference in law between the position of a ryot holding without a patta and that of one holding over, after the expiry of the term covered by a patta, with the consent of his landlord.

Such a tenant cannot be evicted without a reasonable notice to quit being given; and the relationship does not come to an end at the expiration of each year, without some act on the part of the landlord and tenant jointly, or of either of them.

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<i>Suit to have certain lands declared mal—Document once received without objection by lower Court. Where it is admitted that the defendants hold certain lands within the plaintiff's zamindari, some at least of which are rent-paying; the defendants, if desirous of proving that any of these lands are rent-free, are bound to give some prima facie evidence of the fact, before they can call upon the plaintiff, the zamindar, to prove that the whole or any part of the lands are mal.</i>		
An Appellate Court has no right to refuse to admit on technical grounds a document which has been received and read in the Court below without objection.		
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<b>PROBANDI—</b>		
<i>Mortgage-bond—Proof of Execution and bona fides of transaction—Evidence—Recital in Instrument. Where a claim is made under an alleged mortgage against a bona fide purchaser for value, and the defendant puts in issue the genuineness of the transaction, the onus is upon the plaintiff of proving prima facie the bona fides as well as the actual execution of the mortgage; and if the Court discredits the plaintiff's witnesses as regards the bona fides of the transaction, it is at liberty to dismiss the suit, although the defendant gives no substantial evidence of fraud.</i>		
A recital in a deed or other instrument is in some cases conclusive and in all cases evidence as against the parties who make it, and it is of more or less weight or more or less conclusive against them according to circumstances. It is a statement deliberately made by those parties, which, like any other statement, is always evidence against the persons who make it. But it is no more evidence as against third persons than any other statement would be.		
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<b>Order and Disposition—</b>		
<i>Indian Insolvent Act, 11 and 12 Vict., c. 21, s. 23. Where goods are in the order and disposition of any person under such circumstances as to enable him by means of them to obtain false credit, then the owner of the goods, who has permitted him to obtain false credit, must suffer the penalty of losing such goods for the benefit of those who have given the credit.</i>		
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